

MSRB Notice

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June 17, 2021

Category

Fair Practice

Affected Rules

[Rule G-17](#), Rule G-46

Request for Comment on Fair Dealing Solicitor Municipal Advisor Obligations and New Draft Rule G-46

Overview

The Municipal Securities Rulemaking Board (MSRB) is requesting comment on new draft Rule G-46 that would codify interpretive guidance previously issued in 2017. That guidance relates to the obligations of “solicitor municipal advisors” under MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities (the “G-17 Excerpt for Solicitor Municipal Advisors”) and was originally included in a larger notice regarding the application of MSRB rules to solicitor municipal advisors.¹ In addition to codifying the general substance of the G-17 Excerpt for Solicitor Municipal Advisors, the draft rule also would add additional requirements that would better align some of the obligations imposed on solicitor municipal advisors with those applicable to non-solicitor municipal advisors under Rule G-42, on duties of non-solicitor municipal advisors, and to underwriters under Rule G-17, on conduct of municipal securities and municipal advisor activities. The proposed codification of this guidance is a next step in the MSRB’s ongoing review of the catalogue of interpretive guidance in its rule book, as announced in [MSRB Notice 2021-02](#). The MSRB invites all interested parties to submit comments in response to this request for comment, along with any other information they believe would be useful.

Comments should be submitted no later than June 17, 2021 and may be submitted in electronic or paper form.

[Comments may be submitted electronically by clicking here.](#)

Comments submitted in paper form should be sent to Ronald W. Smith, Corporate Secretary, Municipal Securities

¹ See [MSRB Notice 2017-08](#), Application of MSRB Rules to Solicitor Municipal Advisors (May 4, 2017).



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Rulemaking Board, 1300 I Street NW, Suite 1000, Washington, DC 20005. All comments will be available for public inspection on the MSRB's website.²

Background

In 2017, the MSRB published Notice 2017-08 on the application of MSRB rules to municipal advisors that undertake the solicitation of a municipal entity or obligated person ("solicitor municipal advisors").³ Notice 2017-08 was intended to promote understanding of the regulatory framework applicable to solicitor municipal advisors' activities as well as their obligations under MSRB rules when soliciting obligated persons and municipal entities (collectively, "solicited entities"). Among other things, the notice summarized several key MSRB rules applicable to solicitor municipal advisors, including obligations owed by solicitor municipal advisors to solicited entities under MSRB Rule G-17. Those obligations stemmed from basic principles of fair dealing and drew some parallels to obligations owed by non-solicitor municipal advisors under MSRB Rule G-42, by underwriters pursuant to interpretive guidance issued under MSRB Rule G-17 (the "G-17 Underwriter's Guidance") and by certain solicitors under the U.S. Securities and Exchange

² Comments generally are posted on the MSRB's website without change. For example, personal identifying information such as name, address, telephone number, or email address will not be edited from submissions. Therefore, commenters should only submit information that they wish to make available publicly.

³ For purposes of this notice and draft Rule G-46, the term "solicitor municipal advisor" means a municipal advisor within the meaning of Section 15B(e)(4) of the Exchange Act of 1934 (the "Act"), 17 CFR 240.15Ba1-1(d)(1)-(4) and other rules and regulations thereunder; provided that it shall exclude a person that is otherwise a municipal advisor solely based on activities within the meaning of Section 15B(e)(4)(A)(i) of the Act and the rules and regulations thereunder.

Generally, this means a communication with a municipal entity or obligated person made by a person, for direct or indirect compensation, on behalf of a broker, dealer, municipal securities dealer (collectively, "dealers") or municipal advisor, or investment adviser that does not control, is not controlled by, or is not under common control with the person undertaking the solicitation for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of a dealer or municipal advisor for or in connection with municipal financial products, the issuance of municipal securities, or of an investment adviser to provide investment advisory services to or on behalf of a municipal entity. The term does not include advertising by a dealer, municipal advisor, or investment adviser, or solicitation of an obligated person, if such obligated person is not acting in the capacity of an obligated person or the solicitation of the obligated person is not in connection with the issuance of municipal securities or with respect to municipal financial products. See Section 15B(e)(9) of the Act and 17 CFR 240.15Ba1-1(n).

Commission (“SEC”)’s cash solicitation rule, under the Investment Adviser’s Act of 1940.⁴

Since the publication of Notice 2017-08, the MSRB undertook a retrospective review of the G-17 Underwriter’s Guidance. Additionally, in 2020, the SEC amended its advertising rule for investment advisers and created a merged marketing rule (the “IA Marketing Rule” or “IA Rule 206(4)-1”) that replaces the previous advertising and cash solicitation rules for investment advisers.⁵

Rule G-42. Rule G-42 generally sets forth the core standards of conduct for non-solicitor municipal advisors, requires them to evidence each of their municipal advisory relationships in writing and to disclose to their clients all material conflicts of interest. Additionally, Rule G-42 contains provisions pertaining to recommendations and the review of recommendations of other parties and expressly prohibits such municipal advisors from engaging in certain specified conduct, including but not limited to making payments to unaffiliated persons for the purpose of obtaining or retaining an engagement to perform municipal advisory activities unless such person is a registered municipal advisor. Rule G-42 applies only to non-solicitor municipal advisors acting in their capacity as such. Generally, this means municipal advisors that provide certain advice to or on behalf of a municipal entity or obligated person as contemplated in Section 15B(e)(4)(A)(ii) of the Act and rules and regulations thereunder. According to MSRB data, at least some municipal advisors that engage in non-solicitor municipal advisory activity pursuant to Rule G-42 also engage in activity that would subject them to draft Rule G-46, if adopted.

G-17 Underwriter’s Guidance. Among other things, the G-17 Underwriter’s Guidance sets forth basic standards for underwriters in their dealings with issuers of municipal securities, requires certain disclosures regarding an underwriter’s role, compensation and conflicts of interest, specifies the

⁴ See Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Aug. 2, 2012). As part of its retrospective rule review, the MSRB recently undertook a review of the G-17 Underwriter’s Guidance and made certain amendments to that guidance. See [MSRB Notice 2019-20](#), SEC Approves Amendments to Underwriters’ Fair Dealing Obligations to Issuers Under Rule G-17 (Nov. 8, 2019). The compliance date for the G-17 Underwriter’s Guidance, as amended, is March 31, 2021.

⁵ See Investment Adviser Marketing, [SEC Release No. IA-5653](#) (December 22, 2020). The effective date of the IA Marketing Rule is 60 days after publication in the *Federal Register*, with an 18-month transition period between the IA Marketing Rule’s effective date and its compliance date. The IA Marketing Rule was published in the *Federal Register* on March 5, 2021. See 86 FR 13024 (March 5, 2021).

timing and manner of such disclosures, and describes the applicable standard regarding representations made to issuers. The MSRB recently completed a retrospective review of the G-17 Underwriter's Guidance and, in 2019, amended and restated it.⁶ The compliance date for the amended and restated G-17 Underwriter's Guidance is March 31, 2021. According to MSRB data, at least some municipal advisors that also engage in underwriting activity as a dealer and are subject to the G-17 Underwriter's Guidance also engage in activity that would subject them to draft Rule G-46, if adopted.

Paid Solicitations Under the Investment Adviser's Act. In relevant part, and subject to certain exemptions, the IA Marketing Rule permits an investment adviser to use paid testimonials and endorsements in its advertisements if the investment adviser discloses, or reasonably believes that the person giving the testimonial or endorsement (the "promoter") discloses: certain clear and prominent disclosures pertaining to the testimonial or endorsement; the material terms of the compensation arrangement; and certain material conflicts of interest on the part of the promoter.⁷ The rule also requires the investment adviser to have a reasonable basis for believing that the testimonial or endorsement complies with the requirements of the IA Marketing Rule and, subject to exemptions, requires the investment adviser to have a written agreement with the promoter. Additionally, as advertisements, paid testimonials and endorsements must comply with the rule's general prohibitions applicable to advertisements. While the MSRB does not have specific data that correlates to the defined terms used in the IA Marketing Rule, the MSRB believes that at least some promoters under the IA Marketing Rule would also be subject to draft Rule G-46, if adopted.

⁶ See MSRB Notice 2019-20, SEC Approves Amendments to Underwriters' Fair Dealing Obligations to Issuers Under Rule G-17 (November 8, 2019).

⁷ For purposes of the rule, an endorsement is a statement by a person other than a current client or investor in a private fund advised by the investment adviser that: (i) indicates approval, support, or recommendation of the investment adviser or its supervised persons or describes that person's experience with the investment adviser or its supervised persons; (ii) directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or (iii) refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser. See IA Rule 206(4)-1(e)(5).

A testimonial is a statement by a current client or investor in a private fund advised by the investment adviser: (i) about the client or investor's experience with the investment adviser or its supervised persons; (ii) that directly or indirectly solicits any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser; or (iii) that refers any current or prospective client or investor to be a client of, or an investor in a private fund advised by, the investment adviser. See IA Rule 206(4)-1(e)(17).

The MSRB believes that this retrospective review of the G-17 Excerpt for Solicitor Municipal Advisors presents an opportunity to promote more regulatory consistency between solicitor municipal advisors and these other regulated entities, while simultaneously removing certain obligations for solicitor municipal advisors that may impose a burden not reasonably justified by their potential benefits. The MSRB also believes that, because the content of the G-17 Excerpt for Municipal Advisors was initially included in a larger notice that discussed myriad other regulatory obligations, codification of the applicable substantive standards would promote clearer regulatory obligations for solicitor municipal advisors.

Draft Rule G-46

As discussed above, new draft Rule G-46 would codify key substantive requirements of the G-17 Excerpt for Solicitor Municipal Advisors. Additionally, it would remove certain obligations that, in retrospect, the MSRB believes may impose more burdens than benefits. Finally, it would incorporate certain additional changes that would better align the standards applicable to solicitor municipal advisors with those applicable to other regulated entities.

Codification of the G-17 Excerpt for Solicitor Municipal Advisors

The G-17 Excerpt for Solicitor Municipal Advisors generally reminded solicitor municipal advisors of their Rule G-17 obligation to deal fairly with all persons in the conduct of their municipal advisory activities and that this duty includes an obligation to not engage in any deceptive, dishonest, or unfair practice. The excerpt further explained that this fair dealing obligation includes the obligation not to misrepresent or omit facts or other material information.

Additionally, it stated that solicitor municipal advisors have an affirmative duty to disclose to the municipal entity or obligated person being solicited all material facts about the solicitation and specified certain facts that, in the MSRB's view, are material. Generally, this included the obligation to disclose information regarding the solicitor municipal advisor's compensation, certain payments made by the solicitor municipal advisor and information about select relationships with the solicited entity. It also included the obligation to disclose certain information relevant to a solicited entity's consideration of products or services offered by a third-party client of the solicitor municipal advisor, but presented by the solicitor municipal advisor. Finally, the G-17 Excerpt for Solicitor Municipal Advisors reminded solicitor municipal advisors that because a solicitor municipal advisor's clients are not the municipal

entities that they solicit, but rather the third parties that retain or engage the solicitor municipal advisor to solicit such municipal entities, solicitor municipal advisors do not owe a fiduciary duty under the Act or MSRB rules to their clients (or the municipal entity) in connection with such activity. However, as noted above, they are subject to the fair dealing standards under Rule G-17 including with respect to their clients and the entities that they solicit.

Draft Rule G-46 would codify the key principles expressed in the G-17 Excerpt for Solicitor Municipal Advisors but omits a general statement of a solicitor municipal advisor's fair dealing obligations as those obligations would continue to remain applicable under Rule G-17. Additionally, draft Rule G-46 makes certain changes to the description of some of the duties currently described in the G-17 Excerpt for Solicitor Municipal Advisors to provide limited, more prescriptive guidance that may promote clearer regulatory expectations. For example, rather than requiring disclosure of the amount and source of "all of" the solicitor's compensation, draft Rule G-46 more specifically requires the disclosure of certain specified information pertaining to a solicitor municipal advisor's compensation.

Finally, draft Rule G-46 omits provisions pertaining to the obligations of a solicitor municipal advisor when it is engaged by a client to present information about a product or service offered by such client, as well as payments made to other solicitor municipal advisors to facilitate a solicitation. At this time, the MSRB believes that a solicitor municipal advisor's client, rather than the solicitor municipal advisor, is in the best position to identify and provide such product and service disclosures. Additionally, the MSRB is not aware of any sub-contractor solicitation arrangements. However, while draft Rule G-46 currently does not include such provisions, the MSRB seeks comment as to whether such provisions should be codified in any potential finalized rule.

New Draft Requirements

The substantively new components under draft Rule G-46 generally would:

- add a new requirement for solicitor municipal advisors to document their relationships in writing;
- describe standards regarding solicitor municipal advisor representations to solicited entities;
- add new role, compensation and conflict of interest disclosures to the set of disclosures solicitor municipal advisors must make to solicited entities; and

- set forth standards regarding the timing and manner of the required disclosures.

The draft rule also would require solicitor municipal advisors to keep certain records demonstrating their compliance with the obligations set forth in draft Rule G-46. These new components are designed to aid solicitor municipal advisors and the entities charged with examining and enforcing such standards in their understanding of the MSRB's compliance expectations. Further, they would better align some of the obligations imposed on solicitor municipal advisors with those applicable under other relevant regimes.

Documentation of the Solicitor Relationship. Draft Rule G-46 would require a solicitor municipal advisor to evidence each of its solicitor relationships by a writing or writings created and delivered to the solicitor client prior to, upon or promptly after the establishment of the solicitor relationship. The writing(s) would be required to be dated and include, at a minimum: a description of the solicitation activities to be engaged in by the solicitor municipal advisor on behalf of such client (including the scope of the agreed-upon activities); the compensation to be received by the solicitor municipal advisor; and the term of the engagement. Additionally, the description of the solicitation activities would be required to include an affirmative statement that the scope of the solicitation is anticipated to include the solicitation of municipal entities and/or obligated persons.⁸

The obligation to document the relationship is generally consistent with a non-solicitor municipal advisor's obligation to document its municipal advisory relationship with a client under Rule G-42(c) and draws on an investment adviser's oversight obligation to enter into a written agreement with a promoter under the IA Marketing Rule. Notably, unlike Rule G-42(c), draft Rule G-46 does not specifically require the writing(s) evidencing the relationship to include information pertaining to the solicitor municipal advisor's conflicts of interest, nor does it require disclosure regarding legal and disciplinary events. However, below, the MSRB seeks comment as to

⁸ The MSRB understands that a solicitor may be asked to solicit a broad range of entities on behalf of a third-party client of the solicitor. These entities may include municipal entities, obligated persons and corporate entities that are not obligated persons. While the solicitation of municipal entities and obligated persons generally would require compliance with draft Rule G-46 (to the extent the solicitation would make the solicitor a "municipal advisor"), the solicitation of a corporate entity that is not an obligated person ordinarily would not require such compliance. In order to promote certainty as to the applicable regulatory scheme for any engagement, the MSRB believes that it is imperative for any engagement to be documented in a writing that clearly indicates whether the solicitation of municipal entities and/or obligated persons is anticipated.

whether such information should be required to be included in the writing(s) or whether such disclosures should otherwise be required to be provided to a solicitor client. Additionally, the MSRB seeks comment as to the scope of engagements that are typically included in solicitor municipal advisors' engagement documentation today.

Representations to Solicited Entities. Draft Rule G-46 specifically would require solicitor municipal advisors to have a reasonable basis for the representations and other material information conveyed to solicited entities and would expressly require solicitor municipal advisors to refrain from making representations that they know or should know are inaccurate or misleading. Supplementary Material .01 expounds on these obligations and sets forth examples as an aid to understanding the MSRB's intent.

These obligations resemble an underwriter's obligations regarding representations to issuers under the G-17 Underwriter's Guidance as well as a non-solicitor's obligations under Rule G-42(e) and Rule G-42, Supplementary Material .01. However, the relevant obligations under draft Rule G-46 are designed to be more tailored to the activities in which a solicitor municipal advisor engages. They also draw some parallels to an investment adviser's obligation under the IA Marketing Rule to ensure that its advertisements do not include: untrue statements of material fact or material statements of fact that the investment adviser does not have a reasonable basis for believing.

Specific Role Disclosures. Solicitor municipal advisors would be required to disclose the following statements to a solicited entity:

- a solicitor municipal advisor is required to deal fairly at all times with both solicited entities and the solicitor municipal advisor's clients; and
- a solicitor municipal advisor's primary role is to solicit the solicited entity on behalf of certain third-party regulated entities and the solicitor municipal advisor will be compensated for its solicitation services by the solicitor municipal advisor's client.⁹

These obligations resemble an underwriter's obligation to make certain disclosures concerning the underwriter's role under the G-17 Underwriter's Guidance but are designed to be more tailored to the activities in which a solicitor municipal advisor engages. As a result, draft Rule G-46 does not require the disclosure of certain other role-based disclosures required of an

⁹ While the draft rule text uses the defined term "solicitor municipal advisor," to facilitate a more plain-language disclosure, the MSRB expects that solicitor municipal advisors will insert their name in place of the term solicitor municipal advisor.

underwriter under G-17 Underwriter's Guidance. Notably, unlike the G-17 Underwriter's Guidance, draft Rule G-46 does not require any specific disclosures regarding the applicability of a fiduciary duty to the relationship. However, below, the MSRB specifically seeks comment as to whether such a statement would or would not be helpful to the municipal entities and obligated persons solicited by a solicitor municipal advisor.

Specific Compensation Disclosures. Solicitor municipal advisors would be required to disclose to a solicited entity the material terms of the solicitor municipal advisor's compensation arrangement, including a description of the compensation provided or to be provided, directly or indirectly, to the solicitor for such solicitation.

This requirement resembles the obligation, under the IA Marketing Rule, for an investment adviser (or its promoter) to make similar disclosures in connection with certain endorsements and testimonials. Below, the MSRB seeks comment as to whether any other elements under the IA Marketing Rule should be incorporated into draft Rule G-46 and whether the applicable requirements of these rules would be sufficiently harmonized if draft Rule G-46 were to be adopted.

Conflicts of Interest. The G-17 Excerpt for Solicitor Municipal Advisors specified that solicitor municipal advisors must disclose any material relationships of the solicitor municipal advisor with any employees or board members of the solicited entity or any other persons affiliated with the solicited entity or their officials who may have influence over the selection of the solicitor client. The MSRB believes that this is one example of a material conflict of interest and that there could be other material conflicts of interest that should be disclosed to a solicited entity. Accordingly, draft Rule G-46 expressly would require solicitor municipal advisors to disclose any material conflicts of interest.

This obligation is comparable to a non-solicitor municipal advisor's obligation under Rule G-42 to disclose to its clients all material conflicts of interest. Below, the MSRB seeks comment as to whether this is an appropriate requirement considering the activities in which a solicitor municipal advisor engages.

Solicitor Client Disclosures. Draft Rule G-46 would require a solicitor municipal advisor to explain to a solicited entity: (a) the type of information that is generally available on a Form MA (in the case of a municipal advisor client) or Form ADV (in the case of an investment adviser client) and (b) how the solicited entity can obtain a copy of the solicitor client's Form MA or Form ADV, as applicable.

These requirements are designed to help ensure that—at any early stage—solicited entities are directed to important written information about the entities the solicitor municipal advisor represents—including, but not limited to, information about the disciplinary history of the solicitor municipal advisor’s clients. However, it does not require solicitor municipal advisors to obtain a copy of these documents and provide them to their solicited entities, nor does it require solicitor municipal advisors to disclose any specific information about their client that is included in such forms.¹⁰

Timing and Manner of Disclosures. Draft Rule G-46 would require disclosures to be made in writing to an official of the solicited entity that the solicitor municipal advisor reasonably believes has the authority to bind the solicited entity by contract and that, to the knowledge of the solicitor municipal advisor, is not a party to a disclosed conflict. The disclosures would be required to be delivered at the time of the first solicitation of the solicited entity for that specific solicitor client. In the event that a solicitor municipal advisor makes multiple solicitations of a solicited entity on behalf of the same client for the same type of services over the course of more than one calendar year, the disclosures must be provided annually thereafter until the solicitor municipal advisor ceases to make such solicitations of such solicited entity. To the extent that any additional conflicts that require disclosure arise before a solicitation is complete, such conflicts would be required to be disclosed as they arise.¹¹

These obligations are comparable to those applicable to underwriters with respect to the delivery of their required disclosures to issuers pursuant to the G-17 Underwriter’s Guidance. However, the timing of the delivery of such disclosures is tailored to the activities in which solicitor municipal advisors engage. Notably, unlike the G-17 Underwriter’s Guidance, draft Rule G-46 would not require solicitor municipal advisors to attempt to receive written acknowledgement of the disclosures, although as described below, solicitor municipal advisors would be required to keep such disclosures along with evidence that they were delivered (*e.g.*, automatic email delivery receipt) for

¹⁰ However, solicitor municipal advisors should be mindful of their general fair dealing obligations under Rule G-17 and of their obligations related to their representations under draft Rule G-46(b). If a solicitor municipal advisor makes a representation that it knows or should know is inaccurate based on a review of its client’s Form MA or Form ADV, that solicitor municipal advisor may be in violation of Rule G-46.

¹¹ The MSRB previously extended to municipal advisors existing interpretive guidance regarding the use of electronic media to deliver and receive information under MSRB rules. As a result, disclosures required by draft Rule G-46 may be delivered electronically to the extent such delivery is consistent with that guidance. See Notice Regarding Electronic Delivery and Receipt of Information by Municipal Advisors (Oct. 13, 2017).

books and records purposes. Below, the MSRB seeks comment as to whether the disclosures required by draft Rule G-46 should be permitted to be provided orally, as long as the solicitor municipal advisor can establish that the disclosures were otherwise provided in the manner required by draft Rule G-46.

Definitions. Draft Rule G-46 would set forth four new definitions for the following terms used in the draft rule: “solicitor client,” “compensation,” “solicitor municipal advisor,” and “solicited entity.”

The term, “solicitor client” generally would mean the municipal advisor or investment adviser on behalf of whom the solicitor municipal advisor undertakes a solicitation within the meaning of Sections 15B(e)(4)(A)(ii) and (e)(9) of the Act and the rules and regulations thereunder.

The term, “compensation” would be defined to mean any cash, in-kind or non-cash remuneration.

As noted above, the term, “solicitor municipal advisor” would be defined to mean a municipal advisor within the meaning of Section 15B(e)(4) of the Act, 17 CFR 240.15Ba1-1(d)(1)-(4) and other rules and regulations thereunder; provided that it shall exclude a person that is otherwise a municipal advisor solely based on activities within the meaning of Section 15B(e)(4)(A)(i) of the Act and the rules and regulations thereunder. Notably, the term “solicitor municipal advisor” is defined differently from the defined term, “municipal advisor third-party solicitor,” which is used in MSRB Rule G-37. Unlike the term “municipal advisor third-party solicitor,” the term “solicitor municipal advisor” includes certain solicitations of both municipal entities *and obligated persons*. Importantly, as discussed in Supplementary Material .02, a municipal advisor may be, simultaneously, both a solicitor municipal advisor for purposes of Rule G-46 and a non-solicitor municipal advisor for purposes of Rule G-42. For example, a municipal advisor may provide “advice” as defined in Rule G-42 to a municipal entity (the “advisory engagement”) and separately may act as a solicitor municipal advisor with respect to another municipal entity as contemplated in draft Rule G-46 (the “solicitor municipal advisor engagement”). As a result, the municipal advisor would be subject to Rule G-42 with respect to the advisory engagement and would be subject to Rule G-46 with respect to the solicitor municipal advisor engagement.

Finally, the term “solicited entity” would be defined to mean any municipal entity (as defined in Section 15B(e)(8) of the Act, 17 CFR 240.15Ba1-1(g) and other rules and regulations thereunder) or obligated person (as defined in Section 15B(e)(10) of the Act, 17 CFR 240.15Ba1-1(k) and other rules and regulations thereunder) that the solicitor municipal advisor has solicited, is

soliciting or intends to solicit within the meaning of Sections 15B(e)(4)(A)(ii) and (e)(9) of the Act and the rules and regulations thereunder.

Recordkeeping. Recordkeeping is an important component of a solicitor municipal advisor's effective supervisory system consistent with MSRB Rule G-44, on supervisory and compliance obligations for municipal advisors. To that end, draft Rule G-46 would require solicitor municipal advisors to retain for a period of not less than five years a copy of each writing or writings required by Rule G-46(a) (documenting the relationship between the solicitor municipal advisor and the solicitor client), documentation substantiating the solicitor municipal advisor's reasonable basis belief regarding its representations as described in Rule G-46(b), and evidence that the disclosures required by Rule G-46(c) were made in the manner described in the draft rule.

Summary of Draft Rule G-46

In summary, draft Rule G-46 would require solicitor municipal advisors to evidence each of their solicitor relationships by a writing or writings that include certain minimum content set forth in the draft rule. It also would require solicitor municipal advisors to have a reasonable basis for their representations and to refrain from making representations that they know or should know are inaccurate or misleading. Further, the draft rule would require solicitor municipal advisors to disclose to any solicited entity all material facts about the solicitation, including: (i) certain information regarding the role and compensation of the solicitor municipal advisor; (ii) any material conflicts of interest of the solicitor municipal advisor; and (iii) information about how the solicited entity can obtain the solicitor client's Form MA or Form ADV, as applicable. Draft Rule G-46 generally also would require that all disclosures must be made in writing and must be delivered to an official of the solicited entity by no later than the first solicitation of the municipal entity for a specified solicitor client. Finally, the draft rule would require solicitor municipal advisors to retain certain documentation as evidence of compliance with the requirements of the rule.

Archival of the G-17 Excerpt for Solicitor Municipal Advisors

Because draft Rule G-46 would codify the substance of the G-17 Excerpt for Solicitor Municipal Advisors, as modified by the additional content discussed in this Request for Comment, upon adoption of any final rule, the MSRB

would retire and archive the excerpt that currently appears behind Rule G-17 in the MSRB rule book.¹²

Economic Analysis

The purpose of draft Rule G-46 would be to codify guidance on the obligations of solicitor municipal advisors currently outlined in an excerpt under Rule G-17. Further, the draft rule would better align the duty and obligations of solicitor municipal advisors to those for underwriters under Rule G-17, for non-solicitor municipal advisors under Rule G-42, and for solicitors that undertake certain solicitations on behalf of investment advisers under the SEC's investment adviser regime.

