

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-97218; File No. SR-MSRB-2023-02)

March 29, 2023

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Create New MSRB Rule G-46, on Duties of Solicitor Municipal Advisors, and to Amend MSRB Rule G-8, on Books and Records

I. Introduction

On January 31, 2023, the Municipal Securities Rulemaking Board (“MSRB” or “Board”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to create a new rule, MSRB Rule G-46 (“Rule G-46”), on duties of solicitor municipal advisors (“Proposed Rule G-46”) and amend MSRB Rule G-8 (“Rule G-8”), on books and records (“Proposed Amended Rule G-8”) (together, the “proposed rule change”).

The proposed rule change was published for comment in the Federal Register on February 14, 2023.³ The public comment period closed on March 7, 2023.⁴ The Commission

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Release No. 34-96842 (February 8, 2023), 88 FR 9560 (February 14, 2023) (File No. MSRB-2023-02) (the “Notice”).

⁴ The comment letter received on the proposed rule change is available on the Commission’s website at <https://www.sec.gov>.

received one comment letter on the proposed rule change.⁵ On March 23, 2023, the MSRB responded to the comment letter⁶ and filed Amendment No. 1 to the proposed rule change (“Amendment No. 1”).⁷ The Commission is publishing this notice to solicit comments on Amendment No. 1 to the proposed rule change from interested parties and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of Proposed Rule Change

As described further below, the proposed rule change consists of new Proposed Rule G-46, as modified by Amendment No. 1, and amendments to Rule G-8.

A. Solicitor Municipal Advisor Activity

There are 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.⁸ The first category of municipal advisors is often referred to as non-solicitor

⁵ See Letter to Secretary, from Leslie Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (“SIFMA”), dated March 7, 2023 (“SIFMA Letter”).

⁶ See Letter to Secretary, Commission, from Saliha Olgun, Interim Chief Regulatory Officer, MSRB, dated March 23, 2023 (“Response Letter”).

⁷ Id. As described in Amendment No. 1, the MSRB stated it proposed to amend the original proposed rule change to make a change directly responsive to the comments and two other technical changes.

⁸ Exchange Act Section 15B(e)(4) generally defines “municipal advisor” to mean a person (who is not a municipal entity or an employee of a municipal entity) that (i) provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or (ii) undertakes a solicitation of a municipal entity. Additionally, the SEC has interpreted the definition of “municipal advisor” to include a person who engages in the solicitation of an obligated person acting in the capacity of an obligated person. 15 U.S.C. 78o-4(e)(4). See also Release No. 34-70462 (September 20, 2013), 78

municipal advisors, while the latter is sometimes referred to as solicitors.⁹ Proposed Rule G-46 would govern the conduct of these solicitors, more specifically defined as “solicitor municipal advisors” under Proposed Rule G-46(a)(vi).¹⁰

Although the Exchange Act¹¹ permits a municipal advisor to conduct such solicitations on behalf of a third-party broker, dealer or municipal securities dealer (collectively and individually “dealers”),¹² MSRB Rule G-38 (“Rule G-38”), on solicitation of municipal securities business, prohibits a dealer from providing or agreeing to provide payment to third

FR 67468 (November 12, 2013) (File No. S7-45-10) at 67469, n. 138, 408; 17 CFR 240.15Ba1-1(d)(1)(i).

⁹ Exchange Act Section 15B(e)(9) generally defines “solicitation of a municipal entity or obligated person” to mean a direct or indirect communication with a municipal entity or obligated person made by a person, for direct or indirect compensation, on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products, the issuance of municipal securities, or of an investment adviser to provide investment advisory services to or on behalf of a municipal entity. 15 U.S.C. 78o-4(e)(9).

¹⁰ Notice, 88 FR at 9561.

¹¹ See 15 U.S.C. 78o-4(e)(4) and (e)(9).

¹² See 15 U.S.C. 78c(a)(4)(a) (defining the term “broker” to mean any person engaged in the business of effecting transactions in securities for the account of others); see also 15 U.S.C. 78c(a)(5) (defining the term “dealer” to mean any person engaged in the business of buying and selling securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants) for such person’s own account through a broker or otherwise) and 15 U.S.C. 78c(a)(30) (defining the term “municipal securities dealer” to mean any person (including a separately identifiable department or division of a bank) engaged in the business of buying and selling municipal securities for his own account, through a broker or otherwise, subject to certain exclusions).

parties for solicitations of municipal securities business made on behalf of the dealer.¹³

Additionally, the MSRB stated that a substantial number of solicitations that would be subject to Proposed Rule G-46 involve a solicitation on behalf of a third-party investment adviser to provide investment advisory services to a municipal entity.¹⁴ The MSRB noted that such solicitations often occur in connection with the solicitation of a public pension plan.¹⁵ For example, the MSRB offered that, 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.¹⁶

The MSRB also stated the number of municipal advisors that engage in solicitations that may subject them to Proposed Rule G-46 comprise a relatively small percentage of the municipal advisors that are registered with the MSRB.¹⁷ Notwithstanding the relatively small size of such solicitation market, the MSRB argued that it is important that the fundamental protections extended to the municipal entity and obligated person clients of other MSRB-regulated entities be extended to the municipal entities and obligated persons with whom solicitor municipal

¹³ The prohibition in Rule G-38 predates the regulation of municipal advisors. See Release No. 34-52278 (August 17, 2005), 70 FR 49342 (August 23, 2005) (File No. MSRB-2005-04).

¹⁴ Notice, 88 FR at 9561.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

advisors interact.¹⁸ Due to such increased protections contemplated by the proposed rule change, the MSRB concluded that the proposed rule change would serve as an important bulwark against potential improper practices in the municipal market and also would provide greater certainty and transparency to solicitor municipal advisors regarding regulatory expectations.¹⁹

With respect to solicitations on behalf of third parties to provide investment advisory services, the MSRB stated that there are two ways (discussed below) in which a solicitor municipal advisor typically may solicit a municipal entity: (1) directly or (2) through an intermediary.²⁰

1. Direct Solicitations

The MSRB identified that a solicitor municipal advisor often first communicates with a staff member of the solicited entity (i.e., the municipal entity or obligated person) who handles investment manager research for the entity.²¹ The MSRB further described that this individual generally is responsible for evaluating the solicitor client's product/services to ensure they are appropriate for the entity given the entity's investment policy statement guidelines and restrictions.²² The MSRB elaborated that this first communication potentially is one of many that may span years.²³ Additionally, the MSRB further observed the solicitor municipal advisor's client likely will have its own communications with the solicited entity, which may

¹⁸ Id.

¹⁹ Notice, 88 FR at 9562.

²⁰ Id.

²¹ Id.

²² Id.

