MSRB
Municipal Securities Rulemaking Board

October 7, 2019

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Response to Comments on SR-MSRB-2019-10

Dear Ms. Countryman:

On August 1, 2019, the Municipal Securities Rulemaking Board ("MSRB") filed with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change to amend and restate the MSRB's August 2, 2012 interpretive notice[1] concerning the application of MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities, to underwriters of municipal securities (the "original proposed rule change"). The original proposed rule change (1) updates the 2012 Interpretive Notice in light of its implementation in the market since its first adoption and current market practices and (2) proposes a number of revisions to the 2012 Interpretive Notice to update and streamline certain of its disclosure obligations, such as incorporating certain implementation guidance[2] and frequently-asked-questions[3] issued subsequent to the 2012 Interpretive Notice in order to consolidate the MSRB's relevant guidance on this topic into a single publication.

To inform its development of the original proposed rule change, the MSRB initiated a retrospective review of the 2012 Interpretive Notice and sought public comment on draft amendments through two separate public requests for comment prior to preparing the original proposed rule change.[4] In response to the requests for comment, the MSRB received a total of ten letters from a diverse group of market participants. Some commenters expressed support for

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1 The 2012 interpretive notice was approved by the SEC on May 4, 2012 and became effective on August 2, 2012 (hereinafter, the "2012 Interpretive Notice"). See Release No. 34-66927 (May 4, 2012); 77 FR 27509 (May 10, 2012) (File No. SR-MSRB-2011-09); and MSRB Notice 2012-25 (May 7, 2012).

2 See MSRB Notice 2012-38 (July 18, 2012) (hereinafter, the "Implementation Guidance").

3 See MSRB Notice 2013-08 (Mar. 25, 2013) (hereinafter, the "FAQs").

4 See MSRB Notice 2018–10 (June 5, 2018) (the "Concept Proposal") and MSRB Notice 2018–29 (Nov. 16, 2018) (the "Request for Comment").

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the draft amendments to the 2012 Interpretive Notice. Others generally supported the MSRB's efforts to enhance the effectiveness of the disclosures required by the 2012 Interpretive Notice but suggested further revisions or expressed various concerns regarding the draft amendments. The MSRB found this input to be highly informative and valuable. After carefully considering the comments received in response to the Concept Proposal and Request for Comment, the MSRB incorporated revisions to the draft amendments prior to filing the original proposed rule change with the Commission. The SEC published the original proposed rule change for comment in the Federal Register on August 9, 2019[5] and received three comment letters.[6]

Consistent with the written comments received in the MSRB's prior public comment periods, two commenters on the original proposed rule change generally expressed their continued support for the MSRB's efforts to enhance the effectiveness of the disclosures, while one commenter to the original proposed rule change expressed its lack of support until the MSRB further amends the original proposed rule change to incorporate its comments regarding various revisions. At the most general level, NAMA commented that it is "very supportive of the changes that the MSRB has proposed to its G-17 Interpretive Guidance,"[7] and the ICI commented that it "supports adoption of the [n]otice" but "recommend[s] a few changes to clarify its application to underwritings involving municipal fund securities[.]"[8] In contrast, SIFMA commented that the SEC should "disapprove[]" of the original proposed rule change "until such time that the MSRB amends the [f]iling to address our further comments described herein."[9]

This letter responds to the three comment letters received by the Commission. After carefully considering, and in response to, those comments, the MSRB is filing this day Amendment No. 1 to SR-MSRB-2019-10 ("Amendment No. 1") to make certain revisions to the original proposed rule change, as discussed below and in further detail in Amendment No. 1. This letter first describes the response to comments on the original proposed rule change that the MSRB incorporated into Amendment No. 1 and then describes the MSRB's response to

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5 See Exchange Act Release No. 86572 (Aug. 5, 2019), 84 FR 39646 (Aug. 9, 2019). Except as otherwise expressly defined herein, the defined terms used in this letter shall have the meanings as defined in the proposed rule change.

6 See letters from Tamara K. Salmon, Associate General Counsel, Investment Company Institute ("ICI") (Aug. 26, 2019) (the "ICI Comment Letter"), Leslie Norwood, Managing Director and Associate General Counsel, the Securities Industry and Financial Markets Association ("SIFMA") (Aug. 30, 2019) (the "SIFMA Comment Letter"), and Susan Gaffney, Executive Director, National Association of Municipal Advisors ("NAMA") (Aug. 30, 2019) (the "NAMA Comment Letter").