A. The need for Draft Rule G-46

Before the enactment of the Dodd-Frank Act of 2010, municipal advisors were mostly unregulated.¹³ In the succeeding years after the enactment of the new federal law, the MSRB established a regulatory framework for municipal advisors that included several new rules. As part of this new framework, the MSRB prescribed the duties for all municipal advisors, which were divided into "solicitor" and "non-solicitor" municipal advisors. The MSRB first amended Rule G-17 in December 2010 to include the conduct of municipal advisory activities, municipal advisors, including solicitor municipal advisors, and their associated persons, which articulated that municipal advisors must deal fairly with all persons and not engage in any deceptive, dishonest, or unfair practice.¹⁴ The duties of non-solicitor municipal advisors were subsequently outlined in 2016 with Rule G-42. In 2017, the MSRB published Notice 2017-18 which largely summarized already effective, or recently approved, but not yet operative, regulatory obligations. However, it also included the G-17 Excerpt for Solicitor Municipal Advisors.

¹² While the G-17 Excerpt for Solicitor Municipal Advisors would be removed from the MSRB rule book, the excerpt could continue to be accessed, for historical purposes only, at the MSRB's Archived Interpretive Guidance page.

¹³ Prior to 2010, municipal advisors were subject to a patchwork of state and local laws. In support of SEC regulation, the MSRB wrote: "despite a thin patchwork of state and local laws, the majority of financial advisors is unregulated and operates in the public sphere without any legal standards or regulatory accountability." Municipal Securities Rulemaking Board, *Unregulated Municipal Market Participants – A Case for Reform*, April 2009.

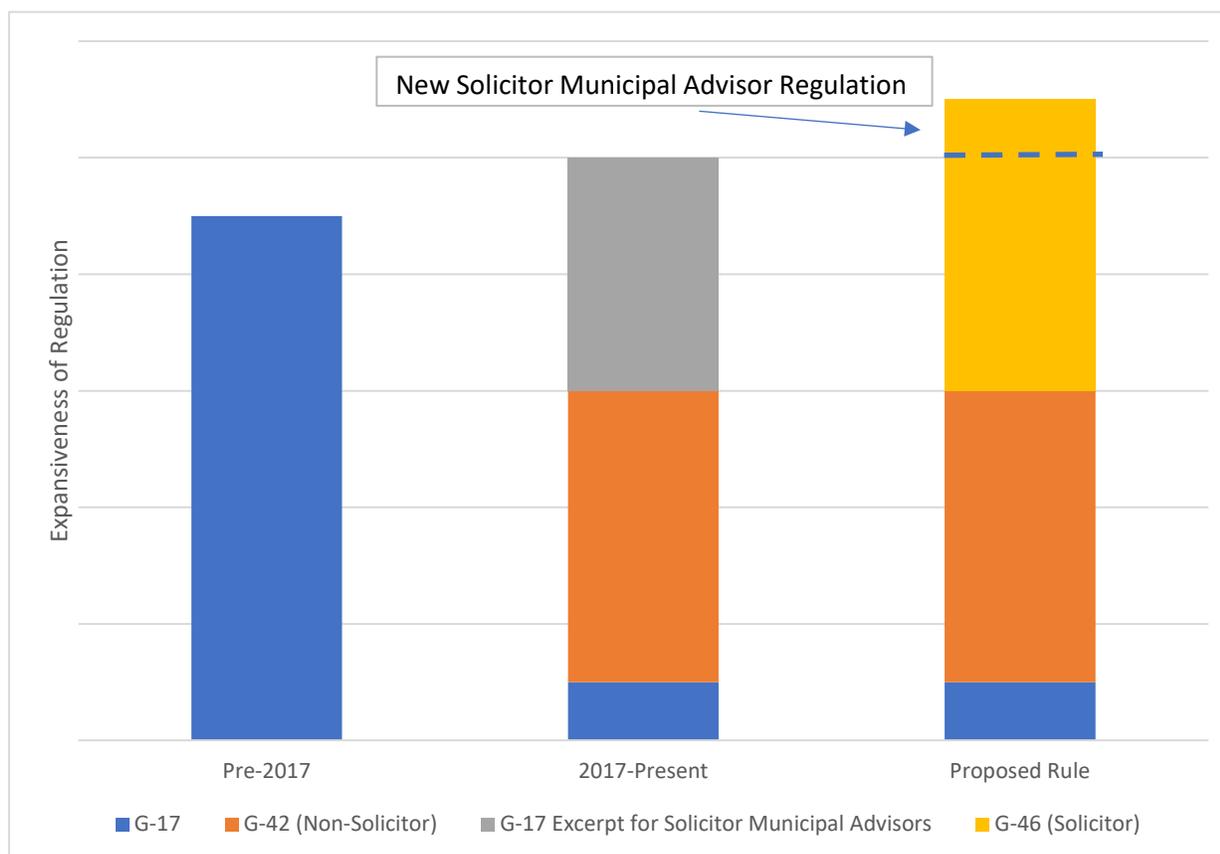
¹⁴ Previously, the rule only applied to the municipal securities activities of dealers.

The core standards applicable to non-solicitor municipal advisors and underwriters under Rule G-42 and Rule G-17 are highlighted in a standalone rule for non-solicitor municipal advisors and a standalone interpretation that was filed with and approved by the SEC, respectively. In contrast, the G-17 Excerpt for Solicitor Municipal Advisors did not undergo a formal public comment process. While, by its terms, MSRB Notice 2017-08 was intended to be a resource only, having the G-17 Excerpt for Solicitor Municipal Advisors with interpretive guidance in the MSRB rule book has resulted in inconsistency in its application among solicitor municipal advisors.

In contrast to the regulation for underwriters and non-solicitor municipal advisors, the MSRB does not have any express standards regarding documentation of a solicitor municipal advisor's engagement. Nor does it have express standards regarding solicitor municipal advisor disclosures of conflicts of interest. Given the importance that these standards have under other regimes, the MSRB believes that it is important to seek comment as to whether such standards are equally important for the regulation of solicitor municipal advisors. The MSRB believes that a codified Rule G-46, as modified in response to public comments and if filed with and approved by the SEC, would result in informed, clearer regulatory standards and expectations for solicitor municipal advisors and that the process followed to arrive at any such final rule would help ensure appropriate consideration of the benefits and burdens of any potential final requirements. In addition, draft Rule G-46 would better align the obligations imposed on solicitor municipal advisors with those applicable to non-solicitor municipal advisors under Rule G-42, underwriters under the G-17 Underwriter's Guidance, and investment advisers or their promoters under the IA Marketing Rule.

B. Relevant baselines against which the likely economic impact of the proposed changes can be considered

To evaluate the potential impact of draft Rule G-46, a baseline or baselines must be established as a point of reference to compare the expected future state with draft Rule G-46. The economic impact of the proposed changes is generally viewed as the difference between the baseline state and the expected state. Chart 1 below identifies the rules pertaining to municipal advisors that have evolved since the passage of the Dodd-Frank Act in 2010.

Chart 1. MSRB Obligations for Solicitor and Non-Solicitor Municipal Advisors Since 2010

For solicitor municipal advisors, the evaluation baseline is Rule G-17, which applies to all municipal advisors (solicitor and non-solicitor alike) and requires municipal advisors to deal fairly with all persons and not engage in any deceptive, dishonest, or unfair practice. The G-17 Excerpt for Solicitor Municipal Advisors expounds on these fair dealing obligations for solicitor municipal advisors.

Another baseline for consideration is the cash solicitation rule under the Investment Adviser's Act.¹⁵ That rule generally prohibits investment advisers that are required to be registered under the Investment Adviser's Act from

¹⁵ While the cash solicitation rule will be replaced by the new merged IA Marketing Rule later in 2021, the MSRB understands that, at this time, investment advisers must continue to comply with the requirements of the cash solicitation rule. See Investment Adviser Marketing, [SEC Release No. IA-5653](#) (December 22, 2020). The effective date of the IA Marketing Rule is 60 days after publication in the *Federal Register*, with an 18-month transition period between the IA Marketing Rule's effective date and its compliance date. The IA Marketing Rule was published in the *Federal Register* on March 5, 2021. See 86 FR 13024 (March 5, 2021).

paying a cash fee to a solicitor for a solicitation unless the arrangement complies with a number of conditions set forth in the rule. Thus, for a subgroup of solicitor municipal advisors who undertake solicitations on behalf of an investment adviser that is subject to the requirements of the cash solicitation rule, the burden for compliance is already in place partially, as these solicitor municipal advisors are presumably already complying with the conditions outlined by the rule. A new draft Rule G-46 would not increase the burden for this subgroup of solicitor municipal advisors as much as the burden for solicitor municipal advisors who do not conduct solicitations that are subject to the cash solicitation rule.

Finally, for a subset of municipal advisory firms who conduct both solicitation and non-solicitation business activities, the baseline is comprised of Rule G-17 and Rule G-42 on duties of non-solicitor municipal advisors.

C. Identifying and evaluating reasonable alternative regulatory approaches

The MSRB policy on economic analysis in rulemaking addresses the need to consider alternative regulatory approaches, when applicable. Under this policy, only reasonable regulatory alternatives should be considered and evaluated.

Another alternative would be to amend Rule G-42 on the duties of non-solicitor municipal advisors to have it apply to solicitor municipal advisors. This would help provide one helpful location for all duty of care obligations for *all* municipal advisors, as defined by the SEC. However, the MSRB deliberately decided not to apply Rule G-42 to solicitor municipal advisors due to fundamental differences between the nature of their clients and the business activities in which they engage. For example, whereas the clients of non-solicitor municipal advisors are municipal entities and obligated persons, the clients of solicitor municipal advisors are third-party dealers, municipal advisors and investment advisers. Similarly, whereas non-solicitor municipal advisors primarily provide advice to their clients, solicitor municipal advisors are retained to solicit municipal entities and obligated persons on behalf of the solicitor municipal advisor's clients. Because the roles of solicitor and non-solicitor municipal advisors differ in critical ways, combining the obligations for both types of municipal advisors into a single Rule G-42 would not be easily feasible; therefore, the MSRB believes that a standalone rule for solicitor municipal advisors is warranted.

D. Assessing the benefits and costs of the proposed changes

The MSRB policy on economic analysis in rulemaking requires consideration of the likely costs and benefits of a proposed rule change when the rule change proposal is fully implemented against the context of the economic

baselines. The MSRB is currently unable to quantify the economic effects of draft Rule G-46 in totality because not all of the information necessary to provide a reasonable estimate is available. There are few publicly available sources of information about the municipal advisory industry, especially in terms of the business operations, as well as revenue and expense data for relevant business lines. In addition, estimating the costs for solicitor municipal advisory firms to comply with the draft rule is hampered by the fact that these costs depend on the business activities and size of these firms, which can vary greatly. Given the limitations on the MSRB's ability to conduct a quantitative assessment of the costs and benefits associated with the draft rule, the MSRB has considered these costs and benefits primarily in qualitative terms augmented with some preliminary quantitative cost estimates based on the information provided by a previous SEC analysis.

Regardless, the MSRB is seeking, as part of this Request for Comment, additional data or studies relevant to the costs and benefits of the proposed changes.

Benefits

The main benefit of draft Rule G-46 would be to codify and provide needed clarification on regulatory obligations for solicitor municipal advisors with regard to their duties. Draft Rule G-46 would help prevent derelictions of a solicitor municipal advisor's fair dealing obligations by promoting clearer regulatory requirements and expectations. Thus, the benefit provided by draft Rule G-46 is that it will remove uncertainty and potential "gray areas" of regulations that would hinder a potential solicitor municipal advisor from completing its obligations as intended.

Furthermore, the additional requirements for solicitor municipal advisors from draft Rule G-46 would enhance the transparency and protection for recipients of solicitations, further promoting fair dealings between the market participants. As mentioned above, the additional requirements would also align some of the obligations imposed on solicitor municipal advisors with those applicable to non-solicitor municipal advisors under Rule G-42 and underwriters under the G-17 Underwriter's Guidance as well as those applicable to certain endorsements and testimonials in connection with certain investment adviser advertisements under the SEC's investment adviser regime. This alignment would alleviate the complexity due to differing obligations and increase the efficiency for regulatory entities tasked with examining and enforcing such requirements.

Costs

The MSRB acknowledges that solicitor municipal advisors would likely incur costs, relative to the baseline state, to meet the standards of conduct and duties contained in draft Rule G-46. These changes may include the one-time upfront costs related to setting up and/or revising policies and procedures, as well as the ongoing costs such as compliance costs associated with each solicitation and additional record-keeping costs.

For the upfront costs, it is possible that solicitor municipal advisors may need to seek the appropriate advice of in-house or outside legal and compliance professionals to revise policies and procedures in compliance with draft Rule G-46. Solicitor municipal advisors may also incur costs as related to continuing education and/or standards of training in preparation for the implementation of draft Rule G-46. Assuming solicitor municipal advisors currently already have policies and procedures in place in relation to the G-17 Excerpt for Solicitor Municipal Advisors, the additional upfront costs for draft Rule G-46 should be incremental.

For the ongoing costs, solicitor municipal advisors may incur compliance costs as related to each solicitation, including costs pertaining to creating and maintaining books and records. Firms may have to make changes to their current recordkeeping practices in order to satisfy the additional requirements of draft Rule G-46 for the specific disclosures to a solicited entity as outlined above, such as the creation of disclosures for all material information regarding the role and compensation of the solicitor municipal advisor; documentation of the relationship between a solicitor municipal advisor and its solicitor client; and disclosure of material conflicts of interest. However, the MSRB currently does not have the necessary information to calculate the totality of these costs.

Table 1 below shows the number of solicitor municipal advisory firms registered with the MSRB. The table groups together solicitor municipal advisor only firms (meaning those firms that indicated to the MSRB that they engage in solicitation activity only and not non-solicitation municipal advisory activity) and separately groups together those solicitor municipal advisor firms that indicated to the MSRB that they engage in both solicitation and non-solicitation municipal advisory activities (*e.g.*, under some engagements, they conduct solicitations of municipal entities and/or obligated persons whereas pursuant to other engagements, they provide covered advice to municipal entities and/or obligated persons). Table 1 also illustrates the type of solicitation activity in which solicitor municipal advisory firms registered

with the MSRB engage (*i.e.*, solicitations for investment advisory business versus other solicitations).¹⁶

Table 2 illustrates preliminary estimates for both the upfront and ongoing compliance costs assuming implementation of the new draft Rule G-46 for each solicitor municipal advisory firm in its respective group. As of January 2021, there is a total of 105 municipal advisory firms registered with the MSRB who indicated solicitation business activities on Form A-12, with 20 of those firms indicating that they engage solely in solicitation activities and the remaining 85 firms indicating they engage in both solicitation and non-solicitation municipal advisory activities. Of the 20 municipal advisory firms engaging solely in solicitation activities, 17 firms (10 + 7) indicate solicitation activities made on behalf of investment advisory business and three firms indicate solicitation activities only made on behalf of non-investment advisory business. Of the 85 municipal advisory firms engaging in both solicitation and non-solicitation activities, 58 firms (26 + 32) indicate solicitation activities made on behalf of investment advisory business and 27 firms indicate solicitation activities only made on behalf of non-investment advisory business.

¹⁶ Pursuant to MSRB Rule A-12, on registration, all municipal advisors, including solicitor municipal advisors, must register with the MSRB prior to engaging in any municipal advisory activity. Form A-12 is the single, consolidated form for registrants to provide the MSRB with registration information required under Rule A-12. Among other things, Form A-12 is used to: register with the MSRB, update registration information following a change to any information contained in the form, and affirm registration information on an annual basis. The data in Tables 1 and 2 below regarding the number and breakdown of solicitor municipal advisor firms and the types of activities in which they engage is derived from Form A-12 data submitted to the MSRB.

Table 1. Number of Solicitor Municipal Advisory Firms

Business Activities	Number of Firms
Firms with Solicitation Activities Only	20
Investment Advisory Business Only	10
Non-Investment Advisory Business Only	3
Both	7
Firms with Solicitation and Non-Solicitation Activities	85
Investment Advisory Business Only	26
Non-Investment Advisory Business Only	27
Both	32
Total	105

Table 2. Estimated Incremental Compliance Costs for Each Solicitor Municipal Advisory Firm¹⁷

Cost Components	Assumed Hourly Rate	20 Firms with Solicitation Activities Only				85 Firms with Solicitation and Non-Solicitation Activities			
		17 Firms On Behalf of Investment Advisory		3 Firms Not On Behalf of Investment Advisory		58 Firms On Behalf of Investment Advisory		27 Firms Not On Behalf of Investment Advisory	
		Number of Hours	Cost per Firm	Number of Hours	Cost per Firm	Number of Hours	Cost per Firm	Number of Hours	Cost per Firm
Upfront Cost									
a) Revision of Policies and Procedures	\$ 470	3.0	\$ 1,410	4.0	\$ 1,880	2.5	\$ 1,175	3.5	\$ 1,645
b) Training	\$ 620	1.0	\$ 620	1.5	\$ 930	1.0	\$ 620	1.5	\$ 930
Ongoing Compliance Cost - Per Each Solicitation	\$ 430	2.0	\$ 860	3.0	\$ 1,290	2.0	\$ 860	3.0	\$ 1,290

¹⁷ Hourly rate data are gathered from the 2013 SEC's Final Rule on Registration of Municipal Advisors, [17 CFR Parts 200, 240 and 249](#). The data reflect the 2021 hourly rate level after adjusting for the annual wage inflation rate of 2% between 2013 and 2021. The MSRB uses the higher hourly rate in each category of costs. For example, while the revision of policies and procedures can be conducted by either an in-house attorney (average hourly rate \$445) or outside counsel (average hourly rate \$470), the MSRB chooses the higher hourly rate for this analysis to be aggressive in the cost estimate. Similarly, for both the training and the ongoing compliance cost per each solicitation, the task can be performed by either a Chief

As previously mentioned, the incremental costs for the subgroup of solicitor municipal advisory firms soliciting on behalf of investment advisory business may be lower than other solicitor municipal advisory firms to the extent that such solicitor municipal advisors engage in solicitations that are subject to the former cash solicitation rule. These solicitor municipal advisors are presumed to have policies and procedures consistent with, although not necessarily identical to, some of the requirements under draft Rule G-46. In addition, the MSRB assumes that municipal advisory firms that engage in both solicitation and non-solicitation activities are currently in compliance with Rule G-42 with respect to their non-solicitation municipal advisory activities. The MSRB believes these firms may be able to leverage some of their existing Rule G-42 policies and procedures, resulting in a potentially lower upfront cost for implementing draft Rule G-46 as compared to municipal advisory firms that engage in solicitation activities only. For example, municipal advisory firms that engage in both solicitation and non-solicitation activities are likely accustomed to documenting their relationships in an engagement letter and may be able to leverage their existing supervisory and compliance framework to extend it to their solicitation activities.

Effect on Competition, Efficiency, and Capital Formation

The MSRB believes that draft Rule G-46 would neither impose a burden on competition nor hinder capital formation, as the proposed rule changes bring a similar regulatory regime to solicitor municipal advisors that currently exists for non-solicitor municipal advisors under Rule G-42 and for underwriters under the G-17 Underwriter's Guidance. The MSRB believes that the proposed rule would improve the municipal securities market's operational efficiency by providing solicitor municipal advisors with a clearer understanding of regulatory obligations, as well as enhancing the transparency and protection for recipients of the solicitations, further promoting fair dealings between market participants.

At present, the MSRB is unable to quantitatively evaluate the magnitude of the efficiency gains or losses, but believes the overall benefits accumulated over time for market participants would outweigh the upfront costs of revising policies and procedures and ongoing compliance and recordkeeping costs by solicitor municipal advisors.

Compliance Officer (average hourly rate of \$620), an in-house compliance attorney (average hourly rate \$430) or an in-house compliance manager (average hourly rate \$316), and the MSRB chooses the Chief Compliance Officer rate for the training and the compliance attorney rate for the ongoing compliance cost in the estimates.

The MSRB does not expect that draft Rule G-46 would change the competitive landscape of the solicitor municipal advisory services, as the upfront costs are expected to be relatively minor for all solicitor municipal advisory firms while the ongoing costs are expected to be proportionate to the size and business activities of each solicitor municipal advisory firm.

Request for Comments

The MSRB seeks comments in response to the following questions, as well as on any other topic relevant to the draft amendments. The MSRB particularly welcomes statistical, empirical and other data from commenters that may support their views and/or relate to the topics, statements or questions raised in this request for comment.

1. Would codifying the G-17 Excerpt for Solicitor Municipal Advisors promote clearer regulatory expectations for solicitor municipal advisors?
2. Would the additional standards regarding the timing and manner of delivery of the disclosures be helpful for solicitor municipal advisors in their efforts to comply with the obligations set forth in draft Rule G-46?
3. Are the requirements set forth in draft Rule G-46 appropriate in light of the activities in which solicitor municipal advisors engage? Are they necessary?
4. Do solicitor municipal advisors anticipate any challenges to implementation of draft Rule G-46? If yes, do commenters have any alternatives that they would like to propose for the MSRB's consideration? If so, please describe them.
5. Are there any aspects of the G-17 Excerpt for Solicitor Municipal Advisors that are not reflected in draft Rule G-46, but should be?
6. What are the benefits and burdens of draft Rule G-46? Are the burdens appropriately outweighed by the benefits?
7. Do commenters agree or disagree with the preliminary estimates in Table 2? To the extent possible, please provide evidence to support your assertions.
8. How is the scope of a solicitor municipal advisor's engagement typically decided upon? Are solicitor municipal advisors typically

engaged to solicit a broad or specific set of entities? Is it always clear whether they can or will solicit municipal entities or obligated persons within the scope of a particular engagement? If not, at the time of an engagement, how do solicitor municipal advisors determine whether their engagement will be subject to MSRB rules? If yes, would a solicitor municipal advisor know which municipal entities and/or obligated persons it anticipates soliciting at the time of an engagement?

9. Do solicitor municipal advisors make payments (including in-kind) to other solicitor municipal advisors to facilitate solicitations of a municipal entity? If so, are there any special disclosures specific to the sub-contractor solicitation arrangement that would seem appropriate?
10. Are solicitor municipal advisors engaged to present information about a product or service offered by the solicitor municipal advisor's municipal advisory client similar to presenting information about a product or service offered by an investment advisor?
11. Should solicitor municipal advisors be required to provide certain disclosures to their clients, including information pertaining to the solicitor municipal advisor's conflicts of interest and/or legal and disciplinary history? If so, should such disclosures be required in connection with engagement documentation with the client?
12. Is there any additional information pertaining to a solicitor municipal advisor's compensation that should specifically be required to be disclosed to a solicited entity?
13. Are the books and records requirements included in draft Rule G-46(f) workable in light of the many ways in which the disclosures required by draft Rule G-46 could be delivered? For example, how would solicitor municipal advisors expect to evidence that disclosures delivered via hand delivery were delivered in a manner that complies with the draft rule?
14. Is it appropriate to require solicitor municipal advisors to disclose any material conflicts of interest to solicited entities since solicitor municipal advisors do not provide any advice to the entities that they solicit? Should the required disclosures instead be limited to conflicts disclosures related to the solicitor municipal advisor's compensation arrangement or the solicitor municipal advisor's relationship with its (municipal advisor or investment adviser) client? Would a conflicts

disclosure requirement result in sufficient benefit to outweigh any potential burden? Is any additional guidance warranted in this area?

15. Should solicitor municipal advisors be required to make disclosures regarding their fiduciary status (or the lack thereof) in connection with the solicitation of a municipal entity or obligated person? Are solicitor municipal advisors sometimes deemed fiduciaries in connection with their solicitation activities pursuant to other regulatory regimes (e.g., state law)? If so, would a requirement to specifically state the solicitor municipal advisor's fiduciary status under the federal municipal advisor regime provide clarity or cause confusion to solicited entities?
16. Is the draft requirement to provide the requisite disclosures at the time of the first solicitation for a specified client workable? Why or why not? Are there circumstances under which they should be permitted to be provided as soon as reasonably practicable thereafter? If yes, please explain.
17. Should a municipal advisor client of a solicitor municipal advisor be required to make a bona fide effort to ascertain whether the solicitor municipal advisor has provided any or all of the disclosures related to the municipal advisor client to the solicited entities (e.g., the role and compensation disclosures required by draft Rule G-46(c)(i) and/or solicitor client disclosures required by draft Rule G-46(c)(iii))? For example, should the engagement documentation require the solicitor municipal advisor to contractually commit to provide the disclosures required by draft Rule G-46, and if so, should the municipal advisor client be required to undertake some level of diligence to confirm that the required disclosures are, in fact, made? Given that both the solicitor municipal advisor and all of its potential clients are regulated entities, would such a requirement appropriately further any policy goals? If so, would any burdens associated with such a requirement be outweighed by its potential benefits?
18. Draft Rule G-46 currently specifies that the required disclosures must be disclosed in writing. Should the MSRB permit such disclosures to be made orally as long as the solicitor municipal advisor maintains a record that the oral disclosures were provided, the substance of what was provided, and when?
19. Are there any elements of the IA Marketing Rule that should be incorporated into draft Rule G-46, but currently are not? Are the requirements of draft Rule G-46 sufficiently harmonized with the IA

Marketing Rule? Are there any other regimes that the MSRB should look to in connection with the potential adoption of draft Rule G-46?

20. While the Act and related SEC rules recognize a category of municipal advisors that undertake the solicitation of a municipal entity or obligated person on behalf of third-party dealers, MSRB Rule G-38 currently prohibits dealers from paying or agreeing to provide payment to any person who is not affiliated with the dealer for a solicitation of municipal securities business on behalf of such dealer. Accordingly, draft Rule G-46 assumes that such solicitations do not occur.¹⁸ This approach is different from that taken under certain other MSRB rules, including for example, MSRB Rule G-37. The MSRB believes that this is appropriate because draft Rule G-46 is designed specifically for solicitor municipal advisors. Do commenters agree? Why or why not?

March 17, 2021

* * * * *

Text of Draft Rule*

Rule G-46: Duties of Solicitor Municipal Advisors

(a) Documentation of the Solicitor Relationship. A solicitor municipal advisor must evidence each of its solicitor relationships by a writing or writings created and delivered to the solicitor client prior to, upon or promptly after the establishment of the solicitor relationship. The writing(s) must be dated and include, at a minimum:

(i) a description of the solicitation activities to be engaged in by the solicitor municipal advisor on behalf of the solicitor client (including the scope of the agreed-upon activities and a statement that the scope of the solicitation is anticipated to include the solicitation of municipal entities and/or obligated persons);

(ii) the compensation to be received by the solicitor municipal advisor; and

(iii) the term of the engagement.

(b) Representations to Solicited Entities.