²³ Id.

include board presentations, meetings and discussions during which the solicitor municipal advisor may or may not be present.²⁴

2. Indirect Solicitations Through an Intermediary

The MSRB explained that a solicitor municipal advisor typically initially will solicit a financial intermediary or an investment consultant (collectively “intermediary”) who is hired by the solicited entity to conduct searches and identify appropriate investment managers to meet a municipal entity’s specific need.²⁵ Such intermediary itself may be a solicitor municipal advisor. According to the MSRB, when a solicitor municipal advisor first solicits the intermediary, the solicitor municipal advisor may not necessarily know who the intermediary represents (i.e., whether the intermediary represents municipal entities, obligated persons, other private entities, or all of the above).²⁶ Additionally, the MSRB noted that the solicitor municipal advisor generally will not know whether the intermediary will recommend the solicitor municipal advisor’s client to the intermediary’s municipal entity client(s) (if any). As a result, at the time of the first solicitation, the MSRB stated that a solicitor municipal advisor may not know if it is indirectly soliciting a municipal entity.²⁷ The MSRB noted that moreover, the solicitor municipal advisor’s client (e.g., the investment adviser) may engage in multiple subsequent communications with either the intermediary and/or the intermediary’s client (e.g., the municipal entity or obligated person), during which the solicitor municipal advisor may or may not be

²⁴ Id.

²⁵ Id.

²⁶ Id.

²⁷ Id.

present.²⁸ In some instances, the solicitor municipal advisor may never meet or directly communicate with an intermediary’s municipal entity or obligated person client.²⁹

B. Summary of Proposed Rule G-46

As described in further detail below and in the Notice, the MSRB stated that Proposed Rule G-46 would establish the core standards of conduct and duties of “solicitor municipal advisors” when engaging in solicitation activities that would require them to register with the SEC and the MSRB as municipal advisors.³⁰ The MSRB also noted that Proposed Rule G-46 would codify certain statements contained in an MSRB notice issued in 2017 pertaining to the application of MSRB rules to solicitor municipal advisors.³¹ Those statements relate to the obligation of solicitor municipal advisors under MSRB Rule G-17 (“Rule G-17”), on conduct of municipal securities and municipal advisory activities (the “G-17 Excerpt for Solicitor Municipal Advisors”).³² In addition to codifying much of the substance of the G-17 Excerpt for Solicitor Municipal Advisors, the MSRB stated that the Proposed 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 MSRB Rule G-42 (“Rule G-42”), on duties of non-solicitor municipal advisors; underwriters under Rule G-17, on fair dealing; and certain solicitations undertaken on behalf of third-party investment advisers

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ See MSRB Regulatory Notice 2017-08, Application of MSRB Rules to Solicitor Municipal Advisors (May 4, 2017), available at <https://www.msrb.org/sites/default/files/2017-08.pdf> (“Regulatory Notice 2017-08”).

³² Notice, 88 FR at 9562.

under the SEC’s marketing rule for investment advisers (the “IA Marketing Rule” or “IA Rule 206(4)-1”).³³

In summary, the MSRB stated that the core provisions of Proposed Rule G-46 generally would:

- Set forth definitions for terms used in the proposed rule;³⁴
- Require solicitor municipal advisors to provide to their solicitor clients full and fair disclosure in writing of all of their material conflicts of interest and material legal or disciplinary events;³⁵
- Require solicitor municipal advisors to document their relationships in writing(s), deliver such writing(s) to their solicitor clients, and set forth certain minimum content that must be included in such writing(s);³⁶
- Prohibit solicitor municipal advisors from making a representation that the solicitor municipal advisor knows or should know is either materially false or misleading regarding the capacity, resources or knowledge of the solicitor client and require solicitor municipal advisors to have a reasonable basis for any material representations it makes to a solicited entity regarding the capacity, resources or knowledge of the solicitor client;³⁷
- Require solicitor municipal advisors to disclose to solicited entities material facts about the solicitation, including but not limited to an obligation to disclose information about

³³ 17 CFR 275.206(4)-1; Notice, 88 FR at 9562.

³⁴ Notice, 88 FR at 9562.

³⁵ Id.

³⁶ Id.

³⁷ Id.

the solicitor municipal advisor’s role and compensation, the solicitor municipal advisor’s material conflict of interest; and information regarding the solicitor client;³⁸

- Set forth a dual disclosure standard with respect to required disclosures to solicited entities;³⁹ and
- Expressly prohibit solicitor municipal advisors from: delivering an inaccurate invoice for fees or expenses and making payments for the purpose of obtaining or retaining an engagement to perform municipal advisory activities subject to exceptions specified in the rule.⁴⁰

The MSRB stated that the supplementary material to Proposed Rule G-46 generally would:

- Provide additional explanation regarding the MSRB’s expectations with respect to the reasonable basis a solicitor municipal advisor must have for certain of its representations;⁴¹
- Explain the relationship between a solicitor municipal advisor’s fair dealing obligations and a federal fiduciary duty for municipal advisors;⁴²
- Explain the relationship between a municipal advisor’s obligations under Proposed Rule G-46 and Rule G-42;⁴³ and

38

Id.

39

Notice, 88 FR at 9563.

40

Id.

41

Id.

42

Id.

43

Id.

- Provide additional explanation applicable to a solicitor municipal advisor’s obligation to document its compensation arrangement and make related disclosures.⁴⁴

1. Definitions

The MSRB explained that Proposed Rule G-46(a) would set forth a set of definitions for terms used in the rule.⁴⁵ In the proposed rule change, the MSRB would define the terms “compensation,”⁴⁶ “excluded communications,”⁴⁷ “solicitation,” “solicited entity,” “solicitor client,” “solicitor municipal advisor,” and “solicitor relationship.”⁴⁸ As detailed below, the

44

Id.

45

Id.

46

Id. Proposed Rule G-46(a)(i) generally would provide that “compensation” means any cash, in-kind or non-cash remuneration, including but not limited to merchandise, gifts, travel expenses, meals and lodging. Notice, 88 FR at 9563, n.17.

47

Notice, 88 FR at 9563. Proposed Rule G-46(a)(ii) generally would provide that “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. Notice, 88 FR at 9563, n.18. The term “excluded communications” is used in the term “solicitation,” which would be defined in Proposed Rule G-46(a)(iii). Id.

48

Notice, 88 FR at 9563. Proposed Rule G-46(a)(vii) generally would provide that, for purposes of the rule, a “solicitor relationship” is 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 Exchange Act Section 15B(e)(9) and the rules and regulations thereunder. Notice, 88 FR at 9563, n.19. 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

MSRB identified that several of these definitions are integral to understanding nearly all of the provisions of Proposed Rule G-46, and the MSRB discussed each of these definitions in fuller detail and context.

The MSRB noted that Proposed Rule G-46(a)(iii) generally would define the term “solicitation” to mean 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 Proposed Rule G-46(a)(ii).⁴⁹ The MSRB stated that this definition is consistent with the defined term “solicitation of a municipal entity or obligated person” under Exchange Act Section 15B(e)(9), except to the extent that the term “solicitation” under Proposed Rule G-46(a)(iii) does not address solicitations undertaken on behalf of a third-party dealer.⁵⁰ The MSRB stated that because Rule G-38 generally prohibits a dealer from providing or agreeing to provide payment to third parties for solicitations of municipal securities business made on behalf of the dealer,

solicitor relationship required by Proposed Rule G-46(c) or (ii) the date on which the solicitor municipal advisor withdraws from the solicitor relationship. Id.

⁴⁹ Notice, 88 FR at 9563.

⁵⁰ Id.; 15 U.S.C. 78g-4(e)(9).

