



February 26, 2024

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

Dear Mr. Smith:

The National Association of Municipal Advisors (“NAMA”) appreciates the opportunity to comment on MSRB Notice 2023-11, *Request for Information on Impacts of MSRB Rules on Small Firms* (“RFI”). NAMA represents independent municipal advisory firms and individual municipal advisors (“MA”) from across the country and is dedicated to educating and representing its members on regulatory, industry and market issues. A working group of our members developed this response.

NAMA appreciates the Municipal Securities Rulemaking Board’s (“MSRB”) attention on the critical issues that small firms face to comply with MSRB rules. As a vast majority of MA firms consist of a small number of MAs/covered persons within the firm, a focused look at these issues will be helpful to overall rule and compliance conversations. A key theme in NAMA’s comments is the need for the MSRB to undertake a greater effort during the rule and guidance development process to understand MA firms and the varied MA services they provide. Within this process, the MSRB should also consider the approach firms, especially small firms, take to understand and comply with rules. As NAMA has commented in the past, it would be helpful for all involved for the MSRB to engage regulated entities at the beginning of and throughout the rule and guidance development process.

There are no definitive answers to many of the questions asked in the RFI although they raise important issues. Each key area deserves greater discussion and attention as the MSRB considers next steps with the information gathered from RFI respondents.

Please note that for the most part, NAMA is approaching this comment letter by providing thoughts on items that are included in the RFI that transcend numerous questions. These comments are particularly applicable to independent MA firms (those not associated with broker-dealer firms).

What Factors Should be Utilized to Define “Small”?

The first question in the RFI asks about how to determine the definition of “small” regulated entity. For MAs, that question is further complicated by the fact that compared to other types of financial services firms, a great majority of independent MA firms are likely to be considered “small.” When taking the next step and looking within the scope of only independent MA firms, there are gradations of ‘small’ that need

to be considered. A review of MA firm information posted on the MSRB's web site notes that approximately 75% of MA firms have five or fewer Municipal Advisor Representatives (MAR). However, does that mean that a 7 or 10 or 15 MAR firm is not "small?" It is very difficult to definitively say. On this key issue, especially, we would appreciate having additional conversations with the MSRB as we all continue to grapple with how to, and to what end to, identify small firms.

In discussions with NAMA member firms, however, it is unanimous that the definition of "small" should not be associated with revenues. This conflicts with the Securities and Exchange Commission's ("SEC") MA Rule that pegs the definition of "small" to that of the Small Business Administration's financial services sector, which currently establishes that threshold at \$47 million of revenues. NAMA believes that for this discussion, that amount is grossly inappropriate. Even the \$7 million threshold used in the 2014 Final MA Rule and currently used in Form MA, may not be a good guidepost when there are such variations of "small" within the MA community. Another question that should be part of this conversation is if and how the MSRB, while having the mandate to avoid burdening "small MA firms," can define this unilaterally when the small firm definition is part of the SEC's MA Rule. Perhaps that can be done within the context of the application of each rule, and is worth further discussion. The MSRB may also wish to look at how other regulators define "small" for regulated entities.

MSRB Approach to Rules and Guidance to Better Assist Small MA Firms

The MSRB, understandably, approaches MA rulemaking in a manner similar to rulemaking for broker-dealers ("BD") that has been done for nearly the entirety of the MSRB's existence. Rules have always been and continue to be written by lawyers for lawyers. However, this overlooks an important hallmark of most independent MA firms – those serving as Chief Compliance Officers ("CCO"), are also practicing MAs, and very few MA firms have in-house legal counsel to review and provide insights into understanding MSRB rules.

These matters are further complicated since unlike underwriting, which ultimately is a clear transactional role for which rules are written, municipal advisory firms are not uniform in their roles and may perform different and various services to clients, some of which are not transactional and, further, may not even be MA activities. This places administrative, and ultimately costly, burdens on small MA firms. Additionally, while NAMA develops resources by and for MAs, and other general resources are available through the MSRB and other providers, there is a dearth of legal counsel able to help firms interpret rules and how rules apply directly to their firm's practice.

Many firms do seek outside counsel or compliance professionals to assist with their compliance programs. These costs may represent the price of doing business, but place greater financial and administrative burdens on smaller firms. The cost of external compliance review and/or development and maintenance of written supervisory procedures ("WSP")/policies and procedures, etc., are typically not based on the size of the firm, but rather a fixed cost to firms. That proportionately places greater costs on small firms. Additionally, NAMA members report that when small firms are uniquely challenged to find answers of the application of a rule during an SEC exam, they spend additional staff time and funds on counsel to advise them. Again, this all speaks to the need for MSRB rules and guidance to be clear and to be better developed for the MA audience that must adhere to the rules.