7 NAMA Comment Letter, at p. 1.

8 ICI Comment Letter, at p. 2.

9 SIFMA Comment Letter, at p. 2.

comments on the original proposed rule change that the MSRB declined to incorporate into Amendment No. 1. The original proposed rule change as amended by Amendment No. 1 is referred to as the "proposed rule change" and the 2012 Interpretive Notice as revised by the proposed rule change is referred to as the "amended revised interpretive notice."

Comments Incorporated into Amendment No. 1

Delivery of Complex Municipal Securities Financing Disclosures. The original proposed rule change would revise the 2012 Interpretive Notice to incorporate existing language from the Implementation Guidance that modifies the application of the interpretive notice to circumstances in which an underwriter must provide transaction-specific disclosures regarding the material aspects of a financing structure recommended by an underwriter that involves unique, atypical, or otherwise complex financing structures (i.e., the complex municipal securities financing disclosures triggered by a Complex Municipal Securities Financing Recommendation). The original proposed rule change would assign to the syndicate manager the fair dealing obligation to deliver the requisite transaction-specific disclosures, including, when applicable, the complex municipal securities financing disclosures. The text of the original proposed rule change thus attempts to reduce the number of duplicative disclosures delivered by underwriters to an issuer when an underwriting syndicate is formed by eliminating any ambiguity about the fair dealing obligation of underwriters other than the syndicate manager to deliver transaction-specific disclosures.[10] In such case, the original proposed rule change as filed with the Commission would modify the 2012 Interpretive Notice to state that only the syndicate manager would have a fair dealing obligation to deliver the transaction-specific disclosures to the issuer.

Specific to this aspect of the original proposed rule change, the SIFMA Comment Letter expressed concern that the text of the original proposed rule change does not identify "who needs to provide transaction specific disclosures for a swap recommendation if not made by the syndicate manager or sole manager."[11] SIFMA encouraged the MSRB to resolve this ambiguity by amending the original proposed rule change to clarify that "the duty to provide such disclosures should remain with the underwriter or dealer providing or recommending the

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10 84 FR 39653. As originally filed, the proposed rule change's text assigning this responsibility to the syndicate manager in circumstances where a syndicate is formed was grounded in the feedback that the MSRB received from market participants that issuers were routinely receiving duplicative disclosures from multiple underwriters in transactions involving a syndicate, because underwriters in the syndicate felt compelled to individually deliver such disclosures, either out of an abundance of caution or from an understanding that the 2012 Interpretive Notice required such individual delivery. Thus, the recommendation of a financing structure or product by the syndicate manager could lead to duplicative transaction-specific disclosures from underwriters in the syndicate other than the syndicate manager.

11 SIFMA Comment Letter, at p. 5.

derivatives, even after a syndicate is formed."[12] Among other reasons, SIFMA supported this amendment under the rationale that "recommendations on derivatives require specialized knowledge and . . . in this case, the underwriter or dealer making the recommendation and otherwise providing the derivative product be responsible for making the appropriate transaction-specific disclosures on the material aspects of this financing structure to the issuer."[13]

The MSRB believes that there is merit to this point raised by SIFMA and agrees with SIFMA's suggestion that the original proposed rule change should be amended to state that, except in limited circumstances, the underwriter making a recommendation regarding a financing structure or product to an issuer has the fair dealing obligation to deliver the requisite transaction-specific disclosures.[14] More specifically, the MSRB agrees with SIFMA's concern that the duty to provide a complex municipal securities financing disclosure generally should remain with the dealer "recommending" a financing structure and/or "providing" a specific product within that structure (such as a derivative product), "even after the syndicate is formed."[15] Accordingly, Amendment No. 1 modifies the original proposed rule change to state that the underwriter making a recommendation to an issuer regarding a financing structure or product, including, when applicable, a Complex Municipal Securities Financing Recommendation, has the fair dealing obligation to deliver the applicable transaction-specific disclosures. Consequently, when the syndicate manager (or any other underwriter in the syndicate) is not the underwriter making the recommendation of a financing structure or product to the issuer, Amendment No. 1 states that such underwriter does not have a fair dealing obligation under the proposed rule change to deliver the transaction-specific disclosures.[16] As

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12 SIFMA Comment Letter, at p. 5.