Proposed Rule G-46 assumes that such solicitations do not occur.⁵¹

The MSRB wrote that Proposed Rule G-46(a)(iv) generally would define the term “solicited entity” to mean any municipal entity or obligated person (as those terms are defined in Exchange Act Sections 15B(e)(8) and (e)(10)⁵² and the rules and regulations thereunder) that the solicitor municipal advisor has solicited, is soliciting or intends to solicit within the meaning of Exchange Act Sections 15B(e)(4)(A)(ii) and (e)(9)⁵³ and the rules and regulations thereunder.⁵⁴

The MSRB generally defined “solicitor client” in Proposed Rule G-46(a)(v) to mean the municipal advisor or investment adviser on behalf of whom the solicitor municipal advisor undertakes a solicitation within the meaning of Exchange Act Sections 15B(e)(4)(A)(ii) and (e)(9)⁵⁵ and the rules and regulations thereunder.⁵⁶ As the MSRB previously noted, Proposed Rule G-46 presumes that solicitors do not conduct paid solicitations on behalf of third-party dealers because of the prohibition set forth in Rule G-38.⁵⁷ As a result, the MSRB noted that Proposed Rule G-46(a)(v)’s definition of “solicitor client” does not include dealers as solicitor clients.⁵⁸

⁵¹ Notice, 88 FR at 9563.

⁵² 15 U.S.C. 78o-4(e)(8) and (e)(10).

⁵³ 15 U.S.C. 78o-4(e)(4)(A)(ii) and (e)(9).

⁵⁴ Notice, 88 FR at 9563.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Id.

The MSRB generally defined “solicitor municipal advisor” in Proposed Rule G-46(a)(vi) to mean, for purposes of the rule, a municipal advisor within the meaning of Exchange Act Section 15B(e)(4)⁵⁹ and other rules and regulations thereunder.⁶⁰ The MSRB further provided that Proposed Rule G-46(a)(vi) shall exclude a person that is otherwise a municipal advisor solely based on activities within the meaning of Exchange Act Section 15B(e)(4)(A)(i)⁶¹ and the rules and regulations thereunder.⁶² The MSRB stated that, generally, this means that a solicitor municipal advisor is any municipal advisor that is not a non-solicitor municipal advisor.⁶³

2. Disclosure to Solicitor Clients

The MSRB noted that its Proposed Rule G-46(b) would require a solicitor municipal advisor to provide to a client 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.⁶⁴ Further, the MSRB stated that these disclosures must be provided prior to or upon engaging in municipal advisory activities.⁶⁵

The MSRB stated that the Proposed Rule G-46(b) sets forth an alternative to providing a narrative description of any such legal or disciplinary events by permitting solicitor municipal

⁵⁹ 15 U.S.C. 78o-4(e)(4).

⁶⁰ Notice, 88 FR at 9563.

⁶¹ 15 U.S.C. 78o-4(e)(4)(A)(i).

⁶² Notice, 88 FR at 9563.

⁶³ Id.

⁶⁴ Notice, 88 FR at 9563-64.

⁶⁵ Notice, 88 FR at 9564.

advisors to reference such information in certain other publicly available information if the conditions specified in the rule are met.⁶⁶ As a result, the MSRB posited, solicitor municipal advisors (that are also registered broker-dealers or investment advisers) would be permitted to identify the specific type of event and make specific reference to the relevant portions of the solicitor municipal advisor's Form BD or Form ADV if the solicitor municipal advisor provides detailed information specifying where the client may electronically access such forms.⁶⁷ The MSRB noted that all other municipal advisors would be permitted to identify the specific type of event and make 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.⁶⁸

3. Documentation of the Solicitor Relationship

The MSRB explained that Proposed Rule G-46(c) would require a solicitor municipal advisor to 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.⁶⁹ The writing(s) would be required to be dated and include, at a minimum:

- 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

⁶⁶ Id.

⁶⁷ Id. For example, a solicitor municipal advisor could direct a solicitor client to FINRA's BrokerCheck system or the Investment Adviser Public Disclosure website, as applicable; provided, that the direction is accompanied by information as to how to retrieve the firm's specific Form BD or Form ADV and specific reference to the relevant portions of the applicable form. Notice, 88 FR at 9564, n.26.

⁶⁸ Notice, 88 FR at 9564.

⁶⁹ Id.

and a statement that the scope of the solicitation is anticipated to include the solicitation of municipal entities and/or obligated persons);⁷⁰

- the terms and amount of the compensation to be received by the solicitor municipal advisor for such activities;⁷¹
- the date, triggering event, or means for the termination of the relationship, or, if none, a statement that there is none;⁷² and
- any terms relating to withdrawal from the relationship.⁷³

The MSRB stated that the proposed obligation to document the relationship is generally consistent with a non-solicitor municipal advisor’s obligation to document its municipal advisory relationship with a client under Rule G-42(c).⁷⁴ The MSRB argued that this documentation obligation will help ensure that the solicitor client has certain basic material information about the engagement including the scope of agreed-upon activities and information pertaining to compensation for such activities.⁷⁵ The MSRB also posited that this documentation obligation will assist examining authorities in understanding the solicitation arrangement and will provide

⁷⁰ Id.

⁷¹ Id.

⁷² Id.

⁷³ Id.

⁷⁴ Id. Rule G-42(c) generally requires a municipal advisor to evidence each of its municipal advisory relationships by a writing or writings created and delivered to the municipal entity or obligated person client prior to, upon or promptly after the establishment of the municipal advisory relationship. Notice, 88 FR at 9564, n.28.

⁷⁵ Notice, 88 FR at 9564.

them with necessary information to assist in evaluating a solicitor municipal advisor’s compliance with relevant obligations.⁷⁶

The MSRB stated that a solicitor may be asked to solicit a broad range of entities on behalf of a client of the solicitor.⁷⁷ These entities may include municipal entities, obligated persons and corporate entities that are not obligated persons.⁷⁸ Although the MSRB observed that the solicitation of municipal entities and obligated persons generally would require compliance with Proposed Rule G-46 (to the extent the solicitation would make the solicitor a “municipal advisor”), the MSRB concluded that the solicitation of an entity that is not a municipal entity or an obligated person would not require such compliance.⁷⁹ The MSRB stated that in order to promote certainty as to the applicable regulatory scheme for any engagement, that it is imperative for any engagement to be documented in a writing that clearly indicates whether the solicitation of municipal entities and/or obligated persons is anticipated.⁸⁰ The MSRB also concluded that information pertaining to termination of the relationship or withdrawal from the relationship will similarly assist both solicitor clients and examination and enforcement authorities in understanding the scope of an engagement.⁸¹

The MSRB stated that Supplementary Material .04 to Proposed Rule G-46 would provide additional guidance with respect to the obligation to document the terms and the amount of

⁷⁶ Id.

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ Id.

⁸¹ Id.

compensation to be received.⁸² Specifically, the MSRB provided that such guidance provides that the documentation(s) must clearly describe the structure of the compensation arrangement and the amount of compensation paid or to be paid.⁸³

4. Representations to Solicited Entities

The MSRB explained that Proposed Rule G-46(d)(i) expressly would prohibit a 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.⁸⁴ The MSRB stated that this prohibition is similar to a prohibition applicable to non-solicitor municipal advisors under Rule G-42 except that, unlike with Rule G-42, the prohibition for solicitor municipal advisors 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.⁸⁵ The MSRB explained this assertion by offering its belief that 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.⁸⁶

The MSRB wrote that Proposed Rule G-46(d)(ii) would require a solicitor municipal advisor to have a reasonable basis for any material representations it makes to a solicited entity

⁸² Id.