A step forward for the MSRB could be that within its retrospective rule review, the MSRB approach this review and future rules and guidance by keeping in mind the audience for whom the rules are written. This is not saying to water down the rules or lose important emphasis, but rather to write them in a manner that can be well understood by MAs. The MSRB should also be acutely attuned to comments from MAs about rules and guidance. This is especially true as the MSRB has not employed staff who have been practicing MARs or MA Chief Compliance Officers/regulatory counsels. The same is also, if not more, important regarding MSRB guidance. This does not mean more words are better, but rather the MSRB's efforts could focus on understanding the pressure points within a rule and focus guidance on these areas for the intended audience. NAMA also, as we have in the past, calls on MSRB guidance to take on one form and to have it available for public comment and discussionsⁱ.

The MSRB may also wish to consider developing a year-end regulatory update for regulated entities that would include rule changes and other rulemaking efforts. This could especially help small MA firms easily understand areas where WSPs need to be updated. The MSRB's Model WSP document, though greatly appreciated by MAs, remains static, unaffected by rule changes and guidance. The MSRB should consider establishing an annual linkage between the Model WSP and each year's rule changes and guidance updates. These updates might also include lists of regulatory questions posed by MAs and SEC examiners together with the MSRB's responses and guidance on issues which frequently arise through the MSRB's help line and during SEC examinations.

Another suggestion to help MA firms, and especially small MA firms best understand the application of rules to their practices, would be to ask where guidance may be needed within requests for comments on proposed rules.

Key Focus Area: Sole Proprietor Firms

The independent MA firm community also has the unique nuance of having numerous sole proprietor firms. According to MSRB data, almost 40% of MA firms have only one MAR. The challenges these firms face may not be more than firms with three or four MAs (and in fact could be less). However, the true challenge these firms face, in addition to other points raised in this letter, how to supervise themselves, and demonstrate compliance with MSRB supervision rules (this is also true for small firms that may not have a supervisor-principal to a principal). Since the number of sole proprietor firms is so great the MSRB may wish to consider, again in its retrospective rule and guidance review, how to ensure that guidance addresses single person firms and their needs for complying with a rule. Also, allowing for public comment and engagement about the application of rules and guidance on small firms prior to finalizing documents is imperative for the MSRB's efforts to be successful for this audience (for example, see NAMA's January 2023 comment letter Rule G-3ⁱⁱ). The MSRB may also wish to review how other regulated entities approach sole proprietor firms.

Burdens to Small MAs of the Collective Suite of Rulemaking

Another item that is important to flag is the need for the MSRB not only to include an economic analysis of a rule on the MA community and also specifically for small MA firms, per Securities Exchange Act Section 15B(b)(2)(L)(iv), but a need to analyze the burdens of the entire suite of MSRB's rules on MA firms. This is

an area where the MSRB would benefit from having input from MAs to better understand what it takes for various sized firms to maintain a robust compliance program, and again, the pressure points therein and where more clarity of MSRB rules could be helpful.

The SEC noted various estimates of the time and costs of complying with the MA Rule (Release No. 34-70462; File No. S7-45-10). These estimates only provide for books and records and registration filings, and do not reflect the actual totality of the regulatory compliance costs to MA firms, but rather anticipated costs to comply with the SEC's MA Rule. With no overall estimated costs for MA compliance programs being done since before regulations went into effect, and absent the totality of the costs of MSRB rules, NAMA believes this is an area ripe for more extensive conversations.

The MSRB should address how it approaches its analysis on the costs of regulations, and the burdens to small firms, and allow public comment on its analysis both for individual rules and the totality of the rulebook within its retrospective rule review. Without this information, it is unclear how the MSRB or SEC can determine if application of a rule is burdensome on small MA firms. The MSRB may also wish to confer with small firm CCOs and sole proprietor MAs to discuss how they approach reviewing new/updated rules, making changes to their WSPs, and implementing compliance and supervisory procedures.

How MSRB Rules Could Lessen Impediments and Limits to MA Participation

In response to changes to Rule G-3 last year, NAMA commented on the difficulty in understanding - for the purposes of taking the Series 50 and 54 exams, as well as generally - the sequence of activities a person needs to undertake to start an MA firmⁱⁱⁱ. These unknowns or not-well-understood variables could be barriers for new or returning professionals to start an MA practice.

In this era of having difficulty attracting talent generally in public finance and for municipal advisors in particular, how supervisory procedures work when MAs are not located in the same office also deserves attention. Within its retrospective rule and guidance review, the MSRB should ask respondents if there are any guidance needs to assist with rule compliance and supervision when MARs are not in a central location. This could allow firms to understand the compliance necessities when looking to hire professionals who may seek greater locational flexibility.

