March 15, 2022

VIA ELECTRONIC SUBMISSION

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

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

Dear Mr. Smith,

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

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org. SIFMA's members underwrite over 90% of new issues of municipal securities by volume.

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

SIFMA applauds the MSRB's efforts in revising its original proposal[3] in light of comments received[4] and in seeking a second round of public comment. In particular, we applaud the MSRB for clarifying the ambiguity regarding the standard of conduct that applies to solicitor municipal advisors.

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

I. Concerns with Lack of Solicitation Prohibition

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

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

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

The Dodd-Frank Act provided the MSRB with the authority to create rules for solicitor municipal advisors[7] and the inclusion of a broad solicitation ban in Rule G-46 would further the purpose of the Securities Exchange Act of 1934 by addressing an area of potential corruption, or appearance of corruption. We believe that it is critical that the MSRB continue to protect the

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

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

[5] See MSRB Rule G-38.

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

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

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

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

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

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

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

1) Uniform Approach for Dealers and Solicitor Municipal Advisors

The MSRB adopted the Dealer Solicitation Ban because it was concerned that dealers were using solicitors not subject to MSRB rules as a way to avoid the limitations of Rule G-37.[8] SIFMA believes that the proposed draft Rule G-46 does not adequately address the same concern for solicitor municipal advisors.

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

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

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

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

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

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

III. Inadvertent Solicitation

1) Lack of Safe Harbor for Inadvertent Solicitation

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

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

IV. Concerns with Recordkeeping Requirements

1) Streamlining of Rule G-8

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

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

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

2) Streamlining Approach for Future MSRB Rules and Rule Amendments

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

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

V. Coordinate with Market Participants

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

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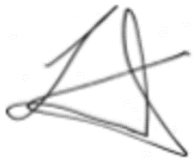
Thank you for considering SIFMA's comments. If a fuller discussion of our comments would be helpful, I can be reached at (212) 313-1130 or lnorwood@sifma.org.

Sincerely,



Leslie M. Norwood
Managing Director
and Associate General Counsel

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

Appendix A

Responses to the MSRB's Questions

The MSRB specifically seeks input on the following questions:

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

    - Response: As with any new rulemaking, SIFMA expects certain challenges to develop in connection with the implementation of Rule G-46. We offer certain alternatives in this Response Letter.

2) Is there data or studies available to quantify the benefits and burdens of draft Rule G-46? Are the burdens appropriately outweighed by the benefits?

    - Response: SIFMA does not know of any other data or studies that are available. SIFMA has concerns that the economic analysis may not have have included the legal and compliance costs associated with amending written supervisory procedures. See Part I Section (1) of this Response Letter for more information.

3) Are the narrower standards regarding a solicitor municipal advisor's representations more workable for solicitor municipal advisors? Do these narrower standards provide solicited entities with sufficient protections?

    - Response: SIFMA applauds the MSRB for narrowing the standards, as suggested in our initial response letter.

4) Does new Supplementary Material .02 regarding fair dealing and fiduciary duty address commenter concerns regarding the application, or lack thereof, of a federal fiduciary duty to solicitor municipal advisors? Is further clarification necessary?

    - Response: SIFMA applauds the MSRB for new Supplementary Material .02, as suggested in our initial response letter.

5) Do commenters agree or disagree with the preliminary estimates set forth in this Request for Comment? To the extent possible, please provide evidence to support your assertions.

    - Response: See response to this Appendix A Question 2 above.

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

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

- Response: SIFMA believes the current rule text adequately captures the description of the compensation arrangement.

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

- Response: SIFMA believes the current approach is workable and less burdensome than the annual update requirement initially proposed.

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

- Response: SIFMA suggests that the MSRB coordinate with solicitor municipal advisors to understand the factors that are relevant and recommends the MSRB provide guidance to assist in complying with the rule.

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

- Response: SIFMA believes that the required disclosures must be made in writing, similar to how dealers and municipal advisors are currently required to provide disclosures, for several reasons. First, the disclosures are critical to understanding and evaluating conflicts of interest and standards of conduct and, as such, must be made in writing. Second, permitting oral disclosures would likely cause confusion for solicited entities because they receive written disclosures from other regulated entities. Third, while the IA Marketing Rule allows for oral disclosures, the oral disclosures are only permitted in certain very limited circumstances that are not applicable in the context of Rule G-

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

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

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

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

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

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

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

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

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

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

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