⁸³ Id.

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ Notice, 88 FR at 9564-65.

regarding the capacity, resources, or knowledge of the solicitor client.⁸⁷ The MSRB noted that solicited entities should be entitled to rely on the material representations made by solicitor municipal advisors, as regulated financial professionals hired for the purpose of soliciting business on behalf of their clients, with respect to the qualifications of their clients.⁸⁸ The MSRB further asserted that such representations should have some reasonable basis.⁸⁹

The MSRB stated that Supplementary Material .01 would provide guidance on compliance with the reasonable-basis standard.⁹⁰ Specifically, the MSRB stated that this supplementary material would clarify that while a solicitor municipal advisor must have a reasonable basis for the representations described in Proposed 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 representations.⁹¹

5. Disclosures to Solicited Entities

The MSRB's Proposed Rule G-46(e) would require a solicitor municipal advisor to disclose to any solicited entity all material facts about the solicitation in the manner specified in

⁸⁷ Notice, 88 FR at 9565.

⁸⁸ Id.

⁸⁹ Id. The MSRB noted that this obligation bears some analogy to a non-solicitor municipal advisor's duty of care obligation to have a reasonable basis for any advice provided to or on behalf of a client pursuant to Rule G-42, Supplementary Material .01. Notice, 88 FR at 9565, n.30. While a non-solicitor municipal advisor provides advice to or on behalf of its municipal entity and obligated person clients, the MSRB stated that a solicitor municipal advisor solicits municipal entities and obligated persons on behalf of its clients. The MSRB concluded that, in both cases, the municipal advisor would be required to have a reasonable basis for what are likely to be the core material statements the municipal advisor was hired to provide to municipal entities and obligated persons. Id.

⁹⁰ Notice, 88 FR at 9565.

⁹¹ Id.

section (f) of the proposed rule.⁹² The MSRB wrote that this proposed change would include an obligation to disclose certain information pertaining to the solicitor municipal advisor's: (i) role and compensation; (ii) conflicts of interest; and (iii) client.⁹³

i. Role and Compensation Disclosures

The MSRB stated that Proposed Rule G-46(e)(i) would require a solicitor municipal advisor to disclose to any solicited entity the solicitor municipal advisor's name; the solicitor client's name; the type of business being solicited (i.e., municipal advisory business or investment advisory services); 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; and payments made by the solicitor municipal advisor to another solicitor municipal advisor to facilitate the solicitation.⁹⁴

The MSRB stated that Supplementary Material .04 would provide additional guidance with respect to the obligation to disclose the material terms of the solicitor municipal advisor's compensation arrangement.⁹⁵ Specifically, the MSRB noted that Proposed Rule G-46(e)(i)(D) would require disclosure of at least the same information as that required by Proposed Rule G-46(c)(ii), to the extent material.⁹⁶ However, Proposed Rule G-46(e)(i)(D) also may require the disclosure of additional information, depending on the facts and circumstances. For example, if

⁹² Id.

⁹³ Id.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ Id.

the solicitor municipal advisor receives indirect compensation for the solicitation, information pertaining to the indirect compensation also must be disclosed.⁹⁷

Additionally, the solicitor municipal advisor would be required to disclose the following statements:

- In connection with its solicitation activities as a municipal advisor, a solicitor municipal advisor does not owe a fiduciary duty under Section 15B(c)(i) of the Exchange Act⁹⁸ or MSRB rules to the entities that it solicits and is not required by those provisions 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 such solicitation activities, a solicitor municipal advisor is required to deal fairly with all persons, including both solicited entities and the solicitor municipal advisor's clients;⁹⁹ and
- 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.¹⁰⁰

The MSRB stated that these statements draw from analogous disclosures that underwriters must make to their issuer clients pursuant to Rule G-17,¹⁰¹ but are tailored to reflect

⁹⁷ Id.

⁹⁸ Id.

⁹⁹ Id.

¹⁰⁰ Id.

¹⁰¹ More specifically, the MSRB explained that these disclosures include an obligation to disclose that: Rule G-17 requires an underwriter to deal fairly at all times with both issuers and investors; unlike a municipal advisor, the underwriter does not have a fiduciary duty to the issuer under the federal securities laws and is, therefore, not required by federal law to act in the best interests of the issuer without regard to its own financial or other interests; and the underwriter's primary role is to purchase securities with a view

the existence of a federal fiduciary duty for non-solicitor municipal advisors and to make clear that a solicitor municipal advisor’s fair dealing obligations apply in connection with its solicitation activities.¹⁰²

The MSRB stated that Supplementary Material .02 to Proposed Rule G-46 would expound on the relationship between Proposed Rule G-46 and the fair dealing obligation under Rule G-17 and includes similar discussion regarding application of the federal fiduciary duty to a solicitor municipal advisor’s solicitations of solicited entities.¹⁰³ The MSRB clarified, however, that this proposed change would specify that solicitor municipal advisors may be subject to fiduciary or other duties under state or other laws and that nothing in Proposed Rule G-46 shall be deemed to supersede any more restrictive provision of state or other laws applicable to municipal advisory activities.¹⁰⁴ Finally, the MSRB described that Supplementary Material .02 would include a cross reference to Supplementary Material .03 and would remind solicitor municipal advisors that, to the extent they also engage in non-solicitor municipal advisory activity, the requirements of Rule G-42 will apply with respect to such activity and a federal fiduciary duty will apply with respect to the municipal entity clients of the municipal advisor.¹⁰⁵

to distribution in an arm’s-length commercial transaction with the issuer and it has financial and other interests that differ from those of the issuer. Notice, 88 FR at 9565, n.32; see MSRB Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (March 31, 2021) (the “G-17 Underwriter’s Guidance”), available at <https://www.msrb.org/Interpretive-Notice-Concerning-Application-MSRB-Rule-G-17-Underwriters-Municipal-Securities>.

¹⁰² Notice, 88 FR at 9565.

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ Id.

ii. Conflicts Disclosures

The MSRB stated that Proposed Rule G-46(e) (ii) would require a solicitor municipal advisor to disclose any material conflicts of interest, including but not limited to the fact that, because the solicitor municipal advisor is compensated for its solicitation efforts, it has an incentive to recommend its clients, resulting in a material conflict of interest.¹⁰⁶ The MSRB noted that a solicitor municipal advisor also would be required to disclose any material conflicts of interest, of which the solicitor municipal advisor is aware after reasonable inquiry that could reasonably be anticipated to impair the solicitor municipal advisor's ability to solicit the solicited entity in accordance with its duty of fair dealing.¹⁰⁷ The MSRB stated that this obligation is comparable to a non-solicitor municipal advisor's obligation under Rule G-42 to disclose to its clients all material conflicts of interest, including any conflicts, of which the municipal advisor is aware after reasonable inquiry, that could reasonably be anticipated to impair the municipal advisor's ability to provide advice to or on behalf of the client in accordance with the standards set forth in the rule.¹⁰⁸ The MSRB observed that this proposed change is comparable to the obligation under the IA Marketing Rule to disclose that a promoter, due to the fact that it is compensated, has an incentive to recommend the investment adviser it promotes, resulting in a material conflict of interest.¹⁰⁹ The MSRB concluded that disclosure of such conflict-of-interest information is key to assisting a solicited entity in evaluating the solicitor municipal advisor's

¹⁰⁶ Notice, 88 FR at 9565-66.