13 Id.

14 The SIFMA Comment Letter identifies and references a limited exception to this general fair dealing obligation related to when disclosures regarding a derivative product are being provided by an affiliate of the underwriter – as opposed to the underwriter itself who has made a Complex Municipal Securities Financing Recommendation regarding such specific product or the overall structure of the complex municipal securities financing – or by the issuer's swap or other financial advisor that is independent of such underwriter, in either case, "as long as such underwriter has a reasonable basis for belief in the truthfulness and completeness of such disclosure." See id. (referencing footnote 32 of Exhibit 5 of the original proposed rule change). Amendment No. 1 would not modify this statement.

15 Id. ("SIFMA believes, given the specialized disclosures required in the derivatives space as the CFTC and SEC rules related thereto, that the duty to provide such disclosures should remain with the underwriter or dealer providing or recommending the derivatives, even after the syndicate is formed.")

16 As further discussed herein, the MSRB understands that in many, but not all, instances the underwriter making the recommendation of a financing structure or product will be

further described therein, Amendment No. 1 revises the text of the original proposed rule change to clearly state and underscore that the transaction-specific disclosures "must be provided to the issuer by the underwriter who has recommended a financing structure or product to the issuer." Similarly, Amendment No. 1 also adds a footnote to the original proposed rule change stating: "Each underwriter, whether a sole underwriter, syndicate manager, or other member of the underwriting syndicate, has a fair dealing obligation under this notice to deliver transaction-specific disclosures where such underwriter has made a recommendation to an issuer regarding a financing structure or product." Consistent with this modification, Amendment No. 1 makes conforming revisions throughout the original proposed rule change intended to emphasize and clearly articulate: (1) the circumstances when an underwriter has made a recommendation to an issuer regarding a financing structure and (2) that only an underwriter that has made such a recommendation to an issuer has the responsibility to deliver the applicable transaction-specific disclosures.

The MSRB believes that these revisions in Amendment No. 1 are responsive to SIFMA's comment and are consistent with the goals of the Board's retrospective review of the 2012 Interpretive Notice. The MSRB believes that the revisions proposed in Amendment No. 1 are responsive to SIFMA's comment because, as SIFMA requested, Amendment No. 1 resolves the ambiguity of "who needs to provide transaction specific disclosures for a swap recommendation if not made by the syndicate manager or sole manager."[17] Specifically, the amended revised interpretive notice articulates that, unless specific circumstances apply, the "underwriter who makes a recommendation" must provide the transaction-specific disclosures, even after the syndicate is formed. Accordingly, the revised interpretive notice more precisely articulates the fair dealing principle that the obligation of ensuring the delivery of transaction-specific disclosures for complex municipal securities financings is taken on by the underwriter who makes a Complex Municipal Securities Financing Recommendation to an issuer.

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the syndicate manager. See, e.g., Letter from Leslie Norwood, Managing Director and Associate General Counsel, SIFMA (Jan. 15, 2019) (hereinafter, the "SIFMA RFC Comment Letter") (stating "[i]n many cases, the recommendation is only made by the senior manager, not the co-managers."). The original proposed rule change acknowledges this practical consideration by indicating that not all negotiated offerings involve a recommendation by the underwriter(s), such as where a sole underwriter merely executes a transaction already structured by the issuer or its financial advisor. See SR-MSRB-2019-10 (Sept. 10, 2019), Exhibit 5 (hereinafter "Exhibit 5 of the original proposed rule change"), available at https://www.sec.gov/rules/sro/msrb.htm. Accordingly, the MSRB believes that Amendment No. 1 is both responsive to SIFMA's comment and also consistent with the goals of the retrospective review of the 2012 Interpretive Notice because it modifies the language of the original proposed rule change to resolve the type of ambiguous situations SIFMA identifies but it still minimizes the instances of duplicative disclosures. See also note 18 infra.

17 SIFMA Comment Letter, at p. 5.

Importantly, the MSRB also believes that these revisions in Amendment No. 1 will continue to reduce the number of duplicative disclosures that an issuer receives during the course of a transaction involving an underwriting syndicate and, thus, Amendment No. 1 is consistent with the goals of the Board's retrospective review of the 2012 Interpretive Notice. As originally filed, the original proposed rule change proposed to assign this fair dealing obligation to the syndicate manager, in part, because the MSRB desired to eliminate any ambiguity regarding whether other syndicate members had a fair dealing obligation to make the transaction-specific disclosures, and, thereby, eliminate the likelihood that an issuer would receive multiple transaction-specific disclosures covering the same topics over the course of a transaction. Amendment No. 1 promotes this outcome by clearly linking an underwriter's disclosure obligation under the amended revised interpretive notice to whether an underwriter has recommended a financing structure or product. If an underwriter has not made such a recommendation, then it does not have the obligation of delivering a transaction-specific disclosure.

