



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”)<sup>1</sup> appreciates this opportunity to comment on Municipal Securities Rulemaking Board (“MSRB”) Notice 2021-07 (the “Notice”)<sup>2</sup> 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

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<sup>1</sup> 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).

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.”<sup>5</sup>

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.

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

<sup>4</sup> Id.

<sup>5</sup> 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.<sup>6</sup> The SEC requested public comment four times, including on the related amendments that sought to address and balance the concerns of the public.<sup>7</sup> 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](mailto:lnorwood@sifma.org), or our counsel, Ed Fierro at (713) 221-1107 or [ed.fierro@bracewell.com](mailto:ed.fierro@bracewell.com), respectively.

Sincerely,

A handwritten signature in black ink, appearing to read 'Leslie M. Norwood', with a stylized, overlapping loop structure.

Leslie M. Norwood  
Managing Director  
and Associate General Counsel

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<sup>6</sup> 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).

<sup>7</sup> 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.
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- 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.
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- 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.
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- 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.

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](mailto: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](http://www.3pm.org).*