¹⁰⁷ Notice, 88 FR at 9566.

¹⁰⁸ Id.; see Rule G-42(b)(i)(F).

¹⁰⁹ Notice, 88 FR at 9566.

statements and in determining whether to retain the solicitor's client.¹¹⁰ In Amendment No. 1., the MSRB corrected a typographical error (i.e., remove an errant "'s" from the rule text) in proposed Rule G-46(e)(ii).¹¹¹

iii. Solicitor Client Disclosures

The MSRB wrote that Proposed Rule G-46(e)(iii) would require a solicitor municipal advisor to provide to the solicited entity the following information regarding the solicitor client 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 investment adviser client) or Form ADV, Part 2 (in the case of an investment adviser client); and 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.¹¹²

The MSRB stated that these requirements are designed to help ensure that, at any early stage, solicited entities are directed to important written information about the entities the solicitor municipal advisor represents—including, but not limited to, information about the disciplinary history of the solicitor municipal advisor's clients.¹¹³ However, the MSRB provided that it does not require solicitor municipal advisors to obtain a copy of these documents and provide them to their solicited entities, nor does it require a solicitor municipal advisor to

¹¹⁰ The MSRB offered the example that, without a specific disclosure about a solicitor municipal advisor's incentives, a solicitation creates a risk that the solicited entity would mistakenly view the solicitor municipal advisor's recommendation as being an unbiased opinion about the solicitor client's ability to, for example, manage the solicited entity's assets, and would rely on that recommendation more than the solicited entity otherwise would if the solicited entity knew of the solicitor municipal advisor's incentive. Id.

¹¹¹ Amendment No. 1.

¹¹² Notice, 88 FR at 9566.

¹¹³ Id.

disclose any specific information about the client that is included in such forms.

6. Timing and Manner of Disclosures to Solicited Entities

The MSRB explained that Proposed Rule G-46(f), as modified by Amendment No. 1., would provide that any disclosures required under section (e) of the proposed rule (pertaining to disclosures to solicited entities) must be made in writing.¹¹⁴ The MSRB also noted the proposed rule would provide for a dual-disclosure requirement, such that solicitations that result in a solicited entity engaging a solicitor client would receive the requisite disclosures twice.¹¹⁵ Specifically, the MSRB explained that the solicited entity would receive the disclosures once at the time of the first communication giving rise to the solicitation and again at the time that engagement documentation pertaining to the solicited entity's engagement of the solicitor client is delivered (or promptly thereafter).¹¹⁶

i. Initial Disclosure at the Time of the First Communication

The MSRB stated that the disclosures would be required to be delivered at the time of the first communication (as that term is used in the definition of "solicitation") with a solicited entity on behalf of a specific solicitor client.¹¹⁷ Specifically, the MSRB wrote that the disclosures would be required to be provided to the solicitor client representative with whom such communication is made. In the case of an indirect solicitation—a solicitation of an intermediary who represents a municipal entity or obligated person—the MSRB expounded that disclosures

¹¹⁴ Id. See also Amendment No. 1.

¹¹⁵ Notice, 88 FR at 9566.

¹¹⁶ Id.

¹¹⁷ Id.

must be provided to the intermediary with whom such communication is made.¹¹⁸ In Amendment No. 1, the MSRB made a technical correction to state that, at the time of such first direct communication with a solicited entity on behalf of a specific solicitor client, the requisite disclosures must be provided to the solicited entity representative (rather than the solicitor client representative as set forth in the Notice) with whom such communication is made.¹¹⁹

Amendment No. 1 also corrected an errant cross-reference in proposed Rule G-46(f)(i)

ii. Second Disclosure at the Time of the Solicitor Client's Engagement with the Solicited Entity

The MSRB noted that if the solicitation results in a solicited entity engaging a solicitor client for investment advisory services or municipal advisory services, all disclosures required by Proposed Rule G-46(e) would be required to be provided at the time that such engagement documentation is delivered to the solicited entity or promptly thereafter.¹²⁰ The MSRB concluded that this is the case even if there are no changes between the initial set of disclosures and the second set of disclosures.¹²¹

The MSRB also described that the second set of disclosures may be provided by either the solicitor client or the solicitor municipal advisor.¹²² The MSRB wrote 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

¹¹⁸ Id.

¹¹⁹ Amendment No. 1.

¹²⁰ Notice, 88 FR at 9566.

¹²¹ Id.

¹²² Id.

an engagement with the solicited entity.¹²³ Further, the MSRB noted that these disclosures would be required to 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.¹²⁴ The MSRB explained that these two conditions would not apply to the initial delivery of disclosures.¹²⁵

The MSRB stated that this dual or 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.¹²⁶ However, the MSRB explained that, because such person(s) may not have the authority to bind the solicited entity by contract (particularly where such person is an intermediary between the solicitor and the solicited entity), the MSRB would require the disclosures to be provided again at the time of the engagement between the solicited entity and the solicitor client (or promptly thereafter).¹²⁷ The MSRB posited that any risk associated with the first disclosures not being passed on to a knowledgeable person with the authority to bind the solicited entity in contract would be mitigated by requiring that the disclosures are provided again at the time of the engagement—this time, to someone who does have such authority.¹²⁸ Additionally, the MSRB noted that the MSRB has observed that solicitations may sometimes

123

Id.

124

Notice, 88 FR at 9566-67.

125

Notice, 88 FR at 9567.

126

Id.

127

Id.

128

Id.

span years, and particularly in such instances, the MSRB concluded that it is important that the solicited entity receives the disclosures again at the time of the solicitor client's engagement with the solicited entity.¹²⁹

7. Specified Prohibitions

The MSRB stated that Proposed Rule G-46(g) expressly would prohibit a solicitor municipal advisor from 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; and making payments for the purpose of obtaining or retaining an engagement to perform municipal advisory activities.¹³⁰ Specifically, the MSRB wrote that solicitor municipal advisors would be prohibited from making payments for the purpose of obtaining or retaining an engagement to perform municipal advisory activities other than:

- payments to an affiliate for a direct or indirect communication with a municipal entity or obligated person on behalf of the solicitor municipal advisor where such communication is made for the purpose of obtaining or retaining an engagement to perform municipal advisory activities;¹³¹
- reasonable fees paid to another municipal advisor registered as such with the Commission and the MSRB for making a communication for the purpose of obtaining or retaining an engagement to perform municipal advisory activities;¹³² and

129 Id.

130 Id.

131 Id.

132 Id.

- payments that are permissible “normal business dealings” as described in Rule G-20, on gifts, gratuities, non-cash compensation and expenses of issuance.¹³³

The MSRB explained that that these specified prohibitions are modeled on similar prohibitions applicable to non-solicitors under Rule G-42(e)(i) and to a lesser degree would align with certain prohibitions applicable to underwriters under the G-17 Underwriter’s Guidance.¹³⁴

In Amendment No. 1 the MSRB proposed to correct an errant internal cross-reference in Proposed Rule G-46 (g)(ii).¹³⁵

C. Proposed Rule G-46 Supplementary Material

Proposed Rule G-46 would set forth four supplementary material sections:

- Providing additional explanation regarding the MSRB’s expectations with respect to the reasonable basis a solicitor municipal advisor must have for the representations described in Proposed Rule G-46(d);¹³⁶
- Explaining the relationship between a solicitor municipal advisor’s fair dealing obligations and the applicability of a federal fiduciary duty for municipal advisors;¹³⁷
- Explaining the relationship between a municipal advisor’s obligations under Proposed Rule G-46 and Rule G-42;¹³⁸ and

133

Id.