Guidance Organization

Within the MSRB's retrospective rule and guidance review, a better organization of materials – in addition to streamlining the types of materials – would be helpful. There are numerous areas on the MSRB's web site where nuggets of compliance and rule information may be found (Guidance, Resources, Advisories, Guides, FAQs, Compliance Tips of the Week, Webinars, and Podcasts), but they are not organized by rule or streamlined in any easy to access manner. This also includes MSRB Notices and Rule Filings that may contain valuable and helpful information, but are buried in the Filings, and the documents themselves are not intuitively found on Rules' web page.

Additionally, as noted above, a comprehensive year end compilation of materials that can assist regulated entities, especially small firms, be more aware of any rule and guidance changes, as well as other information provided about a rule throughout a year, would be helpful.

Other Matters Related to MSRB Rules and Small MA Firms

While NAMA's letter speaks to the issues for independent MA firms, we know that other items may be worth discussing when broker-dealer and/or investment advisor firms also have MAs within the firm. While legal and compliance assistance may be more readily available for these firms (if large), there are still questions worth considering on how various MSRB rules apply to MAs, Registered Investment Advisors (RIA), and BDs, and the compliance needs for these entities. The MSRB may wish, in its retrospective rule review, to address compliance considerations: when one professional may have multiple licenses and designations; that reflect the needs for "small" firms that offer-BD and/or IA and MA services, and; on how firms can best approach compliance when the number of MA representatives may be small compared to other licensed and regulated professionals at the firm.

NAMA also suggests that the MSRB inquire and discuss with marketplace participants whether there are lessons that can be utilized from fellow regulators related to small firms and rule writing and compliance assistance, including for small and sole proprietor firms.

Another item that may need to be on the MSRB's radar during its retrospective rule review is current and possibly future congressional and regulatory action that addresses regulated small firms. This includes the Regulatory Flexibility Act (1980) [<https://advocacy.sba.gov/resources/the-regulatory-flexibility-act/>], and the Small Entity Update Act (H.R. 2792, <https://www.congress.gov/118/bills/hr2792/BILLS-118hr2792ih.pdf>) which passed the House in 2023, and is pending in the Senate.

NAMA is not seeking exemptions or a tiered approaches to regulation, but as the retrospective rule review continues, NAMA may wish to comment on these matters.

NAMA will be providing comments separately about the negative impact of unfair burdens of MSRB rules on mid-sized and/or large firms (per RFI question #11). We would note, however, that generally many of the key concerns that small firms experience and are discussed in this letter, also exist for independent MA firms of all sizes.

A critical theme throughout our response is the need for the MSRB to better understand MA firms, MA activities and how firms approach complying with MSRB rules, especially small MA firms. We also recommend that if the MSRB is looking further into the impact of its rulemaking on small MA firms, that it review the significant drop of MA firms over the past 10 years, and determine if one reason for the decline can be attributed to regulatory barriers.

As discussed in this letter, NAMA would appreciate the MSRB's attention and additional discussions on key matters as the MSRB determines any outputs from the RFI process. These include:

- When reviewing rules and guidance as part of the retrospective rule review, allow for public comment and address the review from the point of view of most MA firms, especially small firms, where compliance is handled by a practicing MA;

- When developing any new rules and guidance, allow for public comment and address the products from the point of view of most MA firms, especially small firms, where compliance is handled by a practicing MA;
- Explain the MSRB’s approach in determining if there are burdens to small firms for its rules;
- Consider the burdens of the entire rulebook on small MA firms;
- Provide greater discussion about compliance for sole proprietor firms in MSRB products; and
- Have additional conversations and public comment, as well as look at other regulators, for how “small” is defined and what that means for various MSRB outputs (without conflicting with the SEC MA Rule).

Additionally, we would welcome the opportunity to have MSRB staff engage with NAMA’s Small MA Firm Working Group about these and other issues, especially as the MSRB determines next steps per the RFI. These discussions could also aid the MSRB’s retrospective rule and guidance review.

We appreciate the MSRB’s focus on small firms and this opportunity to provide comment on the MSRB’s rules and the rulemaking process related to small firm concerns. We hope that this is the beginning of conversations about small MA firms and look forward to working with the MSRB on these matters.

Sincerely,



Susan Gaffney
Executive Director

ⁱ Page 4, fourth bullet, <https://www.msrb.org/sites/default/files/RFC/2020-19/NAMA.pdf>.

ⁱⁱ Answer to question #12, <https://www.msrb.org/sites/default/files/2023-01/NAMA-2022-13.pdf>

ⁱⁱⁱ Page 1, <https://www.msrb.org/sites/default/files/2023-01/NAMA-2022-13.pdf>