¹⁸ See draft Rule G-46(c)(iii) and draft Rule G-46(e)(i) which omit any reference to solicitations made on behalf of third-party dealers, and draft Rule G-46(c)(i)(C), which omits any reference to municipal securities business.

* Underlining indicates new language.

(i) All representations made by a solicitor municipal advisor to a solicited entity in connection with a solicitation subject to this rule, whether written or oral, must be truthful and accurate and must not misrepresent or omit material facts.

(ii) A solicitor municipal advisor must have a reasonable basis for the representations and other material information conveyed to a solicited entity and must refrain from making representations that the solicitor municipal advisor knows or should know are inaccurate or misleading.

(c) Disclosures to Solicited Entities. A solicitor municipal advisor must disclose to any solicited entity all material facts about the solicitation in the manner described in section (d) of this rule. This includes, but is not limited to, an obligation to disclose the following:

(i) Role and Compensation Disclosures. A solicitor municipal advisor must disclose to any solicited entity:

(A) the name of the solicitor municipal advisor;

(B) the name of the solicitor client;

(C) the type of business being solicited (i.e., municipal advisory business or investment advisory services);

(D) the material terms of the solicitor municipal advisor's compensation arrangement, including a description of the compensation provided or to be provided, directly or indirectly, to the solicitor municipal advisor for such solicitation.

(E) the following statements:

(1) a solicitor municipal advisor is required to deal fairly at all times with both solicited entities and the solicitor municipal advisor's clients; and

(2) a solicitor municipal advisor's primary role is to solicit the solicited entity on behalf of certain third-party regulated entities and the solicitor municipal advisor will be compensated for its solicitation services by the solicitor municipal advisor's client.

(ii) Conflicts Disclosures. A solicitor municipal advisor must disclose any material conflicts of interest, including, but not limited to any material relationships of the solicitor municipal advisor with any employees or board members of the solicited entity or any other persons affiliated with the solicited entity or their officials who may have influence over the selection of the solicitor client.

(iii) Solicitor Client Disclosures. A solicitor municipal advisor must provide to the solicited entity the following information regarding the solicitor client:

(A) the type of information that is generally available on Form MA (in the case of a municipal advisor client), or Form ADV (in the case of an SEC-registered investment adviser client); and

(B) a description of how the solicited entity can obtain a copy of the solicitor client's Form MA or Form ADV, as applicable.

(d) *Timing and Manner of Disclosures.* Any disclosures required under section (c) of this rule must comply with the following:

(i) Disclosures must be made in writing to an official of the solicited entity that: (1) the solicitor municipal advisor reasonably believes has the authority to bind the solicited entity by contract; and (2) to the knowledge of the solicitor municipal advisor, is not a party to a disclosed conflict.

(ii) Disclosures must be delivered at the time of the first solicitation of the solicited entity for that specific solicitor client. In the event that a solicitor municipal advisor makes multiple solicitations of a solicited entity on behalf of the same client for the same type of services (i.e., municipal advisory business or investment advisory services) over the course of more than one calendar year, the disclosures must be provided annually thereafter until the solicitor municipal advisor ceases to make such solicitations of such solicited entity. To the extent that any additional conflicts that require disclosure under this rule arise before a solicitation is complete, such conflicts must be disclosed as they arise.

(e) *Definitions.*

(i) "Solicitor Client" means the municipal advisor or investment adviser on behalf of whom the solicitor municipal advisor undertakes a solicitation within the meaning of Sections 15B(e)(4)(A)(ii) and (e)(9) of the Act and the rules and regulations thereunder.

(ii) "Compensation" means any cash, in-kind or non-cash remuneration.

(iii) "Solicitor municipal advisor" means, for purposes of this rule, a municipal advisor within the meaning of Section 15B(e)(4) of the Act, 17 CFR 240.15Ba1-1(d)(1)-(4) and other rules and regulations thereunder; provided, that it shall exclude a person that is otherwise a municipal advisor solely based on activities within the meaning of Section 15B(e)(4)(A)(i) of the Act and the rules and regulations thereunder.

(iv) "Solicited entity" means any municipal entity (as defined in Section 15B(e)(8) of the Act, 17 CFR 240.15Ba1-1(g) and other rules and regulations thereunder) or obligated person (as defined in Section 15B(e)(10) of the Act, 17 CFR 240.15Ba1-1(k) and other rules and regulations thereunder) the solicitor municipal advisor has solicited, is soliciting or intends to solicit within the meaning of Sections 15B(e)(4)(A)(ii) and (e)(9) of the Act and the rules and regulations thereunder.

(f) *Recordkeeping.* Consistent with MSRB Rule G-8(h) and Rule 15Ba1-8(a)(1)-(8) under the Act, a solicitor municipal advisor shall retain for a period of not less than five years:

(i) a copy of each writing or writings required by Rule G-46(a);

(ii) documentation substantiating the solicitor municipal advisor’s reasonable basis belief regarding its representations as described in Rule G-46(b) of this rule; and

(iii) evidence that the disclosures required by section (c) of this rule were made in the manner described in Rule G-46(d) (e.g., automatic email delivery receipt).

Supplementary Material

.01 Reasonable Basis for Representations. While a solicitor municipal advisor must have a reasonable basis for the representations and other material information conveyed to a solicited entity, the solicitor municipal advisor is not required to actively seek out every piece of information that may be relevant to a representation. However, the solicitor municipal advisor must have some basis for its statements and must not ignore any “red flags.” For example, a solicitor municipal advisor soliciting a municipal entity on behalf of an investment advisor to perform investment advisory services may have reviewed the Form ADV for the investment adviser and may have met with a knowledgeable representative of the investment adviser on one or more occasions to better understand its business and to ask any questions that the solicitor municipal advisor may have. In addition, the solicitor municipal advisor has an affirmative duty to refrain from making representations that the solicitor municipal advisor knows or should know are inaccurate or misleading. For example, the solicitor municipal advisor must not knowingly misrepresent the capacity, resources or knowledge of a municipal advisor on whose behalf it is soliciting municipal advisory services.

.02 Relationship to Rule G-42. Municipal advisors should be mindful that one may be, simultaneously, both a solicitor municipal advisor for purposes of Rule G-46 and a non-solicitor municipal advisor for purposes of Rule G-42. For example, a municipal advisor may provide “advice” as defined in Rule G-42 to a municipal entity (the “advisory engagement”) and separately may act as a solicitor municipal advisor with respect to another municipal entity as contemplated in this Rule G-46 (the “solicitor municipal advisor engagement”). As a result, the municipal advisor would be subject to Rule G-42 with respect to the advisory engagement and would be subject to Rule G-46 with respect to the solicitor municipal advisor engagement. Municipal advisors should evaluate the activity undertaken with respect to each engagement to determine which rule governs (Rule G-42 or Rule G-46) and ensure the written supervisory procedures required under Rule G-44 reflect such.

ALPHABETICAL LIST OF COMMENT LETTERS ON NOTICE 2021-07 (MARCH 17, 2021)

1. National Association of Municipal Advisors: Letter from Susan Gaffney, Executive Director, dated June 17, 2021
2. Securities Industry and Financial Markets Association: Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, dated June 17, 2021
3. Third-Party Marketers Association: Letter from Donna DiMaria, Chairman of the Board of Directors and Chair of the 3PM Regulatory Committee, dated June 16, 2021



June 17, 2021

Mr. Ronald Smith, Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street, NW, Suite 1000
Washington, DC 20004

RE: MSRB Notice 2021-07; proposed MSRB Rule G-46

Dear Mr. Smith:

The National Association of Municipal Advisors (NAMA) appreciates the opportunity to comment on MSRB Notice 2020-07 regarding proposed MSRB Rule G-46, Fair Dealing Solicitor Municipal Advisor Obligations. NAMA represents independent municipal advisory firms and municipal advisors (MA) from around the country and serves to represent and educate municipal advisors on regulatory and market matters.

We support MSRB's efforts to clarify the obligations of solicitor MAs. The extensive proposed rule, however, could create confusion instead of fulfilling its intended purpose of clarifying to solicitor MAs, non-solicitor MAs, issuers, and other market participants, the obligations of these professionals. Because they do not have a fiduciary duty to issuers, the phrase "solicitor MAs" is itself confusing. But, as that bridge has been crossed, we believe that the MSRB's intent of clarifying solicitor MA obligations could be improved and offer the following suggestions.

As part of the rule text, the MSRB should require solicitor MAs to disclose to the municipal entities that they are soliciting that they do not have a fiduciary duty to them. A similar disclosure should be required when a solicitor MA solicits an obligated person. This is vitally important as a) solicitor MAs do not have the same heightened obligations to municipal entities and obligated persons despite using the term "municipal advisor" in their profession and b) to best protect municipal entities, such clarification would help ensure that municipal entities are aware that if approached by a solicitor MA that these professionals do NOT and are not required to act in their best interest as is the case with "municipal advisors." Requiring solicitor MAs to accurately disclose their objectives and duties straight away would benefit the Rule and the marketplace as a whole.

The MSRB should also conform the "fair dealing," language used in the proposed rule with that of Rule G-17. To avoid confusion and to be clear on the solicitor MA obligations, we suggest that the MSRB follow the language of G-17 within this new Rule.

Further, the sections in proposed Rule G-46 related to required disclosures, prohibited conduct, and the accuracy of representations, for example, would benefit from conforming to Rule G-42 language, where applicable, so that an issuer would receive disclosures in a format with which they may already be familiar. Disclosures and rule text that unnecessarily includes new language that is similar but not the same as current

rules creates confusion among issuers, other market participants and entities trying to comply with a rule. Similarly, recordkeeping requirements associated with the proposed rule should align with and be included in Rule G-8. Again, most importantly, these responsibilities should also be required to contain language requiring the solicitor MA to disclose to a solicited entity that it is NOT a fiduciary to the municipal entity.

We would be happy to answer any questions that the Board or staff may have about our comments.

Sincerely,

A handwritten signature in cursive script that reads "Susan Gaffney". The signature is written in black ink and is positioned below the word "Sincerely,".

Susan Gaffney
Executive Director



June 17, 2021

VIA ELECTRONIC SUBMISSION

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

**Re: MSRB Notice 2021-07 – Request for Comment on Fair Dealing Solicitor Municipal
 Advisor Obligations and New Draft Rule G-46**

Dear Mr. Smith,

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates this opportunity to comment on Municipal Securities Rulemaking Board (“MSRB”) Notice 2021-07 (the “Notice”)² requesting comment on fair dealing solicitor municipal advisor obligations and new draft Rule G-46. According to the Notice, new draft Rule G-46 would (i) codify interpretive guidance previously issued in 2017 that relates to the obligations of “solicitor municipal advisors” under MSRB Rule G-17 (the “G-17 Excerpt for Solicitor Municipal Advisors”) and (ii) add additional requirements that would align some of the obligations imposed on solicitor municipal advisors with those applicable to non-solicitor municipal advisors.

We applaud the MSRB’s effort to seek information and insight from commenters to further inform codifying existing interpretive guidance and developing new MSRB rules, including new draft Rule G-46. We do, however, have concerns with (1) the codification of the G-17 Excerpt for Solicitor Municipal Advisors, (2) lack of consistency with non-solicitor municipal advisor rules, (3) the rule text of new draft Rule G-46, and (4) certain other matters. Also, responses to the MSRB’s specific questions are attached hereto as Appendix A.

I. Concerns with Codifying the G-17 Excerpt for Solicitor Municipal Advisors

1) Ambiguity Regarding Standard of Conduct

Importantly, the G-17 Excerpt for Solicitor Municipal Advisors reminds solicitor municipal advisors that they do not owe a “fiduciary duty” under the Securities Exchange Act of 1934 (the “Exchange Act”) or

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

² MSRB Notice 2021-07, Request for Comment on Fair Dealing Solicitor Municipal Advisor Obligations and New Draft Rule G-46 (March 17, 2021).

MSRB rules to their clients in connection with undertaking a solicitation.³ The MSRB also emphasizes that solicitor municipal advisors are subject to the fair dealing standard under Rule G-17, including with respect to their clients and the entities that they solicit.⁴ Taken together, this interpretive guidance is critical in understanding the standard of conduct that applies to solicitor municipal advisors.

The rule text of new draft Rule G-46, however, does not clearly state the standard of conduct that applies to solicitor municipal advisors and does not state the inapplicability of the fiduciary duty. Instead, the MSRB mentions the standard of conduct in the role and compensation disclosures and there is no mention that a fiduciary duty is not owed to solicitor municipal advisor clients and solicited entities. We believe this could cause confusion and lack of awareness by solicitor municipal advisors. For the regulation of solicitor municipal advisors to be fair, all municipal advisors must clearly know what standard of conduct applies in connection with undertaking a solicitation.

We suggest that, similar to Rule G-42(a), the rule text of new draft Rule G-46 begin with a clear statement of the standard of conduct that applies in connection with undertaking a solicitation, including a clear statement that solicitor municipal advisors do not owe a fiduciary duty to their clients and solicited entities.

2) Imprecision of Codifying Guidance

In the G-17 Excerpt for Solicitor Municipal Advisors, the MSRB reminds solicitor municipal advisors that they “must not misrepresent or omit the facts, risks, or other material information about municipal advisory activities undertaken.”⁵

The rule text of new draft Rule G-46, however, states that “[a]ll representations made by a solicitor municipal advisor to a solicited entity in connection with a solicitation subject to this rule, whether written or oral, must be truthful and accurate and must not misrepresent or omit material facts.” The language “must be truthful and accurate” does not follow the G-17 Excerpt for Solicitor Municipal Advisors and we question why it was included since it does not appear in Rule G-42. We believe that the language is inconsistent with what non-solicitor municipal advisors must comply with and could cause confusion for solicitor municipal advisors. We also question whether the provision should apply to all representations of a solicitor municipal advisor or, similar to Rule G-42, a subset of representations (e.g., about the capacity, resources or knowledge of the municipal advisor, in oral presentations to a client or prospective client, for the purpose of obtaining or retaining an engagement to perform municipal advisory activities). We believe that the application of this provision to “all representations” may be inconsistent with a level regulatory playing field between solicitor and non-solicitor municipal advisors.

The lack of precision in following and codifying the G-17 Excerpt for Solicitor Municipal Advisors to the rule text of new draft Rule G-46 is concerning and we suggest that the MSRB review to ensure that the G-17 Excerpt for Solicitor Municipal Advisors is followed with precision.

³ MSRB Notice 2017-08, Application of MSRB Rules to Solicitor Municipal Advisors (May 4, 2017).

⁴ Id.

⁵ Id.

II. Lack of Consistency with Non-Solicitor Municipal Advisor Rules

1) Documentation of Solicitor Relationship

In Rule G-42(c), a non-solicitor municipal advisor is required to evidence each of its municipal advisory relationships by a writing or writings created and delivered to the municipal entity or obligated person client prior to, upon or promptly after the establishment of the municipal advisory relationship.

The writing must include at a minimum certain requirements set forth in Rule G-42(c). Some of these requirements appear to be equally applicable to non-solicitor municipal advisors, however, the MSRB chose not to follow the language of the rule text of Rule G-42(c). For example, in Rule G-42(c) there is a requirement for the writing to include “the form and basis of direct or indirect compensation” but the rule text of G-46(a) requires the writing to include “the compensation to be received by the solicitor municipal advisor.” It is not clear why this language does not follow Rule G-42(c). Similarly, Rule G-42(c) requires the writing to include (i) the scope of the activities to be performed, (ii) the date, triggering event, or means for the termination of the relationship, or, if none, a statement that there is none, and (iii) any terms relating to withdrawal from the relationship. This language appears to be equally applicable to solicitor municipal advisors, however, the rule text of G-46(a) does not follow the language in G-42(c).

We suggest that the MSRB review and compare the rule text of Rule G-42(c) with new draft Rule G-46(a) and, to the extent possible, follow the language so that the regulatory requirements are consistent.

2) Representations to Solicited Entities

In Rule G-42 Supplementary Material .01, a non-solicitor municipal advisor must undertake a reasonable investigation to determine that it is not basing any recommendation on materially inaccurate or incomplete information. Specifically, a non-solicitor municipal advisor must have a reasonable basis for: (i) any representations made in a certificate that it signs that will be reasonably foreseeably relied upon by certain parties; and (ii) any information provided to certain parties in connection with the preparation of an official statement for any issue of municipal securities as to which the non-solicitor municipal advisor is advising.

The new draft rule G-46(b)(ii) rule text is inconsistent with Rule G-42 and appears to be overly burdensome. Under new draft rule G-46(b)(ii), a solicitor municipal advisor must have a reasonable basis for the representations and other material information conveyed to a solicited entity. As noted above, the Rule G-42 reasonable basis standard is required for certain, but not all, communications. Notably, the Rule G-42 rule text narrows the scope of communications for when the reasonable basis standard is required (e.g., representations made in a certificate). We suggest, similar to Rule G-42, that certain limitations be included in new draft rule G-46(b)(ii) to narrow the scope of communications where the reasonable basis standard is required. For example, inserting a requirement that the representations and other material information be “made in writing in connection with a solicitation” would help make the rule more consistent with the requirements for non-solicitor municipal advisors.

3) Lack of Prohibited Conduct

In Rule G-42(e), the MSRB provides a list of prohibited conduct that a non-solicitor municipal advisor is prohibited from engaging in which is largely conduct derived from the anti-fraud prohibition.

Under new draft Rule G-46, solicitor municipal advisors do not have similar prohibitions that would assist them in complying with the anti-fraud prohibition. We suggest that, similar to Rule G-42(e), the MSRB work with market participants to develop specific conduct prohibitions for solicitor municipal

advisors. For example, some of the prohibitions listed in Rule G-42(e) may be equally applicable to solicitor municipal advisors (e.g., receiving excessive compensation or delivering materially inaccurate invoices).

4) Timing and Manner of Disclosures

In the rule text for draft Rule G-46(d), a solicitor municipal advisor is required to provide disclosures under Rule G-46(c) in a certain time and manner.

While we believe that the timing and manner of disclosure should be included in the rule text, we believe the more appropriate starting point for rule text is Rule G-42 Supplementary Material .06 Relationship Documentation because municipal advisors are familiar with and have experience complying with Rule G-42. Further, since a solicitor municipal advisor must include a term of the engagement, the timing and manner of a solicitation engagement appears to be more similar to a non-solicitor municipal advisory engagement. We also disagree with including a requirement to provide annual disclosures because it is inconsistent with existing regulations for non-solicitor municipal advisors.

5) Recordkeeping

In the rule text for draft Rule G-46(d), a solicitor municipal advisor is required to comply with certain recordkeeping requirements.

We do not believe the recordkeeping requirements should be contained in new draft Rule G-46(d). Instead, similar to Rule G-42, the requirements should be contained in Rule G-8(h). We also question whether the documentation substantiating the solicitor municipal advisor's reasonable basis belief regarding its representations in Rule G-46(b) is reasonable. We suggest that the MSRB coordinate with solicitor municipal advisors to understand the scope of this requirement. The requirement should not be more burdensome than existing requirements for non-solicitor municipal advisors or create a standard where compliance would be unlikely.

III. Concerns with the Rule Text of New Draft Rule G-46

1) Disclosure Statement – Fiduciary Duty

In the rule text for draft Rule G-46(c)(i)(E), a solicitor municipal advisor is required to provide certain disclosure statements to solicited entities, including a statement describing the fair dealing standard that applies in connection with a solicitation.

While we agree that certain disclosures should be made to solicited entities, we believe that the current rule text is missing a critical disclosure regarding the inapplicability of a fiduciary duty. This disclosure is critical because it clarifies the roles of the parties involved in a solicitation and protects solicited entities. Such a disclosure is already required by the MSRB for underwriters in connection with a negotiated underwriting. Specifically, under the MSRB's interpretive guidance for G-17, the MSRB requires that underwriters disclose to issuers certain statements, including that an underwriter does not have a fiduciary duty to the issuer under the federal securities laws and is not required by federal law to act in the best interest of the issuer without regard to its own financial or other interests. This statement is intended to clarify the role of the underwriter and protect issuers. We believe that a similar disclosure statement should be included in the rule text for draft Rule G-46(c)(i)(E).

Specifically, a statement such as:

“a solicitor municipal advisor does not have a fiduciary duty to solicited entities and the solicitor municipal advisor’s clients under the federal securities laws and is not required by federal law to act in the best interest of solicited entities without regard to its own financial or other interests”

should be included in order to further clarify the role and applicable standard of conduct in connection with undertaking a solicitation of a solicited entity.

2) Disclosure Statement – Fair Dealing

In the rule text for draft Rule G-46(c)(i)(E)(1), a solicitor municipal advisor is required to provide the following disclosure statement to solicited entities: “a solicitor municipal advisor is required to deal fairly at all times with both solicited entities and the solicitor municipal advisor’s clients.”

While we believe this disclosure is important, we note that the statement is not entirely accurate. Specifically, under Rule G-17, the obligation to deal fairly is limited to when the municipal advisor is conducting municipal advisory activities. So the inclusion “at all times” should be preceded by the phrase “when the firm undertakes a solicitation.” Further, under Rule G-17, the obligation for municipal advisors to deal fairly extends to all persons. So the inclusion of “with all persons, including solicited entities and the solicitor municipal advisor’s clients” would help accurately describe the obligation to both the solicitor municipal advisor making the disclosure and the solicited entity receiving the disclosure.

3) Reasonable Basis for Representations

In Supplementary Material .01 for draft Rule G-46, the draft interpretive guidance states that a solicitor municipal advisor must have “some basis” for its statements and must not ignore any red flags. The rule text for draft Rule G-46(b)(ii), however, makes clear that a solicitor municipal advisor must only have a “reasonable basis” for the representations conveyed to a solicited entity. We believe including the term “reasonable” is critical because it follows the rule text. Further, the use of the terms “some basis” appears to create a different standard that is not consistent with Rule G-42.

IV. Certain Other Matters

1) Clarification of Solicitor Municipal Advisor Activity

We suggest that the supplementary material of new draft Rule G-46 include further clarification regarding the MSRB’s interpretation of activity that constitutes an undertaking a solicitation of a solicited entity. Specifically, we request a discussion of examples of activities that fit within the definition of undertaking a solicitation of a solicited entity. We also suggest that the MSRB clarify that a municipal advisor or investment adviser soliciting on its own behalf, or an affiliate of a municipal advisor or investment adviser, soliciting on behalf of such entity—would not fall within the definition of solicitation of a solicited entity.

It is critical that our membership and other market participants understand the activity that triggers the rules for solicitor municipal advisors. We currently do not believe this is adequately addressed. We believe the MSRB should coordinate with solicitor municipal advisors and the SEC to further clarify what activity constitutes undertaking a solicitation of a solicited entity.

2) Inadvertent Solicitation

In Supplementary Material .07 of Rule G-42, a municipal advisor that inadvertently engages in municipal advisory activities but does not intend to continue the municipal advisory activity or enter into a municipal advisory relationship is not required to comply with certain Rule G-42 requirements, if the municipal advisor meets certain requirements. Notably, the supplementary material of new draft Rule G-46 does not provide similar text regarding inadvertent solicitations.

We believe there could be scenarios where an inadvertent solicitation is provided to a solicited entity. For example, where a firm initially is soliciting the solicited entity on behalf of itself but the solicited entity unilaterally chooses not to engage the firm and, instead, seeks to engage a third party investment adviser of the firm and the firm earns compensation based on such engagement. If such an event were to occur, there could be an inadvertent solicitation and violation of Rule G-46(d)(ii) because the required disclosures were not delivered at the time of the first solicitation of the solicited entity. We recommend that the MSRB study such scenario, as well as other scenarios, and determine whether rule text changes, supplementary material or a safe harbor should be developed to ensure that certain firms are not unexpectedly brought into the solicitor municipal advisor regulatory regime due to no fault of their own or an inadvertent solicitation.

3) Clarify Fiduciary Duty Applicability

As previously stated, we believe that the rule text and disclosure statement should include a clear statement that solicitor municipal advisors do not owe a fiduciary duty to their clients and solicited entities. We also believe that the supplementary material should include a discussion of the applicability of the fiduciary duty. For example, when a solicitor municipal advisor speaks with a municipal entity regarding a solicitation but that discussion changes to advice with respect to the issuance of municipal securities. We believe that in such a scenario it should be made clear that the fiduciary duty would apply to the solicitor municipal advisor's discussion with the municipal entity, including all the requirements of Rule G-42. We understand the language in Supplementary Material .02 of draft Rule G-46 is intended to clarify the applicability of Rule G-42, however, we believe that more discussion should be added. We believe that adding such discussion will help clarify the roles of non-solicitor and solicitor municipal advisors and the standards of conduct that apply thereto.

4) Applicability of other MSRB Rules

In connection with the adoption of new draft rule G-46, we suggest that the MSRB provide interpretive guidance or a compliance resource that clarifies what MSRB rules apply to non-solicitor versus solicitor municipal advisors and which MSRB rules apply to both. While we understand that the MSRB provided guidance in 2017, new rules have been adopted since then and we believe that market participants, including issuers of municipal securities, would benefit from such guidance or compliance resource.

V. Coordinate with Market Participants

We encourage the MSRB to continue to coordinate and communicate with market participants in connection with the new draft Rule G-46 and any other types of significant compliance information. Based on the questions the MSRB has provided to market participants in the request for comment, the MSRB appears to need a better understanding of, among other things, what types of activity constitutes a solicitation, compensation structures and disclosures that would be appropriate. We encourage the MSRB to continue coordinating with market participants to understand this line of business.

We remind the MSRB that a cornerstone of the regulatory framework for municipal advisors is MSRB Rule G-42 and during the development of Rule G-42, the MSRB requested public comment two times.⁶ The SEC requested public comment four times, including on the related amendments that sought to address and balance the concerns of the public.⁷ At each stage of the rulemaking process, the MSRB coordinated with the SEC and considered comments submitted, as reflected in a number of revisions to the rule text that were responsive to or derivative of comments received. We believe such coordination between market participants and regulators is critical to the rulemaking process.

* * *

Thank you for considering SIFMA's comments on codifying the G-17 Excerpt for Solicitor Municipal Advisors and new draft Rule G-46. If you have any questions regarding the foregoing, please contact me at (212) 313-1130 or lnorwood@sifma.org, or our counsel, Ed Fierro at (713) 221-1107 or ed.fierro@bracewell.com, respectively.

Sincerely,

A handwritten signature in black ink, appearing to be 'L. Norwood', written over a faint, light-colored signature line.

Leslie M. Norwood
Managing Director
and Associate General Counsel

⁶ See MSRB Notice 2014-01, Request for Comment on Draft MSRB Rule G-42, on Duties of Non-Solicitor Municipal Advisors (January 9, 2014); and MSRB Notice 2014-12, Request for Comment on Revised Draft MSRB Rule G-42, on duties of Non-Solicitor Municipal Advisors (July 23, 2014).