134

Id. See Rule G-42(e)(i); see also G-17 Underwriter’s Guidance at section titled, “Underwriter Compensation and New Issue Pricing.”

135

Amendment No. 1.

136

Notice, 88 FR at 9567.

137

Id.

138

Id.

- Providing additional detail regarding a solicitor municipal advisor’s compensation documentation and disclosure obligations.¹³⁹

The MSRB stated that Supplementary Material .03 explains that municipal advisors should be mindful that one may be, simultaneously, both a solicitor municipal advisor for purposes of Proposed Rule G-46 and a non-solicitor municipal advisor for purposes of Rule G-42.¹⁴⁰ For example, the MSRB explained that 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 Proposed Rule G-46 (the “solicitor municipal advisor engagement”).¹⁴¹ The MSRB wrote that the municipal advisor would be subject to Rule G-42 with respect to the advisory engagement and would be subject to Proposed Rule G-46 with respect to the solicitor municipal advisor engagement.¹⁴² The MSRB stated that municipal advisors should evaluate the activity undertaken with respect to each engagement to determine which rule governs and ensure the written supervisory procedures required under Rule G-44 reflect such.¹⁴³

D. Proposed Amendments to MSRB Rule G-8

The MSRB explained that proposed amendments to Rule G-8 would add specific recordkeeping obligations designed to help facilitate and document compliance with Proposed Rule G-46. Specifically, the MSRB stated that these amendments would add new subsection

¹³⁹ Id.

¹⁴⁰ Id.

¹⁴¹ Id.

¹⁴² Id.

¹⁴³ Id.

(viii) requiring solicitor municipal advisors to make and keep the following books and records:¹⁴⁴

- evidence that the disclosures required by Proposed Rule G-46(b) were made in the manner required by that section;¹⁴⁵
- a copy of each writing or writings required by Proposed Rule G-46(c);¹⁴⁶
- documentation substantiating the solicitor municipal advisor’s reasonable basis for believing its representations as described in Proposed Rule G-46(d) (e.g., a checklist confirming that an investment adviser client's Form ADV was reviewed);¹⁴⁷ and
- evidence that the disclosures required by Proposed Rule G-46(e) were made in the manner described in Proposed Rule G-46(f) (e.g., automatic email delivery receipt).¹⁴⁸

III. Summary of Comment Received and MSRB’s Response

The Commission received one comment letter on the proposed rule change, as well as response from the MSRB to this comment letter. As more fully described below, the SIFMA Letter argued that the proposed MSRB Rule G-46 is unclear and unworkable in several areas,

¹⁴⁴ Id.

¹⁴⁵ Id.

¹⁴⁶ Id.

¹⁴⁷ Id.

¹⁴⁸ Id.

and therefore, urged the SEC to disapprove the proposed rule.¹⁴⁹ The MSRB’s Response Letter responded directly to each of these points.¹⁵⁰

Avoiding Unnecessary Regulation

SIFMA explained that its members believe that the proposed rule change is confusing and unnecessary, as many solicitor municipal advisors are already regulated by the SEC pursuant to the Investment Advisers Act.¹⁵¹ SIFMA also reiterated a request for the MSRB to prohibit municipal advisors from paying third-party municipal advisors for a solicitation of municipal advisory business.¹⁵² Finally, SIFMA warned that solicitation of municipal advisors could “create material conflict of interest,” and thereby, create circumstances leading to corruption that “could be damaging to the integrity of the municipal securities market.”¹⁵³

In its Response Letter, the MSRB stated that the proposed rule change is designed to harmonize with relevant rules under comparative regimes, including the regime for investment advisers.¹⁵⁴ The MSRB also indicated that the MSRB does not believe that the fact that some solicitor municipal advisors are also investment advisers obviates the need for regulation in their capacity as solicitor municipal advisors.¹⁵⁵ Further, the MSRB responded to SIFMA’s conflict of interest concerns by noting that, among other things, the proposed rule change is designed to

¹⁴⁹ SIFMA Letter at 1.

¹⁵⁰ See Response Letter.

¹⁵¹ SIFMA Letter at 2.

¹⁵² Id.

¹⁵³ Id.

¹⁵⁴ Response Letter at 2.

¹⁵⁵ Id.

address these material conflicts of interest and to provide some guardrails around such solicitation activities.¹⁵⁶ The MSRB concluded that the proposed rule change’s approach (as opposed to the outright prohibition on paying solicitor municipal advisors for their third-party solicitations of municipal advisory business) is consistent with the apparent intent in the Dodd-Frank Act in granting rulemaking authority to the MSRB over such conduct.¹⁵⁷

Inadvertent Solicitations

SIFMA further indicated that a safe harbor for inadvertent solicitations is warranted because there confusion exists as to what disclosures are due to which parties and when.¹⁵⁸

In response to SIFMA’s concern, the MSRB explained that, as described in Amendment No. 1, the MSRB made a technical correction to the proposed rule change to correct a typographical error in Proposed Rule G-46(f)(i)(A) that it believes may have inadvertently contributed to any confusion.¹⁵⁹ The MSRB identified that Amendment No. 1’s revisions clarify that, at the time of the first direct communication with a solicited entity on behalf of a specific solicitor client, the requisite disclosures must be provided to the solicited entity representative (rather than the solicitor client representative as set forth in the Notice) with whom such communication is made.¹⁶⁰ Further, the MSRB explained that this prose is consistent with the heading of section (f) of Proposed Rule G-46 (titled “Timing and Manner of Disclosures to

156

Id.

157

Id.

158

SIFMA Letter at 2.

159

Response Letter at 2.

160

Id.

Solicited Entities”).¹⁶¹

The MSRB described that the dual disclosure obligation set forth in the proposed rule change require the following. For direct solicitations of a solicited entity by a solicitor municipal advisor, the MSRB stated that, at the time of the first solicitation, the solicitor municipal advisor would be required to make the disclosures required by Proposed Rule G-46(e) to the solicited entity representative (i.e., the person actually solicited, such as an employee of the solicited entity).¹⁶² The MSRB also noted that, if that solicitation results in the solicited entity engaging the solicitor client for investment advisory services or municipal advisory services, all disclosures required by Proposed Rule G-46(e) would be required to be provided again at the time that such engagement documentation is delivered to the solicited entity or promptly thereafter.¹⁶³ The MSRB wrote that the same standard would apply for indirect solicitations, except for the fact that, at the time of the first solicitation, the disclosures would be required to be provided to the intermediary with whom such communication is made.¹⁶⁴

The MSRB stated that a solicitor municipal advisor may make multiple solicitations of a solicited entity (sometimes spanning more than one year) before a solicitation may result in a solicited entity engaging a solicitor client.¹⁶⁵ As a result, the MSRB concluded that it is important that the disclosures set forth in Proposed Rule G-46(e) are provided twice—once in connection with the initial solicitation so that the solicitee can appropriately evaluate the

¹⁶¹ Id.

