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[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.<sup>1</sup> 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”).<sup>2</sup> 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

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

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

## 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

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

<sup>4</sup> 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.<sup>5</sup>

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

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<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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

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<sup>6</sup> 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.

<sup>7</sup> See *id.*

<sup>8</sup> 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.<sup>9</sup> 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.”<sup>10</sup>

### **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”),<sup>11</sup> the G-17 Excerpt for Solicitor Municipal Advisors and the IA Marketing Rule.<sup>12</sup> Additionally, drawing from

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<sup>9</sup> 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).

<sup>10</sup> 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.

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

<sup>12</sup> 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.<sup>13</sup>

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

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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.

<sup>13</sup> *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.<sup>14</sup> 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,<sup>15</sup> 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

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<sup>14</sup> 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.

<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> A new Supplementary Material .02 expounds on the relationship between draft Rule G-46 and the fair

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

<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> However, they would be required to

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<sup>18</sup> 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.

<sup>19</sup> 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.<sup>20</sup> 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.

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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.

<sup>20</sup> 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.<sup>21</sup> 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?<sup>22</sup>

### 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.<sup>23</sup>

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

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<sup>21</sup> See Rule G-42(e)(A) and (B); see also G-17 Underwriter’s Guidance at section titled, “Underwriter Compensation and New Issue Pricing.”

<sup>22</sup> 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.

<sup>23</sup> 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.<sup>24</sup> 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,

<sup>24</sup> 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.<sup>25</sup> 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

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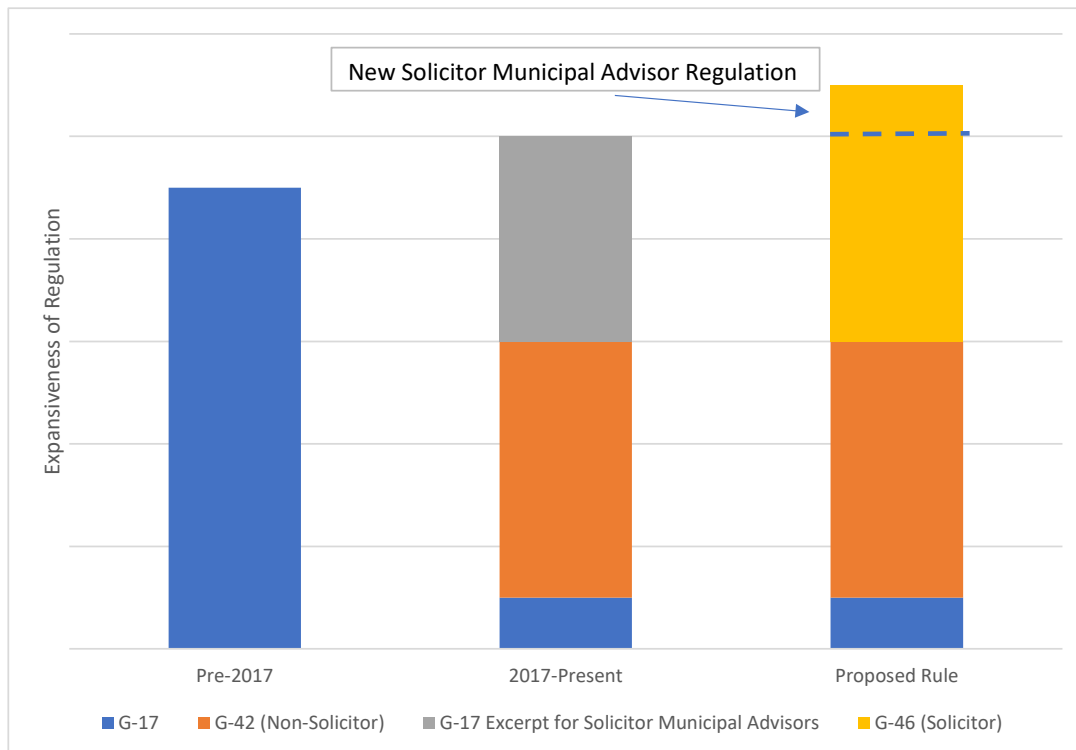
<sup>25</sup> Previously, the rule only applied to the municipal securities activities of dealers.

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.<sup>26</sup> 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

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<sup>26</sup> 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;<sup>27</sup> 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.<sup>28</sup>

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

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<sup>27</sup> 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.

<sup>28</sup> 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.<sup>29</sup> 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**

<b>Business Activities</b>	<b>Number of Firms</b>
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
<b>Total</b>	<b>105</b>

<sup>29</sup> 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 Firm<sup>30</sup>**

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

<sup>30</sup> 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.<sup>31</sup> 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

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<sup>31</sup> 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

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## 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.

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\* 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 is prohibited 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) 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.