⁷ See Securities Exchange Act Release No. 34-74860 (May 4, 2015) 80 FR 26752 (May 8, 2015); Securities Exchange Act Release No. 34-75628 (August 6, 2015) 80 FR 48355 (August 12, 2015); Securities Exchange Act Release No. 34-75737 (August 19, 2015) 80 FR 51645 (August 25, 2015); and Securities Exchange Act Release No. 34-76420 (November 10, 2015) 80 FR 71858 (November 17, 2015).

Appendix A

Responses to the MSRB's Questions

The MSRB specifically seeks input on the following questions:

- 1) Would codifying the G-17 Excerpt for Solicitor Municipal Advisors promote clearer regulatory expectations for solicitor municipal advisors?
 - Response: SIFMA has concerns that the codification may be ambiguous and imprecise. See Part I Sections (1) and (2) of the SIFMA letter for more information.
 - 2) Would the additional standards regarding the timing and manner of delivery of the disclosures be helpful for solicitor municipal advisors in their efforts to comply with the obligations set forth in draft Rule G-46?
 - Response: SIFMA has concerns with the timing and manner of delivery of the disclosures. See Part II Section (4) of the SIFMA letter for more information.
 - 3) Are the requirements set forth in draft Rule G-46 appropriate in light of the activities in which solicitor municipal advisors engage? Are they necessary?
 - Response: SIFMA has concerns regarding the requirements in draft Rule G-46. SIFMA also has concerns regarding the activities in which solicitor municipal advisors engage. See Part II Sections (1) – (5), Part III Sections (1) – (3), and Part IV Sections (1) – (4) of the SIFMA letter for more information.
 - 4) Do solicitor municipal advisors anticipate any challenges to implementation of draft Rule G-46? If yes, do commenters have any alternatives that they would like to propose for the MSRB's consideration? If so, please describe them.
 - Response: SIFMA has concerns and recommendations to draft Rule G-46. See Part III Sections (1) – (3), and Part IV Sections (1) – (4) of the SIFMA letter for more information.
 - 5) Are there any aspects of the G-17 Excerpt for Solicitor Municipal Advisors that are not reflected in draft Rule G-46, but should be?
 - Response: SIFMA has concerns that the codification may be ambiguous and imprecise. See Part I Sections (1) and (2) of the SIFMA letter for more information.
 - 6) What are the benefits and burdens of draft Rule G-46? Are the burdens appropriately outweighed by the benefits?
 - Response: SIFMA has concerns about the burdens of draft Rule G-46. To appropriately address the burdens, SIFMA suggests that the MSRB harmonize the rule with G-42 to the extent possible. Aligning the rule more closely will lessen the regulatory burden for municipal advisors. See Part II Sections (1) – (5) of the SIFMA letter for more information.
-

- 7) Do commenters agree or disagree with the preliminary estimates in Table 2? To the extent possible, please provide evidence to support your assertions.
- Response: SIFMA has concerns with the preliminary estimates. We believe there may be confusion with respect to what activity constitutes undertaking a solicitation of a solicited entity and, as such, the data in Form A-12 may not be accurate. See Part IV Section (1) of the SIFMA letter for more information. We also suggest that the MSRB validate the estimates with a sample of solicitor municipal advisor firms.
- 8) How is the scope of a solicitor municipal advisor's engagement typically decided upon? Are solicitor municipal advisors typically engaged to solicit a broad or specific set of entities? Is it always clear whether they can or will solicit municipal entities or obligated persons within the scope of a particular engagement? If not, at the time of an engagement, how do solicitor municipal advisors determine whether their engagement will be subject to MSRB rules? If yes, would a solicitor municipal advisor know which municipal entities and/or obligated persons it anticipates soliciting at the time of an engagement?
- Response: SIFMA suggests that the MSRB coordinate with solicitor municipal advisors to understand the type of activity the rule is intended to address. See Part (IV) Section (1) of the SIFMA letter for more information.
- 9) Do solicitor municipal advisors make payments (including in-kind) to other solicitor municipal advisors to facilitate solicitations of a municipal entity? If so, are there any special disclosures specific to the sub-contractor solicitation arrangement that would seem appropriate?
- Response: SIFMA suggests that the MSRB coordinate with market participants, including solicitor municipal advisors, to understand payments and what other disclosures may be appropriate. See Part (V) of the SIFMA letter for more information.
- 10) Are solicitor municipal advisors engaged to present information about a product or service offered by the solicitor municipal advisor's municipal advisory client similar to presenting information about a product or service offered by an investment advisor?
- Response: SIFMA suggests that the MSRB coordinate with solicitor municipal advisors to understand the type of activity the rule is intended to address. See Part (IV) Section (1) of the SIFMA letter for more information.
- 11) Should solicitor municipal advisors be required to provide certain disclosures to their clients, including information pertaining to the solicitor municipal advisor's conflicts of interest and/or legal and disciplinary history? If so, should such disclosures be required in connection with engagement documentation with the client?
- Response: SIFMA suggests that solicitor municipal advisors be required to provide certain disclosures to their clients, similar to Rule G-42. To the extent possible, SIFMA suggests that the MSRB harmonize the rule with G-42. Aligning the rule more closely will lessen the regulatory burden for municipal advisors. See Part II Sections (1) – (5) of the SIFMA letter for more information.

12) Is there any additional information pertaining to a solicitor municipal advisor's compensation that should specifically be required to be disclosed to a solicited entity?

- Response: SIFMA suggests that the MSRB coordinate with market participants, including solicitor municipal advisors, to understand compensation and what other disclosures may be appropriate. See Part (V) of the SIFMA letter for more information.

13) Are the books and records requirements included in draft Rule G-46(f) workable in light of the many ways in which the disclosures required by draft Rule G-46 could be delivered? For example, how would solicitor municipal advisors expect to evidence that disclosures delivered via hand delivery were delivered in a manner that complies with the draft rule?

- Response: SIFMA has concerns with the books and records requirements included in draft Rule G-46(f). See Part II Section (5) of the SIFMA letter for more information.

14) Is it appropriate to require solicitor municipal advisors to disclose any material conflicts of interest to solicited entities since solicitor municipal advisors do not provide any advice to the entities that they solicit? Should the required disclosures instead be limited to conflicts disclosures related to the solicitor municipal advisor's compensation arrangement or the solicitor municipal advisor's relationship with its (municipal advisor or investment adviser) client? Would a conflicts disclosure requirement result in sufficient benefit to outweigh any potential burden? Is any additional guidance warranted in this area?

- Response: SIFMA has concerns with the disclosure requirements. SIFMA suggests that the MSRB coordinate with market participants, including solicitor municipal advisors, to understand compensation and what other disclosures may be appropriate. See Part (V) of the SIFMA letter for more information.

15) Should solicitor municipal advisors be required to make disclosures regarding their fiduciary status (or the lack thereof) in connection with the solicitation of a municipal entity or obligated person? Are solicitor municipal advisors sometimes deemed fiduciaries in connection with their solicitation activities pursuant to other regulatory regimes (e.g., state law)? If so, would a requirement to specifically state the solicitor municipal advisor's fiduciary status under the federal municipal advisor regime provide clarity or cause confusion to solicited entities?

- Response: SIFMA has concerns regarding the disclosure of fiduciary status. See Part I Section (1), Part III Section (1) and Part (IV) Section (4) of the SIFMA letter for more information.

16) Is the draft requirement to provide the requisite disclosures at the time of the first solicitation for a specified client workable? Why or why not? Are there circumstances under which they should be permitted to be provided as soon as reasonably practicable thereafter? If yes, please explain.

- Response: SIFMA has concerns with the timing of the disclosure, including the timing requirement when an inadvertent solicitation may occur. See Part (II) Section (4) and Part (IV) Section (2) of the SIFMA letter for more information.

- 17) Should a municipal advisor client of a solicitor municipal advisor be required to make a bona fide effort to ascertain whether the solicitor municipal advisor has provided any or all of the disclosures related to the municipal advisor client to the solicited entities (e.g., the role and compensation disclosures required by draft Rule G-46(c)(i) and/or solicitor client disclosures required by draft Rule G-46(c)(iii))? For example, should the engagement documentation require the solicitor municipal advisor to contractually commit to provide the disclosures required by draft Rule G-46, and if so, should the municipal advisor client be required to undertake some level of diligence to confirm that the required disclosures are, in fact, made? Given that both the solicitor municipal advisor and all of its potential clients are regulated entities, would such a requirement appropriately further any policy goals? If so, would any burdens associated with such a requirement be outweighed by its potential benefits?
- SIFMA suggests that the MSRB coordinate with market participants, including solicitor municipal advisors, to understand compensation and what other disclosures may be appropriate. See Part (V) of the SIFMA letter for more information.
- 18) Draft Rule G-46 currently specifies that the required disclosures must be disclosed in writing. Should the MSRB permit such disclosures to be made orally as long as the solicitor municipal advisor maintains a record that the oral disclosures were provided, the substance of what was provided, and when?
- Response: Since Rule G-42 requires written disclosures, new draft Rule G-46 should similarly require written disclosures. SIFMA also suggest that the rule be closely harmonized with Rule G-42. See Part II Sections (1) – (5) of the SIFMA letter for more information.
- 19) Are there any elements of the IA Marketing Rule that should be incorporated into draft Rule G-46, but currently are not? Are the requirements of draft Rule G-46 sufficiently harmonized with the IA Marketing Rule? Are there any other regimes that the MSRB should look to in connection with the potential adoption of draft Rule G-46?
- Response: SIFMA believes that the requirements of draft Rule G-46 should be more closely harmonized with the IA Marketing Rule to the extent possible. SIFMA also suggests that the MSRB provide guidance on Rule G-40 and its applicability if draft rule G-46 were adopted. See Part (IV) Section 5 and Part (V) of the SIFMA letter for more information.
- 20) While the Act and related SEC rules recognize a category of municipal advisors that undertake the solicitation of a municipal entity or obligated person on behalf of third-party dealers, MSRB Rule G-38 currently prohibits dealers from paying or agreeing to provide payment to any person who is not affiliated with the dealer for a solicitation of municipal securities business on behalf of such dealer. Accordingly, draft Rule G-46 assumes that such solicitations do not occur. This approach is different from that taken under certain other MSRB rules, including for example, MSRB Rule G-37. The MSRB believes that this is appropriate because draft Rule G-46 is designed specifically for solicitor municipal advisors. Do commenters agree? Why or why not?
- Response: Since the approach is different and has the potential to cause confusion for market participants, we suggest a robust rulemaking process, similar to Rule G-42, and, if adopted, urge the MSRB to provide interpretive guidance or a compliance resource that clarifies what MSRB rules apply to non-

solicitor versus solicitor municipal advisors and which MSRB rules apply to both. See Part (IV) Section 5 and Part (V) of the SIFMA letter for more information.



OUTSOURCED GLOBAL MARKETING OF ALTERNATIVE + TRADITIONAL INVESTMENTS

June 16, 2021

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

Re: MSRB Notice 2021-07 Request for Comment on Fair Dealing Solicitor Municipal Advisor Obligations and New Draft Rule G-46

Dear Mr. Smith;

I am writing to you today on behalf of the Third-Party Marketer's Association ("3PM") to provide feedback on behalf of the Association's Regulatory Committee regarding the new Draft Rule G-46 proposed in MSRB Notice 2021-07.

3PM appreciates the MSRB's efforts to codify existing guidance offered under G-17 and other guidance issued specifically "solicitor municipal advisors" pertaining to the obligations of this group.

3PM is appreciative that the MSRB has made efforts to try to harmonize this rule proposal with the SEC's Marketing Rule which just became effective in May 2021. While most of the provisions of the two rules are consistent, there some differences in the MSRB's new draft requirements we would like to provide comments on below.

Specific Role Disclosures

We recognize the importance of providing a disclosure to a municipal entity regarding a solicitor municipal advisor's role in a solicitation, however, we believe that we should be allowed sufficient flexibility to customize the disclosure language regarding the specific role such the solicitor plays in the solicitation. Given that 3PM firms fall under FINRA purview and work with solicitor clients that fall under the SEC's purview, our preference would be to manage a single set of disclosures rather than a variety of different ones. In this light, we request that the MSRB consider permitting an MA to craft its own language provided the essential components are clearly included.

Solicitor Client Disclosures

3PM agrees with the MSRB in allowing solicitor municipal advisors to write their own solicitor client disclosure, and requests that MSRB provide guidance as to the essential components to be clearly included in such disclosures.

Timing and Manner of Disclosures

The draft requirements require a solicitor municipal advisor to make a disclosure “in writing to an official of the solicited entity that the solicitor municipal advisor reasonably believes had the authority to bind the solicited entity by contract.” The language goes on to say, “and that, to the knowledge of the solicitor municipal advisors, is not party to a disclosed conflict.” Additionally, the requirement provides further specifics on the timing of the provision of the disclosure and says “the disclosures would be required to be delivered at the time of the first solicitation of the solicited entity for that specific solicitor client.” This requirement is a substantial departure from the SEC’s marketing rule; compliance with the MSRB’s proposal would thus make compliance nearly impossible under current industry practices.

There are two ways in which a solicitor municipal advisor may solicit a municipal entity, either directly or through an intermediary.

- **Direct Solicitation to the Municipal Entity**

When a solicitor municipal advisor first approaches a municipal entity directly, it is likely they begin speaking with a staff member who handles “investment manager research” for the municipal entity. This individual is generally responsible for vetting the solicitor client’s product to ensure the strategy is appropriate given the entity’s investment policy statement guidelines and restrictions. It would be highly unusual to find a person in this role whose level would allow them to “bind the solicited entity by contract.” Additionally, this is typically a multi-year process that includes many board presentations, meetings, discussions, and paperwork directly between the solicitor client, in this case an investment manager, and the municipal entity.

While a disclosure could be given to a staff member at the time of the first solicitation, it is not certain that this staff member would even understand the reasons for the disclosure at this stage of the process and would not likely pass the information to their manager or another superior at the entity that could “bind the solicited entity by contract.”

Furthermore, when speaking to an individual in investment manager research, it might be the first time the solicitor has met with the staff member. Even if a solicitor municipal advisor has worked with the research analyst before, the solicitor municipal advisor may not be aware of any conflicts or a disclosed conflict that analyst has with the solicitor client.

Accordingly, we would ask the MSRB to consider rephrasing the language regarding the provision of the disclosure to allow for some flexibility in the solicitation process & the timing of presenting such disclosures.

We believe that a solicitor municipal advisor should provide a disclosure to the member of municipal entity's staff who is present when the first solicitation to the municipal entity is made without regard to whether the staff member is able to bind the entity. If the initial solicitation should lead to a capital allocation to the solicitor client, then the solicitor client should send out a copy of the disclosure along with other new account paperwork. This would substantially increase the likelihood that a person at the municipal entity who is able to contractually obligate the entity has seen the disclosure.

It is our belief that in many instances, a solicitor municipal advisor can include language in its written agreement with a solicitor client that could compel the solicitor client to include the required disclosure to a municipal entity along with other required paperwork regarding the investment. There may however be instances when a solicitor clients may not agree to including this language in the written agreement between the parties or situations where a written agreement is already in place. Given this we believe that the MSRB should also allow the solicitor municipal advisor to send out the disclosure document to the appropriate person at the municipal entity if the solicitor client will not send it directly. This would help to ensure that the disclosure requirement has been met.

- **Direct Solicitation Through an Intermediary**

Often a solicitor municipal advisor will initially solicit a financial intermediary or an investment consultant (together "Intermediary") who is hired by a municipal entity to conduct searches and identify appropriate investment managers to meet a municipal entity's specific need. At the time of the first solicitation to an intermediary, the solicitor municipal advisor is generally unaware as to whether a solicitor client will be recommended to a municipal entity or another type of client of the Intermediary.

If the scenario arises where an Intermediary recommends a solicitor clients' advisory offering to a municipal entity, the municipal entity may decide to schedule a meeting to vet the solicitor client and determine whether to hire them. In some instances, the solicitor municipal advisor may participate in the meeting and can provide the municipal entity with the disclosure. Alternatively, a solicitor municipal advisor may not attend the meeting with the municipal entity and may never meet them. In such a scenario, it is not clear whether the provision of a disclosure would be required since the solicitor municipal advisor was not the one making a solicitation but would still be compensated for the work done with the Intermediary and ultimately the new account that they identified and as assisted the solicitor client in securing. We would appreciate the MSRB providing guidance on this issue.

Definitions

Both the definitions of Solicitor municipal advisor and Solicited entity include the term obligated persons. Given that a solicitor municipal advisor is not in a contractual relationship with a municipal entity, the solicitor municipal advisor may not always know the relationship between a municipal entity and an obligated person.

While including obligated persons in definitions for other business lines covered in the Municipal Advisor rule set may be appropriate, in the case of a solicitor municipal advisor that is also a municipal advisor third party solicitor, this inclusion of obligated persons is not relevant.

When 3PM's members are soliciting a municipal entity, the solicitation is to receive an allocation of capital for investment in a solicitor client's investment advisory offering or in a security offer by a fund sponsor. This allocation would come directly from the pension plan of that municipal entity rather than from bond proceeds or a municipal security offering. Given the definition of an obligated person, we believe inclusion of this language is potentially confusing.

We believe that the MSRB should either remove the term obligated person from the definition of a solicitor municipal advisor and solicited entity or provide guidance relating to the relevance and application of this term to solicitor municipal advisors that are also municipal advisor third party solicitor working on behalf of third investment advisors. In our opinion, the terms solicitor municipal advisor and municipal advisor third party solicitor are interchangeable in the business practices of our members and should be reflected as such in the proposal.

Recordkeeping

If a disclosure document is sent to a municipal entity electronically, it would not be a problem for the solicitor municipal advisor to maintain a copy of the electronic delivery receipt. The draft rule however, does not specify that the notice must be sent electronically. Alternatively, this means that the written disclosure may be provided in person to a municipal entity. In such a scenario, the solicitor municipal advisor would not have a delivery receipt to meet the record keeping requirement of the rule.

3PM suggests that the MSRB provide further clarification as to the ways the disclosure may be delivered and offer suggestions as to what may constitute acceptable "evidence that the disclosures" were delivered.

In addition to the information above, we respectfully submit the following comments on some of the questions posed in the request for comment.

- 1. Would codifying the G-17 Excerpt for Solicitor Municipal Advisors promote clearer regulatory expectations for solicitor municipal advisors?**

Yes. We firmly believe that all aspects of a rule should be contained within the ruleset. Any need to rely on guidance and other regulatory publications to see the full context of a rule adds confusion to fully understanding the requirement of a particular rule, particularly for municipal advisors as the rule set covers so many different and distinct business models under the same regulatory regime.

2. Would the additional standards regarding the timing and manner of delivery of the disclosures be helpful for solicitor municipal advisors in their efforts to comply with the obligations set forth in draft Rule G-46?

No, we believe that the additional standards and language contained in draft Rule G-46 will complicate a solicitor municipal advisor's effort to comply with its obligations. See comments above.

6. What are the benefits and burdens of draft Rule G-46? Are the burdens appropriately outweighed by the benefits?

We believe the burdens of draft rule G-46 outweigh the benefits to the municipal entities.

The Municipal Advisor rule set was established to protect a constituency that does not fall under the purview of the MSRB and thus rulemaking is challenging.

This indirect rulemaking not only challenges small firms and individuals operating in the industry, but it is our belief that the staff in the municipal entity's pension plans do not know about the MSRB's rules nor how to interpret them.

8. How is the scope of a solicitor municipal advisor's engagement typically decided upon? Are solicitor municipal advisors typically engaged to solicit a broad or specific set of entities? Is it always clear whether they can or will solicit municipal entities or obligated persons within the scope of a particular engagement? If not, at the time of an engagement, how do solicitor municipal advisors determine whether their engagement will be subject to MSRB rules? If yes, would a solicitor municipal advisor know which municipal entities and/or obligated persons it anticipates soliciting at the time of an engagement?

The scope of a municipal advisor's engagement is typically determined in consultation with the solicitor client; however, it is subject to change.

While the ultimate goal of most engagements is to raise assets for the solicitor client, the manner in which this is accomplished is diverse. Some engagements are extremely broad and allow a solicitor to explore the entire universe of institutional or retail investors. Others may outline the

specific distribution channels a solicitor can work in for example, public pension plans (municipal entities), corporate pension plans, endowments and foundations, consultants, subadvisors, wealth management, OCIO and/or Family Offices. Alternatively, some solicitor clients will ask the solicitor to provide a list of specific entities that they will provide outreach to.

Given the above, in some engagements, a solicitor municipal advisor may or may not know at the outset of the relationship whether they will solicit municipal entities. The fact that so many industry participants work through consultants and other intermediaries also complicates the situation. When working with an Intermediary it is never immediately known whether a solicitors' efforts will result in participation in a search nor which of their clients the search will be for.

Best practices would necessitate that a solicitor municipal advisor must ensure that they have the proper policies and procedures in place to cover the solicitation of a municipal entity and then will implement these procedures prior to the first solicitation to a municipal entity.

9. Do solicitor municipal advisors make payments (including in-kind) to other solicitor municipal advisors to facilitate solicitations of a municipal entity? If so, are there any special disclosures specific to the sub-contractor solicitation arrangement that would seem appropriate?

It is not unusual for solicitor municipal advisor to work with sub-contractor solicitation arrangements. In the event this should occur, we believe that it is the role of the solicitor municipal advisor to ensure all regulatory requirements are met, whether by their associated persons or by any sub-contractors they engage. This includes the provision of any required disclosures. Any such engagement would result in the solicitor municipal advisor supervising the role of the sub-contractor.

As a best practice, it would be anticipated that many in the industry may also refine the disclosure statement to show that the solicitor municipal advisor is a sub-contractor working under the supervision of the solicitor municipal advisor on behalf of the solicitor client. The disclosure may also include the fee both the solicitor municipal advisor receives as well as the fee the sub-contractor receives. We further believe that if the provisions of draft Rule G-46 were to be approved, that the conflict-of-interest section of the disclosure would necessitate inclusion of any conflicts for both the solicitor municipal advisor and the sub-contractor. As noted above, we believe these burdens outweigh the benefits to municipal entities.

11. Should solicitor municipal advisors be required to provide certain disclosures to their clients, including information pertaining to the solicitor municipal advisor's conflicts of interest and/or legal and disciplinary history? If so, should such disclosures be required in connection with engagement documentation with the client?

Most solicitor municipal advisors that fall under other regulatory regimes already provide this information to their clients. We believe it would be prudent for municipal advisors to also provide this information.

12. Is there any additional information pertaining to a solicitor municipal advisor's compensation that should specifically be required to be disclosed to a solicited entity?

Disclosures should provide a statement affirming who the solicitor's fees are paid by. As a best practice, currently many solicitors provide investors with the following additional line in their disclosures, "the fees paid to the solicitor is paid by the investment manager and does not increase the fee paid by the investor." This is likely to be information that would be helpful to the solicited entity.

14. Is it appropriate to require solicitor municipal advisors to disclose any material conflicts of interest to solicited entities since solicitor municipal advisors do not provide any advice to the entities that they solicit? Should the required disclosures instead be limited to conflicts disclosures related to the solicitor municipal advisor's compensation arrangement or the solicitor municipal advisor's relationship with its (municipal advisor or investment adviser) client? Would a conflicts disclosure requirement result in sufficient benefit to outweigh any potential burden? Is any additional guidance warranted in this area?

Many solicitor municipal advisors are also registered as investment advisors, so it is likely that many will be required to provide a conflicts disclosure. While in and of itself, we do not necessarily believe that a conflicts disclosure is necessary, the inclusion of a requirement that conforms to existing regulations and is not duplicative would harmonize regulation across a variety of regulatory authorities and eliminate confusion as to what disclosure items need to be provided for each regulator.

15. Should solicitor municipal advisors be required to make disclosures regarding their fiduciary status (or the lack thereof) in connection with the solicitation of a municipal entity or obligated person? Are solicitor municipal advisors sometimes deemed fiduciaries in connection with their solicitation activities pursuant to other regulatory regimes (e.g., state law)? If so, would a requirement to specifically state the solicitor municipal advisor's fiduciary status under the federal municipal advisor regime provide clarity or cause confusion to solicited entities?

Many solicitor municipal advisors are also registered as investment advisors and as such have a fiduciary responsibility to their clients. When applicable, this duty is disclosed to municipal entity clients under investment adviser regulations. As such we do not believe such disclosure would provide any meaningful benefit.

- 17. Should a municipal advisor client of a solicitor municipal advisor be required to make a bona fide effort to ascertain whether the solicitor municipal advisor has provided any or all of the disclosures related to the municipal advisor client to the solicited entities (e.g., the role and compensation disclosures required by draft Rule G-46(c)(i) and/or solicitor client disclosures required by draft Rule G-46(c)(iii))? For example, should the engagement documentation require the solicitor municipal advisor to contractually commit to provide the disclosures required by draft Rule G-46, and if so, should the municipal advisor client be required to undertake some level of diligence to confirm that the required disclosures are, in fact, made? Given that both the solicitor municipal advisor and all of its potential clients are regulated entities, would such a requirement appropriately further any policy goals? If so, would any burdens associated with such a requirement be outweighed by its potential benefits?**

We do not believe that the solicitor client should be required to undertake any level of diligence to confirm that the required disclosures are, in fact, made. As not all market participants are registered nor do most require registration, such a burden would unfairly disadvantage solicitor municipal advisors by making engaging with them more onerous than other sales and marketing professionals who are operating directly on behalf of the investment manager or within larger institutions that maintain registration exemptions.

- 18. Draft Rule G-46 currently specifies that the required disclosures must be disclosed in writing. Should the MSRB permit such disclosures to be made orally as long as the solicitor municipal advisor maintains a record that the oral disclosures were provided, the substance of what was provided, and when?**

With proper guidance from the MSRB as to the record requirements, we are in support of oral disclosures as an option to increase flexibility.

Thank you for the opportunity to share our thoughts with you regarding this proposal. Please feel free to reach out to me at (585) 364-3065 or by email at donna.dimaria@tesseractcapital.com should you have any questions or require additional information pertaining to the proposed CE Requirements for MAs.

Regards,

<<Donna DiMaria>>

Donna DiMaria
Chairman of the Board of Directors and Chair of the 3PM Regulatory Committee
Third Party Marketers Association

About The Third Party Marketers Association (3PM)

3PM is an association of independent, outsourced sales and marketing firms that support the investment management industry worldwide.