¹⁶² Response Letter at 2-3.

¹⁶³ Response Letter at 3.

¹⁶⁴ Id.

¹⁶⁵ Id.

disclosures in connection with the solicitation and again at the time of the relevant engagement when an official that is reasonably believed to have the authority to bind the solicited entity by contract is guaranteed to receive the disclosures.¹⁶⁶

Next, the MSRB asserted that, pursuant to Sections 15B(e)(4)(ii) and (e)(9) of the Exchange Act,¹⁶⁷ one meets the definition of a “municipal advisor” if, in relevant part, one undertakes a direct or indirect communication with a municipal entity or obligated person.¹⁶⁸ Consequently, the MSRB deemed it consistent with a regulated entity’s supervisory and compliance obligations to expect regulated entities to be cognizant of their communications and to put into place appropriate processes to help them ascertain whether or not they are engaging in municipal advisory activity.¹⁶⁹ The MSRB explained that, in the context of third-party solicitations, one such mechanism may be to inquire of intermediaries whether they represent municipal entities or obligated persons.¹⁷⁰ The MSRB also noted that nothing would prohibit a solicitor municipal advisor from, out of an abundance of caution, providing the disclosures specified in Proposed Rule G-46(e) to all intermediaries that the solicitor municipal advisor solicits.

After careful consideration, the MSRB stated that a safe harbor for inadvertent solicitations is not warranted. The MSRB explained that, consistent with the definition of “municipal advisor” under the Exchange Act, to trigger the application of Proposed Rule G-46, a

¹⁶⁶ Id.

¹⁶⁷ 15 U.S.C. 78o-4(e)(4) and (e)(9).

¹⁶⁸ Response Letter at 3.

¹⁶⁹ Id.

¹⁷⁰ Id.

solicitor municipal advisor must undertake the relevant solicitation “for the purpose of obtaining or retaining” an engagement between the solicited entity and the solicitor client.¹⁷¹ Because this requires affirmative intent, the MSRB deemed that a provision for “inadvertent” solicitations is not appropriate.¹⁷² To that end, the MSRB concluded that the example set forth in the SIFMA Letter would subject a firm to Proposed Rule G-46. If a firm initially solicits a solicited entity on its own behalf, 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, the MSRB does not believe that the firm would be subject to Proposed Rule G-46 if it has not solicited the solicited entity for the purpose of obtaining or retaining an engagement on behalf of that third-party investment adviser.¹⁷³

III. Discussion of Commission’s Findings

The Commission has carefully considered the proposed rule change, the comment letter received, the MSRB Response Letter, and Amendment No. 1. The Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Exchange Act, and the rules and regulations thereunder applicable to the MSRB.

In particular, the Commission believes that the proposed rule change, as modified by Amendment No. 1, is consistent with the provisions of Section 15B(b)(2)(C), which provides, in part, that the MSRB’s rules shall be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with

¹⁷¹ Exchange Act Section 15B(e)(9), 15 U.S.C. 78o-4(e)(9).

¹⁷² Response Letter at 3.

¹⁷³ Response Letter at 3-4.

respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.¹⁷⁴

The Commission finds that the proposed rule change, as modified by Amendment No. 1, will: (i) prevent fraudulent and manipulative acts and practices; (ii) foster cooperation and coordination among regulators; and (iii) protect investors, municipal entities, obligated persons, and the public interest.

A. Prevention of Fraudulent and Manipulative Acts and Practices

The Commission finds that the proposed rule change, as modified by Amendment No. 1, would help prevent fraudulent and manipulative acts and practices.

First, Proposed Rule G-46 would expressly prohibit solicitor municipal advisors from making a representation that the solicitor municipal advisor knows or should know is either materially false or misleading regarding the capacity, resources or knowledge of the solicitor client.¹⁷⁵ Second, Proposed Rule G-46 would require solicitor municipal advisors to have a reasonable basis for any material representations the solicitor municipal advisor makes to a solicited entity regarding the capacity, resources or knowledge of the solicitor client.¹⁷⁶ Third, Proposed Rule G-46 expressly would prohibit solicitor municipal advisors from delivering an inaccurate invoice for fees or expenses.¹⁷⁷ The Commission believes that the proposed rule

¹⁷⁴ 15 U.S.C. 78o-4(b)(2)(C).

¹⁷⁵ Notice, 88 FR 9568.

¹⁷⁶ Id.

¹⁷⁷ Id.

change's prohibitions prevent either: (i) forms of fraudulent and manipulative acts and practices themselves (e.g., materially false or misleading representations and inaccurate invoices for fees or expenses) or (ii) behavior that could reasonably be understood to accompany (or serve as indicia of) the commission of fraudulent and manipulative acts and practices, if they are not fraudulent and manipulative acts and practices themselves (e.g., lacking reasonable basis for a material representation). Furthermore, the proposed Supplementary Materials to Rule G-46 provide explanations of Proposed Rule G-46's prohibitions of fraudulent and manipulative acts and practices. This increased clarity would increase the effectiveness of such prohibitions by raising understanding of these prohibitions among solicitor municipal advisors and the municipal entities and obligated persons with whom they interact.

Additionally, Proposed Rule G-46 prohibit solicitor municipal advisors from making payments for the purpose of obtaining or retaining an engagement to perform municipal advisory activities (subject to specified exceptions).¹⁷⁸ Among other things, the Commission finds that this prohibition would effectively require solicitor municipal advisors to use only associated persons or other regulated solicitor municipal advisors to obtain business on their behalf. This proposed rule change would help ensure that only regulated persons (who are subject to rules designed to prevent fraudulent and manipulative acts and practices) may engage in solicitation activities on behalf of a solicitor municipal advisor.

As such, the Commission finds that the proposed rule change, as modified by Amendment No. 1, helps prevent fraudulent and manipulative acts and practices.

¹⁷⁸

Id.

B. Fostering Cooperation and Coordination

The Commission finds that the proposed rule change, as modified by Amendment No. 1, would foster cooperation and coordination with persons engaged in regulating transactions in municipal securities and municipal financial products.

Proposed Rule G-46 requires solicitor municipal advisors to document their relationships in writing that includes certain minimum content that is vital to the solicitor municipal advisor, its clients and applicable regulators in understanding the material terms of an engagement (including the scope of agreed-upon activities, information pertaining to compensation for such activities and whether the solicitation of municipal entities and/or obligated persons is anticipated).¹⁷⁹ Proposed Rule G-46's new documentation obligation (and the Supplementary Materials to Rule G-46 explaining it) would help promote certainty as to the applicable regulatory scheme for any engagement since only solicitations of municipal entities and obligated persons would be subject to Proposed Rule G-46, whereas other solicitations may fall within the jurisdiction of the rules of other regulators (e.g., the Commission or the Financial Industry Regulatory Authority). By promoting certainty regarding the regulatory scheme applicable to solicitor municipal advisors, the proposed rule change will allow different regulators to operate with a common understanding that these solicitations fall under the new regulatory regime for solicitor municipal advisors.

