



3PM

THIRD PARTY MARKETERS ASSOCIATION

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.