3PM Members are properly registered and licensed organizations consisting of experienced sales and marketing professionals who come together to establish and encourage best practices, share knowledge and resources, enhance professional standards, build industry awareness, and generally support the growth and development of professional outsourced investment management marketing.

Members of 3PM benefit from:

- Regulatory Advocacy
- Best Practices and Compliance
- Industry Recognition and Awareness
- Manager Introductions
- Educational Programs
- Online Presence
- Conferences and Networking
- Service Provider Discounts

3PM began in 1998 with seven member-firms. Today, the Association has more grown and represents members from around the globe.

A typical 3PM member-firm consists of two to five highly experienced investment management marketing executives with, on-average, more than 10 years' experience selling financial products in the institutional and/or retail distribution channels. The Association's members run the gamut in products they represent.

Members work with traditional separate account managers covering strategies such as domestic international and global equity, as well as fixed income. In the alternative arena, members represent fund products such as mutual funds, hedge funds, private equity, fund of funds, infrastructure, real assets and real estate. Some firms' business is comprised of both types of product offerings. The majority of 3PM's members are currently registered with FINRA or affiliated with a broker-dealer that is a member of FINRA.

For more information on 3PM or its members, please visit www.3pm.org.

MSRB Notice

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Category

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Affected Rules
[Rule G-17](#), Rule G-46

Second Request for Comment on Fair Dealing Solicitor Municipal Advisor Obligations and New Draft Rule G-46

Overview

The Municipal Securities Rulemaking Board (MSRB) is requesting a second round of comments on a new draft Rule G-46 that would codify certain statements in a notice issued in 2017. Those statements relate to the obligations of “solicitor municipal advisors” under MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities (the “G-17 Excerpt for Solicitor Municipal Advisors”) and were originally included in a larger notice regarding the application of MSRB rules to solicitor municipal advisors.¹ In addition to codifying the general substance of the G-17 Excerpt for Solicitor Municipal Advisors, the draft rule, Rule G-46, also would add additional requirements that would better align some of the obligations imposed on solicitor municipal advisors with those applicable to non-solicitor municipal advisors under Rule G-42, on duties of non-solicitor municipal advisors, to underwriters under Rule G-17, on fair dealing, and to certain solicitations undertaken on behalf of third-party investment advisers under the U.S. Securities and Exchange Commission’s marketing rule for investment advisers (the “IA Marketing Rule” or “IA Rule 206(4)-1”).

The MSRB sought public comment on draft Rule G-46 in a March 2021 Request for Comment (the “First Request for Comment”).² In response to the comments received on the First Request for Comment, the MSRB now proposes, for public comment, certain revisions to draft Rule G-46. Generally, these draft revisions attempt to clarify that solicitor municipal advisors do not owe a fiduciary duty under the

¹ See [MSRB Notice 2017-08, Application of MSRB Rules to Solicitor Municipal Advisors \(May 4, 2017\)](#).

² See [MSRB Notice 2021-07, Request for Comment on Fair Dealing Solicitor Municipal Advisor Obligations and New Draft Rule G-46 \(Mar. 17, 2021\)](#).



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Securities Exchange Act of 1934 (the “Act” or the “Exchange Act”) to clients or municipal entities in connection with their solicitation activities and better align the provisions of draft Rule G-46 with certain requirements applicable to non-solicitor municipal advisors and certain solicitations undertaken under the IA Marketing Rule. The proposed codification of the G-17 Excerpt for Solicitor Municipal Advisors in the form of a standalone rule is a next step in the MSRB’s ongoing review of the catalogue of interpretive guidance in its rule book, as announced in MSRB Notice 2021-02.³ The MSRB invites all interested parties to submit comments in response to this request for comment, along with any other information they believe would be useful.

Comments should be submitted no later than March 15 and may be submitted in electronic or paper form. [Comments may be submitted electronically by clicking here](#). Comments submitted in paper form should be sent to Ronald W. Smith, Corporate Secretary, 1300 I Street NW, Suite 1000, Washington, DC 20005. All comments will be available for public inspection on the MSRB’s website.⁴

Solicitor Municipal Advisor Activity

The Exchange Act and related U.S. Securities and Exchange Commission (“SEC”) rules and regulations identify two broad categories of municipal advisors—those that provide certain advice to or on behalf of a municipal entity or obligated person and those that undertake certain solicitations of a municipal entity or obligated person on behalf of certain third-party financial professionals. The first category of municipal advisors is often referred to as non-solicitor municipal advisors, while the latter are referred to as solicitor municipal advisors. More specifically, solicitor municipal advisors are persons who undertake a *direct or indirect* communication with a municipal entity or obligated person for direct or indirect compensation, on behalf of a third-party broker, dealer, municipal securities dealer (collectively, “dealers”) or municipal advisor, or investment adviser (collectively and individually referred to as “solicitor clients”). The communication must be made for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of the solicitor municipal advisor’s dealer client or

³ See [MSRB Notice 2021-02, MSRB to Retire Select Interpretive Guidance for Dealers and Municipal Advisors \(Feb. 11, 2021\)](#).

⁴ Comments generally are posted on the MSRB’s website without change. For example, personal identifying information such as name, address, telephone number, or email address will not be edited from submissions. Therefore, commenters should only submit information that they wish to make available publicly.

municipal advisor client for or in connection with municipal financial products or the issuance of municipal securities or of the solicitor municipal advisor's investment adviser client to provide investment advisory services to or on behalf of a municipal entity.

The term does not include: (1) advertising by a dealer, municipal advisor, or investment adviser; (2) solicitation of an obligated person, if such obligated person is not acting in the capacity of an obligated person; (3) solicitation of an obligated person that is not in connection with the issuance of municipal securities or with respect to municipal financial products; or (4) solicitation for or in connection with municipal financial products that are investment strategies to the extent that those investment strategies are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments.⁵

While the Act and relevant Act regulations technically permit a municipal advisor to conduct solicitations on behalf of a third-party dealer, MSRB Rule G-38, on solicitation of municipal securities business, generally prohibits a dealer from providing or agreeing to provide payment to an unaffiliated person for a solicitation of municipal securities business on behalf of such dealer. As a result, the MSRB assumes that such solicitations do not occur. Additionally, as discussed further in the Economic Analysis section of this notice, according to MSRB data, it appears that the majority of solicitations that would be subject to draft Rule G-46 involve a solicitation on behalf of a third-party investment adviser to provide investment advisory services to a municipal entity. Anecdotally, the MSRB understands that such solicitations most often occur in connection with the solicitation of a public pension plan. For example, if a person communicates with a public pension plan for the purpose of getting a particular investment advisory firm hired by the plan to provide investment advisory services to such plan, that person may be a solicitor municipal advisor if such person is paid by the investment advisory firm for the communication and if such person and the investment advisory firm are not affiliated.

MSRB data suggests that the number of municipal advisors that engage in solicitations that may subject them to draft Rule G-46 comprise a relatively small percentage of the municipal advisors that are registered with the

⁵ See Section 15B(e)(9) of the Act and Exchange Act Rules 15Ba1-1(n), 15Ba1-1(d)(1) and 15Ba1-1(d)(3)(viii).

MSRB.⁶ However, notwithstanding the relatively small size of the solicitation market, the MSRB believes that it is important that the fundamental protections extended to the municipal entity and obligated person clients of other MSRB regulated entities are also extended to the municipal entities and obligated persons with whom solicitor municipal advisors interact.⁷ Indeed, the MSRB was granted rulemaking authority with respect to municipal advisors, in part, because of certain problematic conduct in the municipal securities market, including conduct involving solicitations of municipal entities and obligated persons. For example, as noted in the SEC's release adopting final rules regarding the registration of municipal advisors and related matters, the solicitation of public pension plans in connection with investment advisory services has been subject to multiple SEC enforcement actions.⁸ The MSRB believes that draft Rule G-46, if filed with and approved by the SEC, would serve as an important bulwark against potential improper practices in the municipal market and would also provide certainty and greater transparency to solicitor municipal advisors regarding regulatory expectations.

Summary of Draft Rule G-46

Summary of Draft Rule G-46 as Set Forth in the First Request for Comment

As proposed in the First Request for Comment, draft Rule G-46 generally would have required:

- Solicitor municipal advisors to evidence each of their solicitor relationships by a writing or writings that include certain minimum content set forth in the draft rule;
- Solicitor municipal advisors to have a reasonable basis for their representations and to refrain from making representations that they know or should know are inaccurate or misleading;
- Solicitor municipal advisors to disclose to any solicited entity all material facts about the solicitation, including: (i) certain information regarding the role and compensation of the solicitor municipal

⁶ 105 out of 521 municipal advisory firms, or 20.2%, conduct solicitation activities, according to Form A-12 registration data submitted to the MSRB as of January 2021.

⁷ See *id.*

⁸ See Release No. 34-70462 (September 20, 2013), 78 FR 67467, at 67482 (Nov. 12, 2013) (File No. S7-45-10) ("Order Adopting SEC Final Rule").

- advisor; (ii) any material conflicts of interest of the solicitor municipal advisor; and (iii) information about how the solicited entity can obtain the solicitor client's Form MA or Form ADV, as applicable;
- That all disclosures must be made in writing and must be delivered to an official of the solicited entity by no later than the first solicitation of the municipal entity for a specified solicitor client; and
 - Solicitor municipal advisors to retain certain documentation as evidence of compliance with the requirements of the rule.

Summary of Draft Revisions to Draft Rule G-46

In response to comments received on the First Request for Comment, the MSRB proposes to revise draft Rule G-46 to:

- Add a new section to the rule that would require solicitor municipal advisors to disclose to their clients certain information pertaining to the solicitor's material conflicts of interest and legal or disciplinary history;
- Require solicitor municipal advisors to disclose to their clients with more specificity certain information pertaining to the term of their relationship;
- Expand the required disclosures to solicited entities to include disclosures regarding: (1) certain payments made by a solicitor municipal advisor to another solicitor municipal advisor; and (2) the inapplicability of a fiduciary duty to the entities solicited by a solicitor municipal advisor;
- Narrow the representation and related reasonable-basis standards proposed in the First Request for Comment to expressly apply only to representations about the capacity, resources or knowledge of a solicitor municipal advisor's client;
- Revise the required timing and manner in which disclosures must be made to solicited entities to better account for indirect solicitation scenarios;
- Add specific prohibitions analogous to certain prohibitions applicable to non-solicitor municipal advisors under Rule G-42;
- Add new supplementary material regarding the relationship between draft Rule G-46 to Rule G-17 and the solicitor's fiduciary obligations under the Exchange Act; and
- Add new draft definitions for certain terms used in the rule.

Revised Draft Rule G-46

Disclosure to Solicitor Clients

As set forth in the First Request for Comment, draft Rule G-46 did not specifically require any disclosures to be provided to the clients of a solicitor municipal advisor (*i.e.*, the municipal advisors and investment advisers that hire such solicitor municipal advisors to obtain business on their behalf). However, the MSRB did inquire as to whether certain information should be required to be disclosed to these clients. After reviewing the comments received in response to the First Request for Comment, the MSRB now proposes to require solicitor municipal advisors to provide to their clients full and fair disclosure in writing of all material conflicts of interest and any legal or disciplinary event that would be material to a reasonable solicitor client's evaluation of the solicitor municipal advisor or the integrity of its management or advisory personnel. Such a requirement would better align the obligations owed by solicitor municipal advisors to their clients with those applicable to non-solicitor municipal advisors to their clients under Rule G-42. The MSRB believes that required disclosure of such information to the entities that determine whether to hire such solicitor municipal advisors could increase solicitor municipal advisor accountability and discourage certain bad actor behavior while simultaneously providing prospective clients with valuable information that is directly relevant to their hiring decisions.

The disclosures would be required to be provided to a solicitor municipal advisor's client prior to or upon engaging in municipal advisory activities for such client. As an alternative to providing a narrative description of any such legal or disciplinary events, solicitor municipal advisors that are also registered broker-dealers or investment advisers would be permitted to disclose such information through identification of the specific type of event and specific reference to the relevant portions of the solicitor municipal advisor's Broker Check report or Form ADV, respectively, if the solicitor municipal advisor provides detailed information specifying where the client may electronically access such forms. Additionally, other solicitor municipal advisors may disclose such information through identification of the specific type of event and specific reference to the relevant portions of the municipal advisor's most recent Forms MA or MA-I filed with the Commission if the municipal advisor provides detailed information specifying where the client may electronically access such forms.

Documentation of the Solicitor Relationship

In the First Request for Comment, the MSRB proposed to require solicitor municipal advisors to evidence each of their solicitor relationships in a writing or writings created and delivered to the solicitor client prior to, upon or promptly after the establishment of the solicitor relationship. Draft Rule

G-46 also would have required the writing(s) to be dated and include certain minimum content, including the term of the relationship. While much of this language was drawn from Rule G-42, the draft minimum required content—in part—was drawn from the investment adviser oversight and compliance obligation under the IA Marketing Rule.⁹ As a result, as proposed in the First Request for Comment, the required minimum content for such documentation was not as comprehensive as the documentation requirements for non-solicitor municipal advisors under Rule G-42.

However, in response to comments advocating for more harmonization between draft Rule G-46 and Rule G-42, the MSRB now proposes to bolster such required minimum content to expressly require such documentation to include: (1) the date, triggering event, or means for the termination of the relationship, or if none, a statement that there is none; and (2) any terms relating to withdrawal from the relationship. These more specific requirements would replace the previous draft obligation to include the more general “term of the engagement.”¹⁰

Representations to Solicited Entities

As set forth in the First Request for Comment, draft Rule G-46 would have provided that all representations made by a solicitor municipal advisor to a solicited entity (in connection with a solicitation subject to the rule) must be truthful and accurate and that the solicitor municipal advisor must not misrepresent or omit material facts. These principles were drawn from guidance applicable to underwriters of municipal securities under Rule G-17 (the “G-17 Underwriter’s Guidance”),¹¹ the G-17 Excerpt for Solicitor Municipal Advisors and the IA Marketing Rule.¹² Additionally, drawing from

⁹ Subject to exceptions, an investment adviser subject to the rule must have a written agreement with any person giving a testimonial or endorsement that describes the scope of the agreed-upon activities and the terms of compensation for those activities. See IA Rule 275.206(4)-1(b)(2)(ii).

¹⁰ Additionally, the MSRB proposes to add a related new definition to define the term “solicitor relationship.” This definition would be consistent with the defined term “municipal advisory relationship” for purposes of Rule G-42.

¹¹ See [Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities \(Mar. 31, 2021\)](#).

¹² See G-17 Underwriter’s Guidance (stating that “[a]ll representations made by underwriters to issuers in connection with municipal securities underwritings, whether written or oral, must be truthful and accurate and must not misrepresent or omit material facts.”) See also

certain principles found in the G-17 Underwriter's Guidance, the IA Marketing Rule and Rule G-42, solicitor municipal advisors would have been required to have a reasonable basis for the representations and other material information conveyed to a solicited entity and to refrain from making representations that they know or should know are inaccurate or misleading.¹³

The MSRB proposes to narrow these standards to expressly prohibit the solicitor municipal advisor from making a representation that the solicitor municipal advisor knows or should know is either materially false or materially misleading due to the omission of a material fact about the capacity, resources or knowledge of the solicitor client. This would better align the representation-related standards applicable to solicitor municipal

G-17 Excerpt for Solicitor Municipal Advisors (explaining that "Rule G-17 contains an anti-fraud prohibition similar to the standard set forth in Rule 10b-5 adopted by the SEC under the Exchange Act. Thus, all municipal advisors must refrain from engaging in certain conduct and *must not misrepresent or omit the facts, risks, or other material information about municipal advisory activities undertaken*" (emphasis added). *See also* IA Rule 206(4)-1(a) (setting forth general prohibitions applicable to advertisements, including compensated endorsements). Among other things, such prohibitions include: any untrue statement of a material fact, or omitting to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading; a material statement of fact that the investment adviser does not have a reasonable basis for believing it will be able to substantiate upon demand by the SEC; information that would reasonably be likely to cause an untrue or misleading implication or inference to be drawn concerning a material fact relating to the investment adviser; or anything that would otherwise be materially misleading.

¹³ *See* G-17 Underwriter's Guidance (stating that "[u]nderwriters must have a reasonable basis for the representations and other material information contained in documents they prepare and must refrain from including representations or other information they know or should know is inaccurate or misleading.") *See also* MSRB Rule G-42, SM .01 (stating that "a municipal advisor must have a reasonable basis for any advice provided to or on behalf of a client). The MSRB believes that the advice provided by a non-solicitor municipal advisor to a municipal entity or obligated person bears some analogy to the communications made by a solicitor municipal advisor during a solicitation of a municipal entity or obligated person since in each case, the municipal advisor was hired to provide such services. *See also* IA Rule 206(4)-1(b)(2)(i) requiring investment advisers that are subject to the rule to have a reasonable basis for believing that any testimonial or endorsement complies with the requirements of the rule. Such requirements include, but are not limited to prohibitions on including in any advertisement (one form of which is compensated endorsements) any untrue statement of material fact or including a material statement of fact that the investment adviser does not have a reasonable basis for believing it will be able to substantiate upon demand by the SEC. *See* IA Rule 206(4)-1(e)(1)(ii) and IA Rule 206(4)-1(a).

advisors with those applicable to certain representations under Rule G-42.¹⁴ Notably however, unlike Rule G-42, these standards would not be limited to representations that occur in response to requests for proposals or qualifications or in oral presentations to a client or prospective client for the purpose of obtaining or retaining an engagement for the solicitor client. This is because all of the solicitor municipal advisor's communications regarding the capacity, resources or knowledge of the solicitor's clients are expected to be for the purpose of obtaining or retaining an engagement for their clients.

The MSRB also proposes to narrow the reasonable-basis standard initially proposed in the First Request for Comment to more closely align with the new narrower representation standard discussed above. As a result, rather than explicitly require solicitor municipal advisors to have a reasonable basis for all of their representations and material information conveyed to a solicited entity, draft Rule G-46(d) expressly would require a solicitor municipal advisor only to have a reasonable basis for its representations regarding the capacity, resources or knowledge of the solicitor's clients. Draft Rule G-46(h) would require the solicitor municipal advisor to keep documentation substantiating the solicitor municipal advisor's reasonable basis belief regarding its representations for a period of not less than five years. Additionally, Supplementary Material .01 would provide guidance on compliance with the reasonable-basis standard. However, in response to commenter concerns that certain language in Supplementary Material .01, as included in the First Request for Comment, may inadvertently set forth conflicting standards,¹⁵ the MSRB proposes to slightly revise the language in Supplementary Material .01 to omit reference to "red flags" and the need to have "some basis" for a solicitor municipal advisor's statements.

Disclosures to Solicited Entities

In the First Request for Comment, the MSRB proposed to require solicitor municipal advisors to disclose to a solicited entity all material facts about the solicitation, including but not limited to certain role and compensation disclosures. The MSRB proposes to expand the previous list of specifically

¹⁴ See Rule G-42(e)(i)(C) which prohibits non-solicitor municipal advisors from making any representation or the submission of any information that the municipal advisor knows or should know is either materially false or materially misleading due to the omission of a material fact about the capacity, resources or knowledge of the municipal advisor, in response to requests for proposals or qualifications or in oral presentations to a client or prospective client, for the purpose of obtaining or retaining an engagement to perform municipal advisory activities.

¹⁵ One commenter suggested that explanatory language that would have required solicitor municipal advisors to have at least "some basis" for their representations might be inconsistent with the "reasonable basis" standard proposed in the draft rule.

enumerated disclosures to include a new requirement to disclose payments made to another solicitor municipal advisor to facilitate the solicitation. The MSRB did not propose to require disclosure of such information in the First Request for Comment. However, in order to inform whether a similar disclosure specified in the G-17 Excerpt for Solicitor Municipal Advisors should be incorporated into draft Rule G-46, the First Request for Comment sought comment as to whether such payments were, in fact, made. Having learned from the comment letters that such payments are made, the MSRB now seeks comment as to the utility of such disclosures and whether the benefit associated with making such disclosures would outweigh the related costs.

The MSRB also proposes to revise the required disclosure regarding a solicitor municipal advisor's fair dealing obligations. Drawing from analogous disclosures that underwriters must make pursuant to the G-17 Underwriter's Guidance, the First Request for Comment proposed to require solicitor municipal advisors to disclose to solicited entities that the municipal advisor is required to deal fairly at all times with both solicited entities and the solicitor municipal advisor's clients.¹⁶ The revised disclosure would make clear that the obligation to deal fairly with all persons applies in connection with a solicitor municipal advisor's solicitation activities. Additionally, the revised disclosure would expressly state that a solicitor municipal advisor does not owe a fiduciary duty to the entities that it solicits and that it is not required to act in their best interest without regard to the solicitor municipal advisor's own financial or other interests.¹⁷ A new Supplementary Material .02 expounds on the relationship between draft Rule G-46 and the fair

¹⁶ See G-17 Underwriter's Guidance at section titled "Disclosures Concerning the Underwriter's Role."

¹⁷ See Order Adopting SEC Final Rule, 78 FR 67467 at note 100 (stating that "...the fiduciary duty of a municipal advisor, as set forth in Exchange Act Section 15B(c)(1), extends only to its municipal entity *clients*") (emphasis added); see also text accompanying note 100 (stating that "...the Exchange Act, as amended by the Dodd-Frank Act, grants the MSRB regulatory authority over municipal advisors and imposes a fiduciary duty on municipal advisors *when advising municipal entities*") (emphasis added); Exchange Act Section 15B(b)(2)(L)(i) (granting the MSRB authority to "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*") (emphasis added).

Because a solicitor municipal advisor's clients are not the municipal entities that they solicit, but rather the third parties that retain or engage the solicitor municipal advisor to solicit such municipal entities, solicitor municipal advisors do not owe a fiduciary duty under the Exchange Act or MSRB rules to their clients (or the municipal entity) in connection with such activity. See MSRB Notice 2017-08, at 10.

dealing obligation under Rule G-17 and includes a similar statement regarding the fiduciary duty.

Timing and Manner of Disclosures to Solicited Entities

Drawing from the G-17 Underwriter's Guidance, the MSRB initially proposed to require that the requisite disclosures to solicited entities be provided in writing to an official of the solicited entity that: (1) the solicitor municipal advisor reasonably believes has the authority to bind the solicited entity by contract; and (2) to the knowledge of the solicitor municipal advisor, is not a party to a disclosed conflict. Additionally, disclosures would have been required to be delivered at the time of the first solicitation of the solicited entity for that specific solicitor client. A further ongoing annual disclosure requirement would have applied if the solicitor municipal advisor were to make multiple such solicitations of the same solicited entity over the course of more than one year.

In response to comments received, the MSRB proposes to revise these requirements to be more workable for certain indirect solicitations of a municipal entity or obligated person. Specifically, disclosures would be required to be made in writing and delivered at the time of the first communication with the solicited entity on behalf of a specific solicitor client.¹⁸ Additionally, if the solicitation results in the solicited entity engaging the solicitor's client for the services solicited, such disclosures must be made again at the time that such engagement documentation is delivered to the solicited entity or promptly thereafter.

Importantly, the latter disclosures would be permitted to be provided by either the solicitor client or the solicitor municipal advisor. The MSRB believes that this flexibility would permit, for example, a solicitor municipal advisor's investment adviser client to provide the solicitor's disclosures to the solicited entity at the time that the investment adviser enters into an engagement with the solicited entity.¹⁹ However, they would be required to

¹⁸ The solicitor municipal advisor would be expected to provide separate disclosures for each of its engagements. For example, assume that a solicitor municipal advisor solicits a municipal entity on behalf of a municipal advisor client to provide municipal advisory services to the municipal entity. One week later, the solicitor municipal advisor solicits the municipal entity again—this time to obtain an engagement for the solicitor municipal advisor's investment advisory client to provide investment advisory services to the municipal entity. The solicitor municipal advisor would be expected to provide its disclosures to the municipal entity again in connection with the second solicitation.

¹⁹ The MSRB does not propose to require the engagement documentation between the solicitor municipal advisor and its solicitor clients to include an affirmative undertaking on

be made to an official of the solicited entity that: (1) the solicitor municipal advisor (or, the solicitor client, if the solicitor client provides such disclosures) reasonably believes has the authority to bind the solicited entity by contract; and (2) is not a party to a disclosed conflict.²⁰ These two conditions would not apply to the first delivery of the disclosures.

The MSRB believes that such a bifurcated approach would help ensure that the person that is initially solicited receives this key information in time to consider it in connection with the initial solicitation. However, because such person(s) may not have the authority to bind the solicited entity by contract (particularly where such person is actually an intermediary between the solicitor and the solicited entity), the MSRB would not require that the solicited person have such authority. The MSRB believes that any related risk would be mitigated by requiring that such disclosures are provided again at the time of the engagement—this time, to someone who does have such authority to bind the solicited entity.

This dual disclosure requirement would replace the annual disclosure requirement proposed in the First Request for Comment and would also better account for the fact that a solicitor municipal advisor may conduct multiple solicitations (spanning more than one year) of a single entity on behalf of a single client. Rather than require continued annual disclosures in such circumstances, the revised approach would help ensure that the disclosures are provided when they are most likely to be helpful to the solicited entity—at the time of the first communication and again in connection with the solicited entity's engagement of the solicitor's client.

the part of the solicitor client to provide the solicitor's disclosures to a solicited entity. However, a solicitor municipal advisor might seek the inclusion of such language in its engagement documentation as one means of complying with draft Rule G-46. As one additional alternative, a solicitor municipal advisor might seek to include in its engagement documentation with its solicitor clients a requirement that the solicitor client provide to the solicitor municipal advisor prompt notice that the solicitor client has been engaged by the solicitor client. Draft Rule G-46 would provide solicitor municipal advisors flexibility in determining how to deliver the second set of disclosures.

²⁰ Solicitor municipal advisors would be expected to adopt reasonable policies and procedures to support the reasonable belief that the solicited entity representative has the authority to bind the solicited entity. However, consistent with the flexible approach to supervision under Rule G-44, on Supervisory and Compliance Obligations of Municipal Advisors, the reasonable policies and procedures of one firm may reasonably differ from that of another's. As one example only, solicitor municipal advisors could seek to incorporate into their written agreements a condition that such disclosures provided on behalf of the solicitor municipal advisor must be provided to a solicited entity representative that the solicitor client reasonably believes has the authority to bind the solicited entity.