Similarly, the Commission finds that proposed Rule G-46 and the proposed amendments to Rule G-8 would assist regulators who examine solicitor municipal advisors understand the solicitation arrangement through both Proposed Rule G-46's documentation requirements, as well as Rule G-8's requirements that such documentation be preserved in solicitor municipal

¹⁷⁹ Id.

advisor's books and records.¹⁸⁰ Furthermore, these proposals would provide these regulators with necessary information to assist in evaluating a solicitor municipal advisor's compliance with relevant obligations.¹⁸¹ The Commission further believes that the proposed amendments to Rule G-8 (with the ensuing application of existing MSRB Rule G-9 on records preservation) would help create an audit trail, assisting examination and enforcement authorities in their examination for compliance with, and prosecution of, these prohibitions.¹⁸²

As such, the Commission finds that the proposed rule change, as modified by Amendment No. 1, fosters cooperation and coordination among persons engaged in regulating transactions in municipal securities and municipal financial products.

C. Protection of Municipal Entities, Obligated Persons, and the Public Interest

The Commission believes that the proposed rule change, as modified by Amendment No. 1, would protect municipal entities, obligated persons, and the public interest.

Specifically, Proposed Rule G-46 requires solicitor municipal advisors to disclose in writing all of their material conflicts of interest and material legal or disciplinary events to the entities that determine whether to hire such solicitor municipal advisors.¹⁸³ The Commission finds that this requirement would increase solicitor municipal advisor accountability and discourage conduct inconsistent with a solicitor municipal advisor's obligations under Proposed Rule G-46 because such conduct would be required to be disclosed in information provided to clients. Specifically, the Commission finds that a municipal entity or obligated person could

¹⁸⁰ Id.

¹⁸¹ Id.

¹⁸² Notice, 88 FR at 9567-68.

¹⁸³ Notice, 88 FR at 9565-66.

view a solicitor municipal advisor's disclosure of material conflict of interests and/or disclosure of material legal or disciplinary events as a reason to avoid retaining that solicitor municipal advisor. Therefore, the Commission believes that a solicitor municipal advisors may try to avoid such behavior to avoid losing future engagements. As such, the Commission finds that the proposed rule change incentivizes firms to refrain from behavior that could harm municipal entities and obligated persons, and therefore, protect municipal entities, obligated persons, and the public interest.

The proposed rule change also would protect municipal entities, obligated persons, and the public interest by setting forth obligations applicable to solicitor municipal advisors similar to those applicable to non-solicitor municipal advisors to their clients under Rule G-42. Like non-solicitor municipal advisors, solicitor municipal advisors would be required to: disclose their material conflicts of interest;¹⁸⁴ document their relationships in writing;¹⁸⁵ and refrain from certain conduct such as making certain materially false or misleading representations,¹⁸⁶ delivering a materially inaccurate invoice,¹⁸⁷ and making certain payments for the purpose of obtaining or retaining an engagement.¹⁸⁸ Under Proposed Rule G-46, the protections provided by these provisions would be provided to municipal entities and obligated persons solicited by solicitor municipal advisors. Furthermore, the proposed changes to Rule G-8 would mandate preserving records related to Proposed Rule G-46; as such, Rule G-8 would strengthening these

¹⁸⁴ See Rule G-42(b)(i)(F).

¹⁸⁵ See Rule G-42(c) and Proposed Rule G-46(c).

¹⁸⁶ See Rule G-42(e)(i)(C) and Proposed Rule G-46(d)(i).

¹⁸⁷ See Rule G-42(e)(i)(B) and Proposed Rule G-46(g)(i).

new protections by compelling contemporaneous documentation of compliance with them.

As such, the Commission finds that the proposed rule change, as modified by Amendment No. 1, protects municipal entities, obligated persons, and the public interest.

In approving the proposed rule change, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation.¹⁸⁹ Exchange Act Section 15B(b)(2)(C)¹⁹⁰ requires that MSRB rules not be designed to impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Commission does not believe the proposed rule change, as modified by Amendment No. 1, would impose any new burden on competition as it would apply a regulatory regime equally to all solicitor municipal advisors (similar to the regime that currently exists for non-solicitor municipal advisors under Rule G-42 and Rule G-8 on recordkeeping, and for underwriters under the Rule G-17 Underwriter's Guidance).¹⁹¹ This consequence of the proposed rule change, as modified by Amendment No. 1, would not burden competition. Further, the Commission finds that on an ongoing year-by-year basis, the additional regulatory burden imposed would be proportional to each solicitor municipal advisory firm's size and business activities. Accordingly, the Commission does not believe that the proposed rule change, as modified by Amendment No. 1, would result in any additional burden on competition that is not necessary or appropriate in in furtherance of the purposes of the Exchange Act.

The Commission also finds that the proposed rule change, as modified by Amendment No. 1, will not hinder capital formation. As noted above, the proposed rule change brings a

¹⁸⁹ 15 U.S.C. 78c(f).

¹⁹⁰ 15 U.S.C. 78o-4(b)(2)(C).

¹⁹¹ See Rules G-42; G-8; and G-17.

regulatory regime to solicitor municipal advisors similar to the regimes that currently exist for non-solicitor municipal advisors and underwriters. Therefore, Commission finds that the proposed rule change would not negatively impact the municipal securities market's operational efficiency.

The Commission also finds that the proposed rule change includes provisions that could help promote efficiency. As noted above, the Commission believes that the proposed rule change would promote clearer regulatory requirements for all solicitor municipal advisors.

As noted above, the Commission received one comment letter on the filing. The Commission believes that the MSRB, through its response and Amendment No. 1, addressed the commenters' concerns. For the reasons noted above, the Commission believes that the proposed rule change, as modified by Amendment No. 1, is consistent with the Exchange Act.

V. Solicitation of Comments on Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 is consistent with the Exchange Act.

Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-MSRB-2023-02 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

All submissions should refer to File Number SR-MSRB-2023-02. This file number should be

included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00 pm. Copies of the filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change; the Commission does not edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-2023-02 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VI. Accelerated Approval of Proposed Rule Change as Modified by Amendment No. 1

The Commission finds good cause for approving the proposed rule change, as modified by Amendment No. 1, prior to the 30th day after the date of publication of notice of Amendment No. 1 in the Federal Register. As noted by the MSRB, Amendment No. 1 does not raise any significant issues with respect to the proposed rule change and only provides a minor change to address an issue raised by the commenter and other technical corrections. Further, the proposed rule change, as modified by Amendment No. 1, is designed to ease burdens without negatively affecting investors or the public interest.

For the foregoing reasons, the Commission finds good cause for approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis, pursuant to Section 19(b)(2) of the Exchange Act.

VII. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,¹⁹² that the proposed rule change (SR-MSRB-2023-02) be, and hereby is, approved.

For the Commission, by the Office of Municipal Securities, pursuant to delegated authority.¹⁹³

Sherry R. Haywood
Assistant Secretary

¹⁹² 15 U.S.C. 78s(b)(2).

¹⁹³ 17 CFR 200.30-3(a)(12).