Specified Prohibitions

As set forth in the First Request for Comment, draft Rule G-46 did not explicitly prohibit solicitor municipal advisors from receiving excessive compensation nor did it expressly prohibit them from delivering a materially inaccurate invoice for fees or expenses for municipal advisory activities performed. However, in response to comments that certain of the specified prohibitions set forth in Rule G-42 should also be applicable to solicitor municipal advisors, the MSRB proposes to include these two prohibitions in the text of draft Rule G-46. The MSRB believes that such inclusion would better align the draft rule with similar prohibitions applicable to non-solicitor municipal advisors under Rule G-42 and to a lesser degree with prohibitions applicable to underwriters under the G-17 Underwriter's Guidance.²¹ However, the MSRB seeks comment as to whether additional guidance is warranted regarding the prohibition on excessive compensation. For example, should the MSRB prescribe certain factors that may be applicable to such a determination?²²

Books and Records

In the First Request for Comment, the MSRB proposed to include the specific recordkeeping expectations applicable to draft Rule G-46 into the text of Rule G-46 itself, rather than incorporating such provisions into the MSRB's books and records rule, Rule G-8. The MSRB proposes to take a similar approach with respect to any future MSRB rules or rule amendments with the goal of eventually including the books and records obligations applicable to each MSRB rule in the text of each rule itself. Rule G-8 would then be streamlined generally to require dealers and municipal advisors to make and preserve the books and records required under MSRB rules, the Exchange Act and any applicable Exchange Act rules.²³

The MSRB understands that, in the short term, this will require regulated entities to refer to Rule G-8 for certain books and records requirements and

²¹ See Rule G-42(e)(A) and (B); see also G-17 Underwriter's Guidance at section titled, "Underwriter Compensation and New Issue Pricing."

²² The MSRB notes that, pursuant to Rule G-42(e)(i)(E), non-solicitor municipal advisors are prohibited from making payments for the purpose of obtaining or retaining an engagement to perform municipal advisory activities, subject to certain exceptions specified in the rule. One such exception permits the making of "reasonable fees paid to another municipal advisor registered as such with the Commission and the Board..." As a result, when the solicitor client is a municipal advisor, there is already *a de facto* prohibition on excessive compensation.

²³ See e.g., FINRA Rule 4511, which sets forth the general requirements applicable a broker-dealer's books and records obligations.

to other MSRB rules for other books and records requirements. However, the MSRB believes that a more streamlined Rule G-8 and more specific books and records obligations included in other MSRB rules will be more helpful to stakeholders in the long run. Such an approach would serve as a prompt to regulated entities to consider their documentation obligations at the same time that they put into place policies and procedures to address the substantive obligations of a particular rule. The MSRB does not propose to modify the approach to books and records taken in the First Request for Comment.

Economic Analysis

The purpose of draft Rule G-46 would be to codify guidance on the obligations of solicitor municipal advisors currently outlined in an excerpt under Rule G-17. Further, the draft rule would better align the duty and obligations of solicitor municipal advisors to those for underwriters under Rule G-17, for non-solicitor municipal advisors under Rule G-42, and for solicitors that undertake certain solicitations on behalf of investment advisers under the SEC's investment adviser regulatory regime.

After reviewing the comment letters received in response to the First Request for Comment, the MSRB is proposing to provide more prescriptive guidance on the responsibility of a solicitor municipal advisor by better aligning it with Rule G-42, Rule G-17 and the IA Marketing Rule. Specifically, the following areas of the proposed new changes would affect the original economic analysis on estimated compliance costs from the First Request for Comment: Disclosure to solicitor clients, documentation of the solicitor relationship and expanded required disclosures to solicited entities for certain payments made by a solicitor municipal advisor to another solicitor municipal advisor.

A. The need for Draft Rule G-46

Before the enactment of the Dodd-Frank Act of 2010, municipal advisors were mostly unregulated.²⁴ In the succeeding years after the enactment of the new federal law, the MSRB established a regulatory framework for municipal advisors that included several new rules. As part of this new framework, the MSRB prescribed the duties for all municipal advisors,

²⁴ Prior to 2010, municipal advisors were subject to a patchwork of state and local laws. In support of SEC regulation, the MSRB wrote: "despite a thin patchwork of state and local laws, the majority of financial advisors is unregulated and operates in the public sphere without any legal standards or regulatory accountability." Municipal Securities Rulemaking Board, *Unregulated Municipal Market Participants – A Case for Reform*, April 2009.

which were divided into “solicitor” and “non-solicitor” municipal advisors. The MSRB first amended Rule G-17 in December 2010 to include the conduct of municipal advisory activities, municipal advisors, including solicitor municipal advisors, and their associated persons, which articulated that municipal advisors must deal fairly with all persons and not engage in any deceptive, dishonest, or unfair practice.²⁵ The duties of non-solicitor municipal advisors were subsequently outlined in 2016 with Rule G-42. In 2017, the MSRB published Notice 2017-18 which largely summarized already effective, or recently approved, but not yet operative, regulatory obligations. However, it also included the G-17 Excerpt for Solicitor Municipal Advisors.

The core standards applicable to non-solicitor municipal advisors and underwriters under Rule G-42 and Rule G-17 are highlighted in a standalone rule for non-solicitor municipal advisors and a standalone interpretation that was filed with and approved by the SEC, respectively. In contrast, the G-17 Excerpt for Solicitor Municipal Advisors did not undergo a formal public comment process. While, by its terms, MSRB Notice 2017-08 was intended to be a resource only, having the G-17 Excerpt for Solicitor Municipal Advisors included with interpretive guidance in the MSRB rule book has resulted in inconsistency in its application among solicitor municipal advisors.

In contrast to the regulation of underwriters and non-solicitor municipal advisors, the MSRB does not have any express standards regarding documentation of a solicitor municipal advisor’s engagement. Nor does it have express standards regarding solicitor municipal advisor disclosures of conflicts of interest. Given the importance that these standards have under other regulatory regimes, the MSRB believes that it is important to seek comment as to whether such standards are equally important for the regulation of solicitor municipal advisors. The MSRB believes that a codified Rule G-46, further modified in response to public comments received and if filed with and approved by the SEC, would result in informed, clearer regulatory standards and expectations for solicitor municipal advisors. The MSRB further believes that the process followed to arrive at any such final rule would help ensure appropriate consideration of the benefits and burdens of any potential final requirements. In addition, draft Rule G-46 would better align the obligations imposed on solicitor municipal advisors with those applicable to non-solicitor municipal advisors under Rule G-42, underwriters under

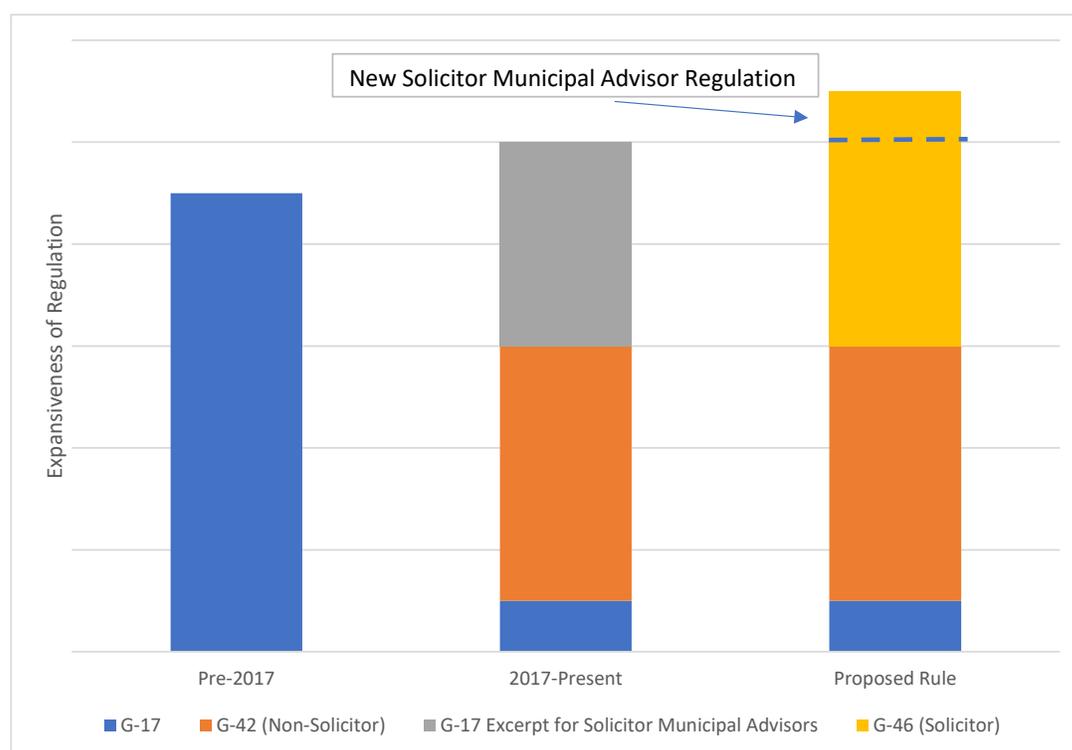
²⁵ Previously, the rule only applied to the municipal securities activities of dealers.

the G-17 Underwriter's Guidance, and investment advisers or their promoters under the IA Marketing Rule.

B. Relevant baselines against which the likely economic impact of the proposed changes can be considered

To evaluate the potential impact of draft Rule G-46, a baseline or baselines must be established as a point of reference to compare the expected future state with draft Rule G-46. The economic impact of the proposed changes is generally viewed as the difference between the baseline state and the expected state. Chart 1 below identifies the rules pertaining to municipal advisors that have evolved since the passage of the Dodd-Frank Act in 2010.

Chart 1. MSRB Obligations for Solicitor and Non-Solicitor Municipal Advisors Since 2010



For solicitor municipal advisors, the evaluation baseline is Rule G-17, which applies to all municipal advisors (solicitor and non-solicitor alike) and requires municipal advisors to deal fairly with all persons and not engage in any deceptive, dishonest, or unfair practice. The G-17 Excerpt for Solicitor Municipal Advisors expounds on these fair dealing obligations for solicitor municipal advisors.

Another baseline for consideration is the cash solicitation rule under the Investment Adviser's Act.²⁶ That rule generally prohibits investment advisers that are required to be registered under the Investment Adviser's Act from paying a cash fee to a solicitor for a solicitation unless the arrangement complies with a number of conditions set forth in the rule. Thus, for a subgroup of solicitor municipal advisors who undertake solicitations on behalf of an investment adviser that is subject to the requirements of the cash solicitation rule, the burden for compliance is already in place partially, as these solicitor municipal advisors are presumably already complying with the conditions outlined by the rule. A new draft Rule G-46 would not increase the burden for this subgroup of solicitor municipal advisors as much as the burden for solicitor municipal advisors who do not conduct solicitations that are subject to the cash solicitation rule.

Finally, for a subset of municipal advisory firms who conduct both solicitation and non-solicitation business activities, the baseline is comprised of Rule G-17 and Rule G-42 on duties of non-solicitor municipal advisors.

C. Identifying and evaluating reasonable alternative regulatory approaches

The MSRB policy on economic analysis in rulemaking addresses the need to consider alternative regulatory approaches, when applicable. Under this policy, only reasonable regulatory alternatives should be considered and evaluated.

One alternative would be to amend Rule G-42 on the duties of non-solicitor municipal advisors to have it apply to solicitor municipal advisors. This would help provide one helpful location for all duty of care obligations for *all* municipal advisors, as defined by the SEC. However, the MSRB deliberately decided not to apply Rule G-42 to solicitor municipal advisors due to fundamental differences between the nature of their clients and the business activities in which they engage. For example, whereas the clients of non-solicitor municipal advisors are municipal entities and obligated persons, the clients of solicitor municipal advisors are third-party dealers, municipal advisors and investment advisers. Similarly, whereas non-solicitor municipal advisors primarily provide advice to their clients, solicitor municipal advisors are retained to solicit municipal entities and obligated

²⁶ While the cash solicitation rule was replaced by the new merged IA Marketing Rule, the MSRB understands that, at this time, investment advisers must continue to comply with the requirements of the cash solicitation rule. See Investment Adviser Marketing, [SEC Release No. IA-5653](#) (Dec. 22, 2020). The effective date of the IA Marketing Rule is 60 days after publication in the *Federal Register*, with an 18-month transition period between the IA Marketing Rule's effective date and its compliance date. The IA Marketing Rule was published in the *Federal Register* on March 5, 2021. See 86 FR 13024 (Mar. 5, 2021).

persons on behalf of the solicitor municipal advisor's clients. Because the roles of solicitor and non-solicitor municipal advisors differ in critical ways, combining the obligations for both types of municipal advisors into a single Rule G-42 could create confusion impeding compliance, and may not be feasible; therefore, the MSRB believes that a standalone rule for solicitor municipal advisors is warranted.

D. Assessing the benefits and costs of the proposed changes

The MSRB policy on economic analysis in rulemaking requires consideration of the likely costs and benefits of a proposed rule change when the rule change proposal is fully implemented against the context of the economic baselines. The MSRB is currently unable to quantify the economic effects of draft Rule G-46 in totality because not all of the information necessary to provide a reasonable estimate is available. There are few publicly available sources of information about the municipal advisory industry, especially in terms of the business operations, as well as revenue and expense data for relevant business lines. In addition, estimating the costs for solicitor municipal advisory firms to comply with the draft rule is hampered by the fact that these costs depend on the business activities and size of these firms, which can vary greatly. Given the limitations on the MSRB's ability to conduct a quantitative assessment of the costs and benefits associated with the draft rule, the MSRB has considered these costs and benefits primarily in qualitative terms augmented with some preliminary quantitative cost estimates based on the information provided by a previous SEC analysis. Regardless, the MSRB is seeking, as part of this Second Request for Comment, additional data or studies relevant to the costs and benefits of the proposed changes.

Benefits

The main benefit of draft Rule G-46 would be to codify and provide needed clarification on regulatory obligations for solicitor municipal advisors with regard to their duties. By aligning draft Rule G-46 with Rule G-42, Rule G-17 and the IA Marketing Rule, Draft Rule G-46 would help prevent derelictions of a solicitor municipal advisor's fair dealing obligations by promoting clearer regulatory requirements and expectations. Thus, the benefit provided by draft Rule G-46 is that it will remove uncertainty and potential "gray areas" of regulations that would hinder a potential solicitor municipal advisor from completing its obligations as intended.

Furthermore, the additional requirements for solicitor municipal advisors from draft Rule G-46 would enhance the transparency and protection for recipients of solicitations, further promoting fair dealings between the market participants. As mentioned above, the additional requirements would also align some of the obligations imposed on solicitor municipal advisors

with those applicable to non-solicitor municipal advisors under Rule G-42 and underwriters under the G-17 Underwriter's Guidance as well as those applicable to certain endorsements and testimonials in connection with certain investment adviser advertisements under the SEC's investment adviser regime. This alignment would alleviate the complexity due to differing obligations, promoting compliance and regulatory certainty, and increase the efficiency for regulatory entities tasked with examining and enforcing such requirements.

Costs

The MSRB acknowledges that solicitor municipal advisors would likely incur costs, relative to the baseline state, to meet the standards of conduct and duties contained in draft Rule G-46. These changes may include the one-time upfront costs related to setting up and/or revising policies and procedures, as well as the ongoing costs such as compliance costs associated with maintaining and updating disclosures. Solicitor municipal advisors may also have additional costs associated with additional recordkeeping costs.

For the upfront costs, it is possible that solicitor municipal advisors may need to seek the appropriate advice of in-house or outside legal and compliance professionals to revise policies and procedures in compliance with draft Rule G-46. As described above, the MSRB now proposes to require solicitor municipal advisors to provide written disclosure of all material conflicts of interest and any legal or disciplinary event to solicitor clients, documentation of the solicitor relationship and required disclosures to solicited entities for certain payments made by a solicitor municipal advisor to another solicitor municipal advisor.

Solicitor municipal advisors may also incur costs as related to standards of training in preparation for the implementation of draft Rule G-46. Assuming solicitor municipal advisors currently already have policies and procedures in place in relation to the G-17 Excerpt for Solicitor Municipal Advisors, the additional upfront costs for draft Rule G-46 should be incremental. Furthermore, the upfront costs may be lower for some solicitor municipal advisors who are currently providing non-solicitation municipal advisory services and therefore are already complying with Rule G-42 requirements, and other solicitor municipal advisors who are soliciting on behalf of investment advisory business and therefore are already complying with the IA Marketing Rule.

For the ongoing costs, solicitor municipal advisors may incur compliance costs as related to each solicitation, including costs pertaining to creating and maintaining books and records. Firms may have to make changes to their current recordkeeping practices in order to satisfy the additional

requirements of draft Rule G-46 for the specific disclosures to a solicited entity as outlined above, such as the creation of disclosures for all material information regarding the role and compensation of the solicitor municipal advisor; documentation of the relationship between a solicitor municipal advisor and its solicitor client;²⁷ disclosure of material conflicts of interest; and certain payments made by a solicitor municipal advisor to another solicitor municipal advisor. However, the MSRB currently does not have the necessary information to calculate the totality of these costs.

Table 1 below shows the number of solicitor municipal advisory firms registered with the MSRB as of the end of January 2021. The table groups together solicitor municipal advisor only firms (meaning those firms that indicated to the MSRB that they engage in solicitation activity only and not non-solicitation municipal advisory activity) and separately groups together those solicitor municipal advisor firms that indicated to the MSRB in Form A-12 that they engage in both solicitation and non-solicitation municipal advisory activities (*e.g.*, under some engagements, they conduct solicitations of municipal entities and/or obligated persons whereas pursuant to other engagements, they provide covered advice to municipal entities and/or obligated persons). Table 1 also illustrates the type of solicitation activity in which solicitor municipal advisory firms registered with the MSRB engage (*i.e.*, solicitations for investment advisory business versus other solicitations), as reported by solicitor municipal advisory firms on Form A-12.²⁸

Table 2 illustrates preliminary estimates for both the upfront and ongoing compliance costs assuming implementation of the new draft Rule G-46 for

²⁷ Based on feedback from the comment letters received, the MSRB proposes to require solicitor municipal advisors to provide to their clients full and fair disclosure in writing of all material conflicts of interest and any legal or disciplinary event that would be material to a reasonable solicitor client's evaluation of the solicitor municipal advisor or the integrity of its management or advisory personnel. These disclosure requirements will entail additional resources to achieve and may result in additional upfront costs.

²⁸ Pursuant to MSRB Rule A-12, on registration, all municipal advisors, including solicitor municipal advisors, must register with the MSRB prior to engaging in any municipal advisory activity. Form A-12 is the single, consolidated form for registrants to provide the MSRB with registration information required under Rule A-12. Among other things, Form A-12 is used to: register with the MSRB, update registration information following a change to any information contained in the form and affirm registration information on an annual basis. The data in Tables 1 and 2 below regarding the number and breakdown of solicitor municipal advisor firms and the types of activities in which they engage is derived from Form A-12 data submitted to the MSRB.

each solicitor municipal advisory firm in its respective group.²⁹ As of January 2021, there is a total of 105 municipal advisory firms registered with the MSRB who indicated solicitation business activities on Form A-12, with 20 of those firms indicating that they engage solely in solicitation activities and the remaining 85 firms indicating they engage in both solicitation and non-solicitation municipal advisory activities. Of the 20 municipal advisory firms engaging solely in solicitation activities, 17 firms (10 + 7) indicate solicitation activities made on behalf of investment advisory business and three firms indicate solicitation activities only made on behalf of non-investment advisory business. Of the 85 municipal advisory firms engaging in both solicitation and non-solicitation activities, 58 firms (26 + 32) indicate solicitation activities made on behalf of investment advisory business and 27 firms indicate solicitation activities only made on behalf of non-investment advisory business.

Table 1. Number of Solicitor Municipal Advisory Firms

Business Activities	Number of Firms
Firms with Solicitation Activities Only	20
Investment Advisory Business Only	10
Non-Investment Advisory Business Only	3
Both	7
Firms with Solicitation and Non-Solicitation Activities	85
Investment Advisory Business Only	26
Non-Investment Advisory Business Only	27
Both	32
Total	105

²⁹ The number of estimated hours for all groups of solicitor municipal advisors in Table 2 has increased slightly from previously estimated hours in the First Request for Comment. This reflects the additional requirements for documentation on the relationship between a solicitor municipal advisor and its solicitor client, disclosure of material conflicts of interest and expanded required disclosures to solicited entities for certain payments made by a solicitor municipal advisor to another solicitor municipal advisor.

Table 2. Estimated Incremental Compliance Costs for Each Solicitor Municipal Advisory Firm³⁰

Cost Components	Assumed Hourly Rate	20 Firms with Solicitation Activities Only				85 Firms with Solicitation and Non-Solicitation Activities			
		17 Firms On Behalf of Investment Advisory		3 Firms Not On Behalf of Investment Advisory		58 Firms On Behalf of Investment Advisory		27 Firms Not On Behalf of Investment Advisory	
		Number of Hours	Cost per Firm	Number of Hours	Cost per Firm	Number of Hours	Cost per Firm	Number of Hours	Cost per Firm
Upfront Cost									
a) Revision of Policies and Procedures	\$ 470	3.0	\$ 1,410	4.0	\$ 1,880	2.5	\$ 1,175	3.5	\$ 1,645
b) Training	\$ 620	1.0	\$ 620	1.5	\$ 930	1.0	\$ 620	1.5	\$ 930
Ongoing Compliance Cost - Per Each Solicitation	\$ 430	2.0	\$ 860	3.0	\$ 1,290	2.0	\$ 860	3.0	\$ 1,290

As previously mentioned, the incremental costs for the subgroup of solicitor municipal advisory firms soliciting on behalf of investment advisory business may be lower than other solicitor municipal advisory firms to the extent that such solicitor municipal advisors engage in solicitations that are subject to the former cash solicitation rule. These solicitor municipal advisors are presumed to have policies and procedures consistent with, although not necessarily identical to, some of the requirements under draft Rule G-46. In addition, the MSRB assumes that municipal advisory firms that engage in both solicitation and non-solicitation activities are currently in compliance with Rule G-42 with respect to their non-solicitation municipal advisory activities. The MSRB believes these firms may be able to leverage some of their existing Rule G-42 policies and procedures, resulting in a potentially lower upfront cost for implementing draft Rule G-46 as compared to municipal advisory firms that engage in solicitation activities only. For example, municipal advisory firms that engage in both solicitation and non-solicitation activities are likely accustomed to documenting their

³⁰ Hourly rate data are gathered from the 2013 SEC's Final Rule on Registration of Municipal Advisors, [17 CFR Parts 200, 240 and 249](#). The data reflect the 2021 hourly rate level after adjusting for the annual wage inflation rate of 2% between 2013 and 2021. The MSRB uses the higher hourly rate in each category of costs. For example, while the revision of policies and procedures can be conducted by either an in-house attorney (average hourly rate \$445) or outside counsel (average hourly rate \$470), the MSRB chooses the higher hourly rate for this analysis to be conservative in the cost estimate (upper bound). Similarly, for both the training and the ongoing compliance cost per each solicitation, the task can be performed by either a Chief Compliance Officer (average hourly rate of \$620), an in-house compliance attorney (average hourly rate \$430) or an in-house compliance manager (average hourly rate \$316), and the MSRB chooses the Chief Compliance Officer rate for the training and the compliance attorney rate for the ongoing compliance cost in the estimates.

relationships in an engagement letter and may be able to leverage their existing supervisory and compliance framework to extend it to their solicitation activities.

Effect on Competition, Efficiency, and Capital Formation

The MSRB believes that draft Rule G-46 would neither impose a burden on competition nor hinder capital formation, as the proposed rule changes bring a similar regulatory regime to solicitor municipal advisors that currently exists for non-solicitor municipal advisors under Rule G-42 and for underwriters under the G-17 Underwriter's Guidance. The MSRB believes that the proposed rule would improve the municipal securities market's operational efficiency and promoting regulatory certainty by providing solicitor municipal advisors with a clearer understanding of regulatory obligations, as well as enhancing the transparency and protection for recipients of the solicitations, further promoting fair dealings between market participants.

At present, the MSRB is unable to quantitatively evaluate the magnitude of the efficiency gains or losses, but believes the overall benefits accumulated over time for market participants would outweigh the upfront costs of revising policies and procedures and ongoing compliance and recordkeeping costs by solicitor municipal advisors.

The MSRB does not expect that draft Rule G-46 would change the competitive landscape of the solicitor municipal advisory services, as the upfront costs are expected to be relatively minor for all solicitor municipal advisory firms while the ongoing costs are expected to be proportionate to the size and business activities of each solicitor municipal advisory firm.

Request for Comments

The MSRB seeks comments in response to the following questions, as well as on any other topic relevant to the draft amendments. The MSRB particularly welcomes statistical, empirical and other data from commenters that may support their views and/or relate to the topics, statements or questions raised in this request for comment.

1. Do solicitor municipal advisors anticipate any challenges to implementation of draft Rule G-46? If yes, do commenters have any alternatives that they would like to propose for the MSRB's consideration? If so, please describe them.

2. Is there data or studies available to quantify the benefits and burdens of draft Rule G-46? Are the burdens appropriately outweighed by the benefits?
3. Are the narrower standards regarding a solicitor municipal advisor's representations more workable for solicitor municipal advisors? Do these narrower standards provide solicited entities with sufficient protections?
4. Does new Supplementary Material .02 regarding fair dealing and fiduciary duty address commenter concerns regarding the application, or lack thereof, of a federal fiduciary duty to solicitor municipal advisors? Is further clarification necessary?
5. Do commenters agree or disagree with the preliminary estimates set forth in this Request for Comment? To the extent possible, please provide evidence to support your assertions.
6. Would there be value in the MSRB providing additional detail regarding the "terms and amount of the compensation" that would be required to be disclosed in Rule G-46(c)? For example, would stakeholders find it helpful if the MSRB specified that the solicitor should disclose whether the compensation arrangement is contingent, fixed, on a trailing basis, *etc.*?
7. Are the revised timing and manner of disclosure standards set forth in draft Rule G-46(f) workable for direct solicitations? Indirect solicitations? Is this approach more or less burdensome than the approach originally proposed in the First Request for Comment?
8. Draft Rule G-46(g) would prohibit solicitor municipal advisors from receiving excessive compensation. Similar prohibitions that apply to underwriters and non-solicitor municipal advisors set forth factors that are relevant to whether the regulated entity's compensation is excessive.³¹ Should the MSRB provide similar guidance regarding the factors that are relevant to whether a solicitor municipal advisor's compensation is excessive? If so, what should those factors be? How do non-solicitor municipal advisors that use the services of solicitor municipal advisors ensure that they do not pay unreasonable fees to

³¹ See G-17 Underwriter's Guidance and Rule G-42, SM .11.

solicitor municipal advisors, as required by Rule G-42(e)(i)(E)? What are the compensation structures that are typically used by solicitors (*e.g.*, contingent, flat fee, *etc.*)?

9. Should disclosures be permitted to be provided orally? Would an ability to provide oral disclosures increase harmonization with the IA Marketing Rule? Would such an ability increase the benefits or decrease the burdens associated with draft Rule G-46? What type of guidance from the MSRB would facilitate a solicitor municipal advisor's ability to provide such disclosures orally?
10. Draft Rule G-46(e)(iii)(B) would require a solicitor municipal advisor soliciting on behalf of a third-party investment adviser to provide to the solicited entity, among other things, a description of how the solicited entity can obtain a copy of the solicitor client's Form ADV, Part 2. This obligation would apply whether the investment adviser client is an SEC-registered investment adviser or a state-registered investment adviser. Are there any circumstances under which a solicitor municipal advisor would not be able to comply with this proposed requirement? For example, are there any situations under which a solicitor municipal advisor's investment adviser client would not be obligated to file a Form ADV?
11. Should a municipal advisor client of a solicitor municipal advisor be required to make a bona fide effort to ascertain whether the solicitor municipal advisor has provided any or all of the disclosures related to the municipal advisor client to the solicited entities (*e.g.*, the role and compensation disclosures and/or solicitor client disclosures required by draft Rule G-46(e))? For example, should the engagement documentation require the solicitor municipal advisor to contractually commit to provide the disclosures required by draft Rule G-46, and if so, should the municipal advisor client be required to undertake some level of diligence to confirm that the required disclosures are, in fact, made?
12. Do commenters believe that there is any value to solicited entities in receiving disclosures regarding the payments made by a solicitor municipal advisor to another solicitor municipal advisor to facilitate the solicitation? If so, does such value exceed the costs associated with making such disclosures?

13. Would the draft requirements of draft Rule G-46 result in a disproportionate and/or undue burden for small municipal advisors? If so, do commenters have any specific recommendations to alleviate these burdens while still promoting the objectives of the draft rule? Please offer suggestions.

14. Would the draft requirements of draft Rule G-46 result in a disproportionate and/or undue burden on minority and women-owned business enterprise (MWBE), veteran-owned business enterprise (VBE) or other special designation municipal advisor firms? If so, do commenters have any specific recommendations to alleviate these burdens while still promoting the objectives of the draft rule? Please offer suggestions.

December 15, 2021

* * * * *

Text of Proposed Amendments*

Rule G-46: Duties of Solicitor Municipal Advisors

~~(e)~~(a) *Definitions.*

(i) “Compensation” means any cash, in-kind or non-cash remuneration.

(ii) “Excluded communications” means (A) advertising by a dealer, municipal advisor, or investment adviser; (B) direct or indirect communications with an obligated person if such obligated person is not acting in the capacity of an obligated person; (C) direct or indirect communications with an obligated person made for the purpose of obtaining or retaining an engagement that is not in connection with the issuance of municipal securities or with respect to municipal financial products; and (D) direct or indirect communications made for the purpose of obtaining or retaining an engagement for or in connection with municipal financial products that are investment strategies to the extent that those investment strategies are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments.

(iii) “Solicitation” means a direct or indirect communication with a municipal entity or obligated person made by a solicitor municipal advisor, for direct or indirect compensation, on behalf of a municipal advisor or investment adviser that does not control, is not controlled by, or is not under common control with the solicitor municipal advisor for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of a municipal advisor for or in connection with municipal financial products or the issuance of municipal securities or of an investment adviser to provide investment advisory services to or on behalf of a municipal entity; provided, however, that it does not include excluded communications, as defined in Rule G-46(a)(ii).

(iv) “Solicited entity” means any municipal entity (as defined in Section 15B(e)(8) of the Act, 17 CFR 240.15Ba1-1(g) and other rules and regulations thereunder) or obligated person (as defined in Section 15B(e)(10) of the Act, 17 CFR 240.15Ba1-1(k) and other rules and regulations thereunder) the solicitor municipal advisor has solicited, is soliciting or intends to solicit within the meaning of Sections 15B(e)(4)(A)(ii) and (e)(9) of the Act and the rules and regulations thereunder.

~~(v)~~(v) “Solicitor client” means the municipal advisor or investment adviser on behalf of whom the solicitor municipal advisor undertakes a solicitation within the meaning of Sections 15B(e)(4)(A)(ii) and (e)(9) of the Act and the rules and regulations thereunder.

~~(iii)~~(vi) “Solicitor municipal advisor” means, for purposes of this rule, a municipal advisor within the meaning of Section 15B(e)(4) of the Act, 17 CFR 240.15Ba1-1(d)(1)-(4) and other rules and regulations thereunder; provided, that it shall exclude a person that is otherwise a municipal advisor solely based on activities within the meaning of Section 15B(e)(4)(A)(i) of the Act and the rules and regulations thereunder.

* Underlining indicates new language; strikethrough denotes deletions.

(vii) A “solicitor relationship” shall, for purposes of this rule, be deemed to exist when a municipal advisor enters into an agreement to undertake a solicitation of a municipal entity or obligated person within the meaning of Section 15B(e)(9) of the Act and the rules and regulations thereunder. The solicitor relationship shall be deemed to have ended on the date which is the earlier of (i) the date on which the solicitor relationship has terminated pursuant to the terms of the documentation of the solicitor relationship required in section (c) of this rule or (ii) the date on which the solicitor municipal advisor withdraws from the solicitor relationship.

(b) Disclosure to Solicitor Clients. A municipal advisor must, prior to or upon engaging in municipal advisory activities, provide to the solicitor client full and fair disclosure in writing of:

(i) all material conflicts of interest; and

(ii) any legal or disciplinary event that would be material to a reasonable solicitor client’s evaluation of the solicitor municipal advisor or the integrity of its management or advisory personnel.

As an alternative to providing a narrative description of any such legal or disciplinary events, information regarding such events may be disclosed for purposes of this subsection by: (i) in the case of solicitor municipal advisors that are also registered broker-dealers or investment advisers, identification of the specific type of event and specific reference to the relevant portions of the solicitor municipal advisor’s Broker Check report or Form ADV if the solicitor municipal advisor provides detailed information specifying where the client may electronically access such forms or (ii) in the case of all other solicitor municipal advisors, identification of the specific type of event and specific reference to the relevant portions of the solicitor municipal advisor’s most recent Forms MA or MA-I filed with the Commission if the solicitor municipal advisor provides detailed information specifying where the client may electronically access such forms.

~~(a)~~(c) Documentation of the Solicitor Relationship. A solicitor municipal advisor must evidence each of its solicitor relationships by a writing or writings created and delivered to the solicitor client prior to, upon or promptly after the establishment of the solicitor relationship. The writing(s) must be dated and include, at a minimum:

(i) a description of the solicitation activities to be engaged in by the solicitor municipal advisor on behalf of the solicitor client (including the scope of the agreed-upon activities and a statement that the scope of the solicitation is anticipated to include the solicitation of municipal entities and/or obligated persons);

(ii) the terms and amount of the compensation to be received by the solicitor municipal advisor for such activities; and

(iii) the term of the engagement the date, triggering event, or means for the termination of the relationship, or, if none, a statement that there is none; and

(iv) any terms relating to withdrawal from the relationship.

~~(b)~~(d) Representations to Solicited Entities.

~~(i) All representations made by a solicitor municipal advisor to a solicited entity in connection with a solicitation subject to this rule, whether written or oral, must be truthful and accurate and must not misrepresent or omit material facts.~~

~~(ii)(i) A solicitor municipal advisor must have a reasonable basis for the representations and other material information conveyed to a solicited entity and must refrain from making representations—a representation that the solicitor municipal advisor knows or should know are inaccurate is either materially false or materially misleading due to the omission of a material fact about the capacity, resources or knowledge of the solicitor client.~~

(ii) A solicitor municipal advisor must have a reasonable basis for any material representations it makes to a solicited entity regarding the capacity, resources or knowledge of the solicitor client.

~~(e)~~(e) Disclosures to Solicited Entities. A solicitor municipal advisor must disclose to any solicited entity all material facts about the solicitation in the manner described in section ~~(d)~~(f) of this rule. This includes, but is not limited to, an obligation to disclose the following:

(i) Role and Compensation Disclosures. A solicitor municipal advisor must disclose to any solicited entity:

(A) the name of the solicitor municipal advisor;

(B) the name of the solicitor client;

(C) the type of business being solicited (*i.e.*, municipal advisory business or investment advisory services);

(D) the material terms of the solicitor municipal advisor's compensation arrangement, including a description of the compensation provided or to be provided, directly or indirectly, to the solicitor municipal advisor for such solicitation;

(E) payments made by the solicitor municipal advisor to another solicitor municipal advisor (including an affiliate, but not an employee) to facilitate the solicitation, regardless of characterization; and

~~(E)~~(F) the following statements:

(1) In connection with its solicitation activities as a municipal advisor, a solicitor municipal advisor does not owe a fiduciary duty to the entities that it solicits and is not required to act in the best interests of such entities without regard to the solicitor municipal advisor's own financial or other interests. However, in connection with its solicitation

activities, a solicitor municipal advisor is required to deal fairly ~~at all times with~~ with all persons, including both solicited entities and the solicitor municipal advisor's clients; and

(2) ~~a~~ A solicitor municipal advisor's primary role is to solicit the solicited entity on behalf of certain third-party regulated entities and the solicitor municipal advisor will be compensated for its solicitation services by the solicitor municipal advisor's client.

(ii) Conflicts Disclosures. A solicitor municipal advisor must disclose any material conflicts of interest, including, but not limited to any material relationships of the solicitor municipal advisor with any employees or board members of the solicited entity or any other persons affiliated with the solicited entity or their officials who may have influence over the selection of the solicitor client.

(iii) Solicitor Client Disclosures. A solicitor municipal advisor must provide to the solicited entity the following information regarding the solicitor client:

(A) the type of information that is generally available on Form MA (in the case of a municipal advisor client, or Form ADV, Part 2 (in the case of an ~~SEC-registered~~ investment adviser client); and

(B) a description of how the solicited entity can obtain a copy of the solicitor client's Form MA or Form ADV, Part 2, as applicable.

~~(d)(f)~~ Timing and Manner of Disclosures to Solicited Entities. Any disclosures required under section ~~(e)~~ (e) of this rule ~~must comply with the following~~ be made in writing and delivered:

(i) at the time of the first communication, as that term is used in the definition of "solicitation" under Rule G-46(a)(iii), to a solicited entity on behalf of a specific solicitor client;

~~(i)(ii)~~ (ii) if the solicitation results in a solicited entity engaging a solicitor client for investment advisory services or municipal advisory services, again at the time that such engagement documentation is delivered to the solicited entity or promptly thereafter. Disclosures required by this paragraph (ii) may be provided by either the solicitor client or the solicitor municipal advisor, but Disclosures must be made in writing to an official of the solicited entity that: (1) the solicitor municipal advisor (or, the solicitor client, if the solicitor client provides such disclosures) reasonably believes has the authority to bind the solicited entity by contract; and (2) to the knowledge of the solicitor municipal advisor, is not a party to a disclosed conflict.

~~(ii) Disclosures must be delivered at the time of the first solicitation of the solicited entity for that specific solicitor client. In the event that a solicitor municipal advisor makes multiple solicitations of a solicited entity on behalf of the same client for the same type of services (i.e., municipal advisory business or investment advisory services) over the course of more than one calendar year, the disclosures must be provided annually thereafter until the solicitor municipal advisor ceases to make such solicitations of such solicited entity. To the extent that any additional conflicts that require disclosure under this rule arise before a solicitation is complete, such conflicts must be disclosed as they arise.~~

(g) Specified Prohibitions. A solicitor municipal advisor is prohibited from:

(i) receiving excessive compensation; and

(ii) delivering an invoice for fees or expenses for municipal advisory activities that is materially inaccurate in its reflection of the activities actually performed or the personnel that actually performed those activities.

~~(f)~~(h) Recordkeeping. Consistent with MSRB Rule G-8(h) and Rule 15Ba1-8(a)(1)-(8) under the Act, a solicitor municipal advisor shall retain for a period of not less than five years:

(i) evidence that the disclosures required by section (b) of this rule were made in the manner required by that section;

~~(i)~~(ii) a copy of each writing or writings required by ~~Rule G-46(a)~~ section (c) of this rule;

~~(ii)~~(iii) documentation substantiating the solicitor municipal advisor's reasonable basis belief regarding its representations as described in ~~Rule G-46(b)~~ section (d) of this rule; and

~~(iii)~~(iv) evidence that the disclosures required by section ~~(c)~~(e) of this rule were made in the manner described in ~~Rule G-46(d)~~ section (f) of this rule (e.g., automatic email delivery receipt).

Supplementary Material

.01 Reasonable Basis for Representations. While a solicitor municipal advisor must have a reasonable basis for the representations ~~and other material information conveyed to a solicited entity, described in Rule G-46(d),~~ the solicitor municipal advisor is not required to actively seek out every piece of information that may be relevant to such a representation. ~~However, the solicitor municipal advisor must have some basis for its statements and must not ignore any "red flags."~~ For example, a solicitor municipal advisor soliciting a municipal entity on behalf of an investment advisor to perform investment advisory services ~~may~~ should have reviewed the Form ADV for the investment adviser and may have met with a knowledgeable representative of the investment adviser on one or more occasions to better understand its business and to ask any questions that the solicitor municipal advisor may have. ~~In addition, the solicitor municipal advisor has an affirmative duty to refrain from making representations that the solicitor municipal advisor knows or should know are inaccurate or misleading. For example, the solicitor municipal advisor must not knowingly misrepresent the capacity, resources or knowledge of a municipal advisor on whose behalf it is soliciting municipal advisory services.~~

.02 Fair Dealing and Fiduciary Duty. Solicitor municipal advisors, like all municipal advisors, must comply with Rule G-17, on conduct of municipal securities and municipal advisory activities. As a result, like all municipal advisors, solicitor municipal advisors must deal fairly with all persons, including solicited entities and solicitor clients and must not engage in any deceptive, dishonest or unfair practice. Unlike non-solicitor municipal advisors, whose clients may include municipal entities, solicitor clients are the third-party financial professionals on whose behalf solicitor municipal advisors conduct solicitations. As a result, in connection with their solicitation activities, solicitor municipal advisors do not owe a fiduciary duty

under Exchange Act Section 15B(c)(i) or MSRB rules to either their solicitor clients or the municipal entity clients that they solicit and are not required to act in their clients' best interest without regard to the solicitor municipal advisor's own financial or other interests. However, solicitor municipal advisors may be subject to fiduciary or other duties under state or other laws. Nothing contained in this rule shall be deemed to supersede any more restrictive provision of state or other laws applicable to municipal advisory activities. Additionally, as described further in SM .03 below, a solicitor municipal advisor may also engage in non-solicitation municipal advisory activity. In that event, the requirements of Rule G-42 will apply with respect to such activity and a fiduciary duty will apply with respect to the municipal entity clients of the municipal advisor.

.02 .03 Relationship to Rule G-42. Municipal advisors should be mindful that one may be, simultaneously, both a solicitor municipal advisor for purposes of Rule G-46 and a non-solicitor municipal advisor for purposes of Rule G-42. For example, a municipal advisor may provide "advice" as defined in Rule G-42 to a municipal entity (the "advisory engagement") and separately may act as a solicitor municipal advisor with respect to that same municipal entity or another municipal entity as contemplated in this Rule G-46 (the "solicitor municipal advisor engagement"). As a result, the municipal advisor would be subject to Rule G-42 with respect to the advisory engagement and would be subject to Rule G-46 with respect to the solicitor municipal advisor engagement. Municipal advisors should evaluate the activity undertaken with respect to each engagement to determine which rule governs (Rule G-42 or Rule G-46) and ensure the written supervisory procedures required under Rule G-44 reflect such.

ALPHABETICAL LIST OF COMMENT LETTERS ON NOTICE 2021-18 (DECEMBER 15, 2021)

1. National Association of Municipal Advisors: Letter from Susan Gaffney, Executive Director, dated March 15, 2022
2. Securities Industry and Financial Markets Association: Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, dated March 15, 2022
3. Third-Party Marketers Association: Letter from Donna DiMaria, Chairman of the Board of Directors and Chair of the 3PM Regulatory Committee, dated March 15, 2022



March 15, 2022

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

RE: 2021-18: Second Request for Comment on Fair Dealing Solicitor Municipal Advisor Obligations and New Draft Rule G-46

Dear Mr. Smith:

Thank you for the opportunity to comment on MSRB Notice 2021-18 regarding Solicitor Municipal Advisors. NAMA represents independent municipal advisory firms and individual municipal advisors (MAs) from across the country and is dedicated to educating and representing its members on regulatory, industry and market issues.

We must begin our comments expressing extreme concern about the “Books and Records” discussion (for proposed rule G-46) on page 13 of the Notice. The Notice states that (by paraphrase) the MSRB proposes to include recordkeeping expectations into the text of the Rule itself rather than including it in MSRB Rule G-8, and that the MSRB will take a similar approach with respect to future MSRB rules or rule amendments with the goal of including books and records obligations to each MSRB rule in the text of each rule itself.

As far as we know the MSRB has not discussed this proposed change in its recordkeeping rulemaking approach and framework with stakeholders, nor has it proposed the change separately and within its own context. Finding a proposed change that impacts the entirety of MSRB recordkeeping rules within a rule about solicitors, and without specifically highlighting the larger implications of such a change, is very surprising. As a matter of principle, proposed broad changes to MSRB rulemaking should not be tucked away in unrelated proposed rulemaking.

The MSRB should have detailed and substantive discussions with stakeholders about its recordkeeping rule intentions and develop a formal proposal for public comment. This is especially true as the Notice states that these changes to the MSRB’s recordkeeping approach “will be more helpful to stakeholders in the long run.” Without input from stakeholders, and without stakeholder review and consideration of such a change, we are unclear how the MSRB has come to this conclusion.

As for the Notice, we agree in principle with the points made in the MSRB’s summary of proposed rules for solicitors. We would suggest that, as with all MSRB rulemaking, the MSRB use existing rules and apply them when possible – or at least apply the baseline intents of them - uniformly. We noted previously that we believe this could be done by using the current rulemaking structure to highlight and include areas where rulemaking applies to solicitors and amend rules to add language specifically needed for solicitors. While we do not necessarily disagree that a new rule is out of place, we again

emphasize the need for MSRB rulemaking and guidance to be clear and especially in this case, avoid confusion between inter- and intra- agency rulemakings.

The only other comment we wish to make about the specific questions in the proposal relate to written disclosures. We support MSRB's proposal to have disclosures provided in writing and not be given orally. This overlays with MSRB rulemaking in this area for broker-dealers and municipal advisors and upholds a key MSRB mission to protect issuers.

We would also like to highlight another broader point raised in the Notice highlighting potential undue burdens the rulemaking places on small firms. This is a topic NAMA has raised consistently over the years and one that deserves further discussion. When the Dodd Frank Act was developed, there was specific effort to make sure that by regulating MA firms, the regulatory regime would not be overly burdensome and costly for small municipal advisors (Section 15B(2)(L)(iv)). We would welcome having conversations on the impact the regulatory regime has on MAs with the MSRB, and helping the MSRB understand these burdens.

Finally, we would like to note that (due to no actions of the authors or staff addressing this issue), the proposed rules apply to professionals that solicit on behalf of third-party professionals and where a government would rely on what is said to them. These professionals have nothing to do with municipal advisory work yet the "solicitor municipal advisor" phrasing implies that the professional involved is providing advice related to a municipal securities transaction. The real intention discussed in the Notice was to regulate "solicitor MAs" in order to have some type of regulatory regime, especially related to pay to play arrangements, over public pension placement agents. It is unfortunate that professionals unrelated to municipal advisory services causes confusion on the larger scale due to the naming convention used for these solicitor professionals.

We realize that the MSRB must address the application of MSRB rules to these professionals and undergo the arduous work to align them with SEC Investor Adviser rules AND MSRB Municipal Advisor rules, AND MSRB Broker-Dealer rules. We hope that this proposal will lead to finalizing the regulatory framework over solicitors and that going forward the MSRB can allocate its time and resources to rulemaking that applies to a larger, regulated profession audience.

Thank you for the opportunity to comment on proposed Rule G-46.

Sincerely,

A handwritten signature in cursive script that reads "Susan Gaffney".

Susan Gaffney
Executive Director



March 15, 2022

VIA ELECTRONIC SUBMISSION

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

**Re: MSRB Notice 2021-18 – Second Request for Comment on Fair Dealing
Solicitor Municipal Advisor Obligations and New Draft Rule G-46**

Dear Mr. Smith,

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates this opportunity to comment on Municipal Securities Rulemaking Board (“MSRB”) Notice 2021-18 (the “Notice”)² second request for comment on fair dealing solicitor municipal advisor obligations and new draft Rule G-46. We understand that new draft Rule G-46 would (i) codify interpretive guidance previously issued in 2017 that relates to the obligations of solicitor municipal advisors under Rule G-17 and (ii) add additional requirements that would align some of the obligations imposed on solicitor municipal advisors with those applicable to non-solicitor municipal advisors under Rule G-42, to duties of non-solicitor municipal advisors, to underwriters under Rule G-17 on fair dealing, and to certain solicitations undertaken on behalf of third-party investment advisers under the U.S. Securities and Exchange Commission’s (“SEC”) marketing rule for investment advisers.

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. 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>. SIFMA’s members underwrite over 90% of new issues of municipal securities by volume.

² MSRB Notice 2021-18, Second Request for Comment on Fair Dealing Solicitor Municipal Advisor Obligations and New Draft Rule G-46 (December 15, 2021).

SIFMA applauds the MSRB's efforts in revising its original proposal³ in light of comments received⁴ and in seeking a second round of public comment. In particular, we applaud the MSRB for clarifying the ambiguity regarding the standard of conduct that applies to solicitor municipal advisors.

We do, however, still have certain concerns with the (1) lack of solicitation prohibition for solicitor municipal advisors, (2) inconsistency with the SEC's Pay-to-Play Rule (as defined herein), (3) lack of safe harbor for inadvertent solicitation, and (4) recordkeeping requirements. Also, responses to the MSRB's specific questions are attached hereto as Appendix A.

I. Concerns with Lack of Solicitation Prohibition

1) Rule G-46 Should Include a Broad Solicitation Prohibition for Solicitor Municipal Advisors

Under Rule G-38, no dealer may provide or agree to provide, directly or indirectly, payment to any person who is not an affiliated person of the dealer for a solicitation of municipal securities business on behalf of such dealer (the "Dealer Solicitation Ban").⁵ To better align the obligations imposed on municipal advisors with those imposed by the Dealer Solicitation Ban, a broad solicitation ban, similar to Rule G-38, should equally apply to solicitor municipal advisors and such ban should be included in Rule G-46.

Solicitation has been an area of concern for regulators in both rulemaking and enforcement.⁶ Importantly, the practice of paying municipal advisors for the solicitation of municipal advisory business could create material conflicts of interest and could give rise to circumstances suggesting quid pro quo corruption involving municipal entities resulting from such conflicted interests. Such practice could be damaging to the integrity of the municipal securities market.

The Dodd-Frank Act provided the MSRB with the authority to create rules for solicitor municipal advisors⁷ and the inclusion of a broad solicitation ban in Rule G-46 would further the purpose of the Securities Exchange Act of 1934 by addressing an area of potential corruption, or appearance of corruption. We believe that it is critical that the MSRB continue to protect the

³ MSRB Notice 2021-07, Request for Comment on Fair Dealing Solicitor Municipal Advisor Obligations and New Draft Rule G-46 (March 17, 2021).

⁴ See Securities Industry and Financial Markets Association: Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, dated June 17, 2021, available at <https://www.msrb.org/rfc/2021-07/SIFMA.pdf>.

⁵ See MSRB Rule G-38.

⁶ See Report on the Municipal Securities Market, U.S. Securities and Exchange Commission (July 31, 2021), available at <https://www.sec.gov/news/studies/2012/munireport073112.pdf>.

⁷ See Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"), which broadened the mission of the MSRB to include the protection of municipal entities and obligated persons. The Dodd-Frank Act also expanded the MSRB's regulatory jurisdiction to cover municipal advisors who solicit business from municipal entities on behalf of others.

integrity of the municipal securities market by creating a broad solicitation ban for solicitor municipal advisors, similar to Rule G-38, and including such ban in new Rule G-46.

2) *Rule G-46 Should Include a Narrow Solicitation Prohibition for Solicitor Municipal Advisors*

In the event the MSRB does not include a broad solicitation ban, the MSRB should, at a minimum, include in proposed Rule G-46 a narrow solicitation prohibition on payments by municipal advisors to other non-affiliated municipal advisors for the solicitation of municipal advisory business, just as Rule G-38 currently prohibits dealers from paying other non-affiliated dealers to solicit municipal securities business.

As noted above, solicitation in connection with obtaining municipal advisory business could create material conflicts of interest and give rise to circumstances suggesting corruption. We believe adding a solicitation prohibition to Rule G-46 regarding non-affiliated municipal advisors, even though narrower than Rule G-38, is important and would help protect the integrity of the municipal securities market. Furthermore, SIFMA believes all market participants engaging in the same or similar activity should be subject to the same or similar standard. We also feel strongly that uniform rules for dealers and municipal advisors are critical to ensuring a level playing field for all municipal market participants.

II. Concerns with Inconsistency with SEC’s Pay-to-Play Rule

1) *Uniform Approach for Dealers and Solicitor Municipal Advisors*

The MSRB adopted the Dealer Solicitation Ban because it was concerned that dealers were using solicitors not subject to MSRB rules as a way to avoid the limitations of Rule G-37.⁸ SIFMA believes that the proposed draft Rule G-46 does not adequately address the same concern for solicitor municipal advisors.

If a broad or narrow solicitation prohibition is not included in Rule G-46, SIFMA recommends that the MSRB develop a uniform approach that allows both dealers and municipal advisors to use either affiliated or non-affiliated regulated persons to solicit municipal securities business and municipal advisory business, respectively, provided that such regulated persons are subject to comprehensive pay-to-play regulation. Such an approach is similar to and would align with the SEC’s Pay-to-Play Rule.⁹

In proposing the SEC’s Pay-to-Play Rule, the SEC reversed course from its initial rulemaking, which had originally included a complete ban on third-party solicitors (similar to Rule G-38).¹⁰ The SEC’s Pay-to-Play Rule, instead, allows investment advisers to compensate third-party “regulated persons” to solicit government entities, provided the “regulated persons” are

⁸ See MSRB Notice 2011-04, Request for Comment on Pay to Play Rule For Municipal Advisors (January 14, 2011).

⁹ See Political Contributions by Certain Investment Advisers; Final Rule, 75 Fed. Reg. 41,018 (July 14, 2010) (“SEC’s Pay-to-Play Rule”) (codified at 17 C.F.R § 275.206(4)-5).

¹⁰ SEC’s Pay-to-Play Rule, 75 Fed. Reg. at 41,036-41,041.

themselves (i) registered with the SEC and (ii) subject either to the SEC's Pay-to-Play Rule, or an equivalent pay-to-play regime. The SEC's Pay-to-Play Rule is an example of how a regulation can reduce the risk of pay-to-play while still allowing firms flexibility in choosing who solicits on their behalf.

III. Inadvertent Solicitation

1) Lack of Safe Harbor for Inadvertent Solicitation

The MSRB did not respond to our initial comment with respect to inadvertent solicitations. We continue to believe there could be scenarios, similar to Rule G-42 Supp. Material .07 Inadvertent Advice, where an inadvertent solicitation is provided to a solicited entity. For example, where a firm initially is soliciting the solicited entity on behalf of itself but the solicited entity unilaterally chooses not to engage the firm and, instead, seeks to engage a third party investment adviser and the firm earns compensation based on such engagement. If such an event were to occur, there could be an inadvertent solicitation.

We recommend that the MSRB include a safe harbor for inadvertent solicitations in Rule G-46, similar to the safe harbor under Rule G-42 Supp. Material .07 for inadvertent advice, to ensure that certain firms are not unintentionally brought into the solicitor municipal advisor regulatory regime due to no fault of their own. SIFMA believes that such a safe harbor has proved beneficial under Rule G-42 and would similarly be helpful under Rule G-46.

IV. Concerns with Recordkeeping Requirements

1) Streamlining of Rule G-8

In the rule text for draft Rule G-46(h), a solicitor municipal advisor is required to comply with certain recordkeeping requirements. We continue to believe that the substance of the recordkeeping requirements should not be contained in new draft Rule G-46(h). Instead, similar to Rule 15Ba1-8(a)(1)-(8), Rule G-20, Rule G-37, Rule G-42, Rule G-44, and Rule G-3, the recordkeeping requirements should be contained in Rule G-8(h). We believe a central location where all recordkeeping requirements can be found has proved beneficial in the past and has enhanced compliance.

While we understand the MSRB's effort to streamline Rule G-8, we do not believe such approach is helpful or beneficial. First, the approach could decrease operational efficiency by causing confusion of where the recordkeeping requirements can be found. Instead of directing firms to a single location (i.e., Rule G-8), the recordkeeping requirements will be peppered throughout the 400-plus page MSRB Rulebook. Second, for those without knowledge and experience with MSRB rules, such as new legal and compliance personnel, the search for the recordkeeping requirements could cause confusion and prove to be overly burdensome. Third, the approach would likely increase legal and compliance costs because firms would be required to amend written supervisory procedures and other firm resources. Lastly, we think the approach over time could lead to non-compliance with the recordkeeping requirements for certain firms, such as new registrants who may not have experience with MSRB rules and small firms who may not have legal or compliance personnel.

At a minimum, the MSRB should include a cross-reference, similar to Rule 15Ba1-8(a)(1)-(8), stating that there is a requirement in Rule G-46 to keep certain records. For example, rule text stating that “Records Concerning Compliance with Rule G-46: All books and records described in Rule G-46.” We believe such cross reference would help assist our members in complying with the recordkeeping requirements while still providing the MSRB with a more streamlined approach to Rule G-8.

2) Streamlining Approach for Future MSRB Rules and Rule Amendments

In the Notice, the MSRB stated that it is proposing to take a similar approach with respect to future MSRB rules or rule amendments. The MSRB stated that the eventual goal would be to include the recordkeeping requirements applicable to each rule in the text of each rule itself, instead of Rule G-8.

We think the overall approach for future MSRB rules and rule amendments is a substantial change to the structure of the MSRB Rulebook and should be open for public comment. Municipal market participants and the public generally should be made aware of such change and presented with an opportunity to comment. The MSRB may find through the comment process that such approach could cause confusion, be overly burdensome, increase legal and compliance costs and decrease operational efficiency for many firms.

V. Coordinate with Market Participants

We continue to encourage the MSRB to coordinate and communicate with market participants in connection with the development of Rule G-46 and any other related compliance materials. We believe such coordination and communication between market participants and regulators is critical to the rulemaking process.

Thank you for considering SIFMA's comments. If a fuller discussion of our comments would be helpful, I can be reached at (212) 313-1130 or lnorwood@sifma.org.

Sincerely,

A handwritten signature in black ink, appearing to be 'L. Norwood', written over a faint, light-colored signature line.

Leslie M. Norwood
Managing Director
and Associate General Counsel

cc: ***Municipal Securities Rulemaking Board***
Gail Marshall, Chief Regulatory Officer

Appendix A

Responses to the MSRB's Questions

The MSRB specifically seeks input on the following questions:

- 1) Do solicitor municipal advisors anticipate any challenges to implementation of draft Rule G-46? If yes, do commenters have any alternatives that they would like to propose for the MSRB's consideration? If so, please describe them.
 - Response: As with any new rulemaking, SIFMA expects certain challenges to develop in connection with the implementation of Rule G-46. We offer certain alternatives in this Response Letter.

- 2) Is there data or studies available to quantify the benefits and burdens of draft Rule G-46? Are the burdens appropriately outweighed by the benefits?
 - Response: SIFMA does not know of any other data or studies that are available. SIFMA has concerns that the economic analysis may not have included the legal and compliance costs associated with amending written supervisory procedures. See Part I Section (1) of this Response Letter for more information.

- 3) Are the narrower standards regarding a solicitor municipal advisor's representations more workable for solicitor municipal advisors? Do these narrower standards provide solicited entities with sufficient protections?
 - Response: SIFMA applauds the MSRB for narrowing the standards, as suggested in our initial response letter.

- 4) Does new Supplementary Material .02 regarding fair dealing and fiduciary duty address commenter concerns regarding the application, or lack thereof, of a federal fiduciary duty to solicitor municipal advisors? Is further clarification necessary?
 - Response: SIFMA applauds the MSRB for new Supplementary Material .02, as suggested in our initial response letter.

- 5) Do commenters agree or disagree with the preliminary estimates set forth in this Request for Comment? To the extent possible, please provide evidence to support your assertions.
 - Response: See response to this Appendix A Question 2 above.

- 6) Would there be value in the MSRB providing additional detail regarding the "terms and amount of the compensation" that would be required to be disclosed in Rule G-46(c)? For example, would stakeholders find it helpful if the MSRB specified that the

solicitor should disclose whether the compensation arrangement is contingent, fixed, on a trailing basis, etc.?

- Response: SIFMA believes the current rule text adequately captures the description of the compensation arrangement.
- 7) Are the revised timing and manner of disclosure standards set forth in draft Rule G-46(f) workable for direct solicitations? Indirect solicitations? Is this approach more or less burdensome than the approach originally proposed in the First Request for Comment?
- Response: SIFMA believes the current approach is workable and less burdensome than the annual update requirement initially proposed.
- 8) Draft Rule G-46(g) would prohibit solicitor municipal advisors from receiving excessive compensation. Similar prohibitions that apply to underwriters and non-solicitor municipal advisors set forth factors that are relevant to whether the regulated entity's compensation is excessive. Should the MSRB provide similar guidance regarding the factors that are relevant to whether a solicitor municipal advisor's compensation is excessive? If so, what should those factors be? How do non-solicitor municipal advisors that use the services of solicitor municipal advisors ensure that they do not pay unreasonable fees to solicitor municipal advisors, as required by Rule G-42(e)(i)(E)? What are the compensation structures that are typically used by solicitors (e.g., contingent, flat fee, etc.)?
- Response: SIFMA suggests that the MSRB coordinate with solicitor municipal advisors to understand the factors that are relevant and recommends the MSRB provide guidance to assist in complying with the rule.
- 9) Should disclosures be permitted to be provided orally? Would an ability to provide oral disclosures increase harmonization with the IA Marketing Rule? Would such an ability increase the benefits or decrease the burdens associated with draft Rule G-46? What type of guidance from the MSRB would facilitate a solicitor municipal advisor's ability to provide such disclosures orally?
- Response: SIFMA believes that the required disclosures must be made in writing, similar to how dealers and municipal advisors are currently required to provide disclosures, for several reasons. First, the disclosures are critical to understanding and evaluating conflicts of interest and standards of conduct and, as such, must be made in writing. Second, permitting oral disclosures would likely cause confusion for solicited entities because they receive written disclosures from other regulated entities. Third, while the IA Marketing Rule allows for oral disclosures, the oral disclosures are only permitted in certain very limited circumstances that are not applicable in the context of Rule G-

46. Fourth, any benefit to oral disclosure would be vastly outweighed by the burden of trying to demonstrate compliance. Lastly, the MSRB has not permitted oral disclosures for any other of its rules and doing so would ensure an unlevel playing field for regulated entities.

10) Draft Rule G-46(e)(iii)(B) would require a solicitor municipal advisor soliciting on behalf of a third-party investment adviser to provide to the solicited entity, among other things, a description of how the solicited entity can obtain a copy of the solicitor client's Form ADV, Part 2. This obligation would apply whether the investment adviser client is an SEC registered investment adviser or a state-registered investment adviser. Are there any circumstances under which a solicitor municipal advisor would not be able to comply with this proposed requirement? For example, are there any situations under which a solicitor municipal advisor's investment adviser client would not be obligated to file a Form ADV?

- Response: SIFMA's understanding is that investment advisers, including state registered investment advisers, file a Form ADV.

11) Should a municipal advisor client of a solicitor municipal advisor be required to make a bona fide effort to ascertain whether the solicitor municipal advisor has provided any or all of the disclosures related to the municipal advisor client to the solicited entities (e.g., the role and compensation disclosures and/or solicitor client disclosures required by draft Rule G-46(e))? For example, should the engagement documentation require the solicitor municipal advisor to contractually commit to provide the disclosures required by draft Rule G-46, and if so, should the municipal advisor client be required to undertake some level of diligence to confirm that the required disclosures are, in fact, made?

- Response: SIFMA needs more information from the MSRB to adequately respond to this question.

12) Do commenters believe that there is any value to solicited entities in receiving disclosures regarding the payments made by a solicitor municipal advisor to another solicitor municipal advisor to facilitate the solicitation? If so, does such value exceed the costs associated with making such disclosures?

- Response: SIFMA believes that such disclosures are important for transparency and for identifying any potential conflicts of interest.

13) Would the draft requirements of draft Rule G-46 result in a disproportionate and/or undue burden for small municipal advisors? If so, do commenters have any specific recommendations to alleviate these burdens while still promoting the objectives of the draft rule? Please offer suggestions.

- Response: SIFMA has concerns with the books and records requirements and its impact on small municipal advisors. See Part I Section (1) of this Response Letter.

14) Would the draft requirements of draft Rule G-46 result in a disproportionate and/or undue burden on minority and women-owned business enterprise (MWBE), veteran-owned business enterprise (VBE) or other special designation municipal advisor firms? If so, do commenters have any specific recommendations to alleviate these burdens while still promoting the objectives of the draft rule? Please offer suggestions.

- Response: SIFMA is not aware of any disproportionate and/or undue burden on such firms.



OUTSOURCED GLOBAL MARKETING OF ALTERNATIVE + TRADITIONAL INVESTMENTS

March 15, 2022

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

Re: MSRB Notice 2021-18 Second Request for Comment on Fair Dealing solicitor municipal advisor Obligations and New Draft Rule G-46

Dear Mr. Smith;

I am writing to you today on behalf of the Third-Party Marketer’s Association (“3PM”) to provide feedback on behalf of the 3PM Regulatory Committee regarding the second request for comment for Draft Rule G-46 proposed in MSRB Notice 2021-18.

3PM appreciates the MSRB’s efforts to codify existing guidance offered under G-17 and other guidance issued specifically for solicitor municipal advisors.

3PM appreciates the extent to which this rule proposal harmonizes with the SEC’s Marketing Rule which will become final in November 2022 as well as amendments that incorporate the input from the MA community regarding MSRB Notice 2021-07.

Below we provide our feedback on Revised Draft Rule G-46 and address the specific comments posed in the Notice.

Revised Draft Rule G-46

3PM generally agrees with the amendments provided in Notice 2021-18, however we offer the following comments to the revisions made to Draft Rule G-46.

- **Specified Prohibitions** – While we have no objections with the intent to harmonize the MSRBs rules nor to the addition of a prohibition that would prevent a solicitor municipal advisor from delivering a materially inaccurate invoice for fees or expense for municipal advisory activities performed, we do believe that the prohibition added to prevent a solicitor municipal advisor from receiving “excessive compensation” will be problematic.

Although we believe the rationale behind the prohibition to prevent a solicitor municipal advisor from receiving “excessive compensation” is sound, the determination of what is considered “excessive compensation” is left open to interpretation.

For non-solicitor municipal advisors and underwriters, the marketplace in which these firms operate is much more robust than the one that exists for solicitor municipal advisors

In the Economic Analysis of the Notice 2021-18, Table 1, Number of solicitor municipal advisor Firms, the MSRB states that there are only 105 firms whose business includes solicitation activities. This is far less than that number of firms that participate in either MA non-solicitation or underwriting activities.

In business activities where there is considerable supply and demand, the market is generally self-regulating in that buyers become aware of the general range of costs involved with the provision of certain services. Such a market does not exist for solicitor municipal advisors.

In addition to the sparse solicitor municipal advisor marketplace that exists, the market is severely fragmented and there are no accurate or reliable sources to track and determine the appropriate compensation a solicitor municipal advisor should earn.

Furthermore, there is not one set of services that a solicitor municipal advisor may provide their clients. For MA Non-solicitors and underwriters, there is enough history to understand what firms generally charge for certain services such that for these firms, “excessive compensation” is determinable.

Solicitor municipal advisors’ business model vary considerably in terms of the range of services offered to solicitor municipal advisor Clients. Some firms provide the full gamut of services which could include a variety of marketing support services such as collateral materials, population of databases, answering of RFPs and DDQs, development of a website, inbound marketing campaigns, PR, etc. Some firms also provide their solicitor municipal advisor Clients on-going Client Service, where the firm will service any clients it brings to the solicitor municipal advisor Client. Alternatively, there are some firms that merely provide solicitation services to help a solicitor municipal advisor Client raise assets. The marketplace is filled with firms that offer some combinations of the services mentioned. In fact, a single solicitor municipal advisor may have a mix of clients who require different services.

There is also another significant difference between solicitor municipal advisors and MA Non-solicitors. This is the payer of the compensation. In the case of a MA Non-solicitor, a municipal entity is the one paying a fee to the MA Non-solicitor. Alternatively, when a solicitor municipal advisor earns a fee for assets raised, that fee is paid for by the solicitor municipal advisor Client and not the Municipal Entity that is investing with the solicitor municipal advisor Client.

3PM is available to share additional examples in which the proposed language regarding “excessive compensation” are unworkable for solicitor municipal advisors.

Given that the MSRB has a responsibility to protect municipal entities, we understand the need for the verbiage regarding “excessive compensation” when establishing rules for MA non-solicitors. However, the same is not true for solicitor municipal advisors. In the case of solicitor municipal advisors, municipal entities are not involved in paying any compensation provided to the solicitor. Compensation is the responsibility of the solicitor municipal advisor Client.

Given the above issues raised, we believe that the provision to prohibit “excessive compensation” should be excluded.

Alternatively, we request that the MSRB provide guidance as to how “excessive compensation” should be determined and who will be the arbiter deciding whether compensation earned by a solicitor municipal advisor was “excessive.”

Request for Comments

3PM is pleased to provide some comments to the following questions included in MSRB Notice 2021-18.

- 6. Would there be value in the MSRB providing additional detail regarding the “terms and amount of the compensation” that would be required to be disclosed in Rule G-46(c)? For example, would stakeholders find it helpful if the MSRB specified that the solicitor should disclose whether the compensation arrangement is contingent, fixed, on a trailing basis, etc.?**

Yes. We believe that additional detail regarding the “terms and amount of the compensation” will allow solicitor municipal advisors to better understand what is being asked and leaves less room for interpretation amongst market participants.

- 7. Are the revised timing and manner of disclosure standards set forth in draft Rule G-46(f) workable for direct solicitations? Indirect solicitations? Is this approach more or less burdensome than the approach originally proposed in the First Request for Comment?**

We believe that the timing and disclosure standards set forth in draft Rule G-46(f) are workable for direct solicitations. We believe that the timing and disclosure standards set forth in draft Rule G-46(f) are workable for direct solicitations.

In the case of indirect solicitations, the process is not as straightforward.

While it appears that the proposed rule language accommodates for indirect solicitations, we would appreciate some clarification regarding whether the disclosure requirement would be met if a Solicitor municipal advisor first presents the disclosure to an investment consultant

or other intermediary (an indirect solicitation) and then to the Solicited entity at the time of engagement to an “official” who is reasonably believed to be able to bind the municipal entity.

When a Solicitor first approaches an investment consultant or intermediary, the Solicitor is trying to gain access to all clients of a consultant or intermediary. Consultants and intermediaries may have a mix of client types that they represent which may include corporate pension plans, endowments and foundations, unions, family office, high net individuals or municipal entities. As such, the initial discussion, or Solicitation, made indirectly to a consultant or intermediary is typically general in nature and not targeted to any specific client or type of client.

The manager research team at a consultant is typically involved in conducting due diligence on investment managers that are being considered for use in search conducted by the firm’s clients. As such, their job will generally not require that they be familiar with the regulatory arena surrounding Solicitor municipal advisors. Most research analysts will not understand why a Solicitor was providing them with a disclosure at their initial meeting and before they were being considered for any client. Even at some point if the Solicitor client is considered for a search being conducted on behalf of a municipal entity, it is unlikely that the disclosure will be passed on from research to someone involved in the relationship with the municipal entity or to the municipal entity itself.

We believe that in either case, whether the solicitation is direct or indirect, it is very unlikely that the first presentation of the disclosure will make its way to an “official” of the municipal entity who the Solicitor reasonably believes is able to bind the entity and “is not party to a disclosed conflict.” Given this, we would suggest elimination of the first presentation of the disclosure and instead relying solely on the presentation of the disclosure document at the time of engagement.

The proposed approach is less burdensome than the previous approach proposed in the First Request for Comment, however, eliminating the need to make a first presentation of the disclosure would streamline the process and eliminate yet another burden.

Draft Rule G-46(g) would prohibit solicitor municipal advisors from receiving excessive compensation. Similar prohibitions that apply to underwriters and non-solicitor municipal advisors set forth factors that are relevant to whether the regulated entity’s compensation is excessive. Should the MSRB provide similar guidance regarding the factors that are relevant to whether a solicitor municipal advisor’s compensation is excessive? If so, what should those factors be? How do non-solicitor municipal advisors that use the services of solicitor municipal advisors ensure that they do not pay unreasonable fees to solicitor municipal advisors, as required by Rule G-42(e)(i)(E)? What are the compensation structures that are typically used by solicitors (e.g., contingent, flat fee, etc.)?

Please see our comments above relating to “excessive compensation.”

If the MSRB is adamant about including “excessive compensation” in some form, we would suggest that the determination of whether “excessive compensation” is received is based on the terms of compensation include in the agreement between the solicitor and the client rather than the total compensation earned by the solicitor.

While we mentioned above that there are no independent sources that provide for compensation information of solicitors, the terms of a solicitation engagement are common in the industry. This fact could at least provide an initial basis to determine whether the compensation is excessive or not.

As discussed, we do not believe that using total compensation for an engagement would be a fair determination of whether “excessive compensation” is received. For example, assume two solicitors earn the same incentive fee of 20% for 10 years. If Solicitor A raises only \$10 million dollars, while Solicitor B raises \$1 billion, the total compensation for each would be vastly different, even though both solicitors worked with the same incentive fee structure and would not be considered excessive. However, if we look at total compensation, would it be fair to say that Solicitor B received “excessive compensation” compared to Solicitor A just because the total compensation figure results in compensation of more than a million dollars for Solicitor B and only a few thousand dollars for Solicitor A? Solicitor B raised a far superior level of assets for its client, and we would say has earned its total compensation.

Compensation comes in several forms, but the typical industry structures are as follows:

- **Retainer:** In long-only, investment advisory accounts, a retainer is a fixed used by solicitors to offset expenses generated in its search for new business opportunities. It may include travel expenses, which are sometimes reimbursed separately.

Retainers are based often based on the extent of marketing support required by the manager and / or how sellable the investment advisory product is. The more marketing support required, (collateral materials, population of databases, completion of RFPs, etc.) the higher the retainer fee.

Products with short track records and/or low assets under management will often require a higher retainer due to the length of the sales cycle.

In today’s market, it could take 18-24 months to find an investor for a competitive product that is in demand and is above the minimum threshold required in assets. The sales cycle lengthens for each box not checked.

Because most of a solicitor’s compensation is earned through an incentive fee, the retainer is used to provide minimal income while the solicitor searches for investors.

Typical retainers range from: \$0 – 150,000 per annum.

- **Expense Reimbursement** - Some clients may reimburse a solicitor for expenses generated in the search for new business, rather than pay a flat retainer fee. These expenses usually include travel and lodging while visiting prospects and clients.
- **Incentive Fee:** The incentive fee is a stated percentage of the fees generated on assets awarded to a MA Client based on the solicitor municipal advisor's efforts. An incentive fee is only paid if assets are raised.

Typically, incentive fees are 20% of the management fee earned on assets raised because of the solicitor's efforts. The time this fee is paid varies by client and could vary anywhere from 3 years to perpetuity, or for as long as the investor remains a client of the MA Client.

Solicitors may negotiate a higher fee payout or a longer term for an incentive payment if little or no retainer is paid up front. There is an inverse relationship between the retainer and the incentive fee. If a retainer is low then the incentive fee will likely be longer and/or higher than the traditional incentive fee.

- **Other payment terms.** Sometimes clients will compensate solicitors with equity or some other type of non-cash compensation. While these structures exist, they are not as prevalent as the other arrangements discussed above.

8. Should disclosures be permitted to be provided orally? Would an ability to provide oral disclosures increase harmonization with the IA Marketing Rule? Would such an ability increase the benefits or decrease the burdens associated with draft Rule G-46? What type of guidance from the MSRB would facilitate a solicitor municipal advisor's ability to provide such disclosures orally?

While providing disclosure orally provides additional flexibility to a solicitor municipal advisor and does increase harmonization with the IA Marketing Rule, we believe that this flexibility does come with complication.

In instances where a disclosure is given orally, how would a solicitor municipal advisor prove that they provided the disclosure? If the MSRB can provide proper guidance as to how to meet the books and record requirements of this provision then we would be in support of oral disclosures as an option of disclosure delivery.

11. Should a municipal advisor client of a solicitor municipal advisor be required to make a bona fide effort to ascertain whether the solicitor municipal advisor has provided any or all of the disclosures related to the municipal advisor client to the solicited entities (e.g., the role and compensation disclosures and/or solicitor client disclosures required by draft Rule G-46(e))?

For example, should the engagement documentation require the solicitor municipal advisor to contractually commit to provide the disclosures required by draft Rule G-46, and if so, should the municipal advisor client be required to undertake some level of diligence to confirm that the required disclosures are, in fact, made?

We believe that this provision is unreasonably burdensome for a Municipal Advisor Client and should be removed from the draft rule.

Most solicitor municipal advisors are diligent in their compliance requirements and will provide the required disclosures to the solicited entity as appropriate.

Under the proposed rule, the disclosure is to be presented at the first solicitation regardless of whether the person receiving the disclosure is knowledgeable about what the disclosure means or if they do not share this disclosure with a person who is able to bind the entity and will be the person signing the engagement with the MA Client.

To alleviate this issue, the MSRB has proposed a dual disclosure requirement which would require disclosures to be provided again at the time of engagement to someone who does have the authority to bind the solicited entity.

While this disclosure does contain valuable information, we believe that the information will be most useful to the person who is signing the agreement with the MA Client. To ensure that this person is the one who sees the disclosure and is aware of the information provided, the best way to effectively deliver this disclosure is at the time of engagement or promptly thereafter.

12. Do commenters believe that there is any value to solicited entities in receiving disclosures regarding the payments made by a solicitor municipal advisor to another solicitor municipal advisor to facilitate the solicitation? If so, does such value exceed the costs associated with making such disclosures?

Yes, we believe that disclosure regarding the payments made by a solicitor municipal advisor to another solicitor municipal advisor should be disclosed to the solicited entities so that these entities are fully aware of all parties that are a part of solicitation process event if the other solicitor municipal advisor did not directly solicit that entity. Full transparency allows all involved to understand more clearly who is involved in the process, make a more educated investment decision, and determine whether any conflicts of interest exist.

Thank you for the opportunity to share our thoughts with you regarding this proposal. Please feel free to reach out to me at (585) 364-3065 or by email at donna.dimaria@tesseractcapital.com should you have any questions or require additional information pertaining to MSRB Notice 2021-18.

Regards,

<<Donna DiMaria>>

Donna DiMaria
Chairman of the Board of Directors and Chair of the 3PM Regulatory Committee
Third Party Marketers Association

About The Third-Party Marketers Association (3PM)

3PM is an association of independent, outsourced sales and marketing firms that support the investment management industry worldwide.

3PM Members are properly registered and licensed organizations consisting of experienced sales and marketing professionals who come together to establish and encourage best practices, share knowledge and resources, enhance professional standards, build industry awareness, and generally support the growth and development of professional outsourced investment management marketing.

Members of 3PM benefit from:

- Regulatory Advocacy
- Best Practices and Compliance
- Industry Recognition and Awareness
- Manager Introductions
- Educational Programs
- Online Presence
- Conferences and Networking
- Service Provider Discounts

3PM began in 1998 with seven member-firms. Today, the Association has more grown and represents members from around the globe.

A typical 3PM member-firm consists of two to five highly experienced investment management marketing executives with, on-average, more than 10 years' experience selling financial products in the institutional and/or retail distribution channels. The Association's members run the gamut in products they represent.

Members work with traditional separate account managers covering strategies such as domestic international and global equity, as well as fixed income. In the alternative arena, members represent fund products such as mutual funds, hedge funds, private equity, fund of funds, infrastructure, real assets, and real estate. Some firms' business is comprised of both types of product offerings. The majority of 3PM's members are currently registered with FINRA or affiliated with a broker-dealer that is a member of FINRA. Some are State Registered Investment Advisers and some Municipal Advisors.

For more information on 3PM or its members, please visit www.3pm.org.