The MSRB understands that in many, but not all, instances involving an underwriting syndicate the only underwriter recommending a financing structure or product is the syndicate manager.[18] Thus, in routine circumstances where the only underwriter making such a recommendation to the issuer is the sole underwriter or syndicate manager, the outcomes under the text of the original proposed rule change as originally filed and under the text of the proposed rule change as amended today are the same, i.e. the issuer would receive a single transaction-specific disclosure from the syndicate manager who has made the only recommendation among the syndicate members of a financing structure or product. In this way, the MSRB believes that Amendment No. 1 modifies the language of the original proposed rule change to resolve the less routine situations SIFMA identified in its comment letter, specifically where an underwriter other than the syndicate manager recommends a financing structure or product.[19] Thus, the

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18 See, e.g., SIFMA RFC Comment Letter, cite at note 16 supra (stating "[i]n many cases, the recommendation is only made by the senior manager, not the co-managers."). As a practical matter, then in many, but not all instances, the revisions in Amendment No. 1 would result in the same number of transaction-specific disclosures delivered to an issuer as compared to the text of the original proposed rule change. More specifically, because syndicate managers are commonly the only underwriter to make the recommendation of a financing structure or product, the syndicate manager would commonly be the only underwriter required to deliver a transaction-specific disclosure under the language of the original proposed rule change and under the modified language of the proposed rule change. However, in instances in which an underwriter other than the syndicate manager has recommended a financing structure or product, then that underwriter would be required to deliver a transaction-specific disclosure.

19 The MSRB also further understands that the original proposed rule change could be understood as either necessitating that (1) an issuer receive duplicative and/or inconsistent disclosures from both the syndicate manager and the underwriter making the Complex Municipal Securities Financing Recommendation or, alternatively, (2) an issuer receive a complex municipal securities financing disclosure from the syndicate manager

MSRB believes that Amendment No. 1 is responsive to the concerns regarding a syndicate manager's burden to deliver transaction-specific disclosures in instances where it is not the underwriter who made the recommendation that triggered the fair dealing obligation to deliver the disclosure and consistent with the goals of the retrospective review.

Application to Underwriters Serving as Placement Agents. The original proposed rule change would revise the 2012 Interpretive Notice to incorporate existing language from the Implementation Guidance that defines the application of the 2012 Interpretive Notice to circumstances in which a dealer serves as an agent to an issuer in the placement of the issuer's municipal securities.[20] The SIFMA Comment letter expressed two concerns regarding this portion of the original proposed rule change. First, SIFMA expressed the concern that the text of the original proposed rule change may inappropriately "front-run"[21] a related issue that is now under consideration by the Commission regarding the duties of municipal placement agents under the federal securities laws.[22] Second, SIFMA encouraged the MSRB to delete the language in footnote 12 of Exhibit 5 of the original proposed rule change and replace it with language that grants dealers the flexibility to omit and disclaim certain fair dealing disclosures when an engagement with an issuer to place municipal securities makes such disclosures not true.[23] Specifically, SIFMA requested that the proposed language in footnote 12 of Exhibit 5 be deleted

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delivered on behalf of the underwriter who actually made the Complex Municipal Securities Financing Recommendation. The MSRB also understands that this potential ambiguity could be reasonably interpreted to require that a syndicate manager always be informed of, or otherwise know, when a recommendation has been made by another syndicate member. The MSRB believes that Amendment No. 1 resolves these questions and potential burdens. See id.

20 84 FR 39648.

21 SIFMA Comment Letter, at p. 4. While not published as of the date of the SIFMA Comment Letter, the MSRB believes that SIFMA is referencing the Commission's "Notice of Proposed Exemptive Order Granting a Conditional Exemption from the Broker Registration Requirements of Section 15(a) of the Securities Exchange Act of 1934 for Certain Activities of Registered Municipal Advisors," Release No. 34-87204 (October 2, 2019) (File No. S7-16-19).

22 The MSRB believes this concern is outside the scope of the proposed rule change and so declines to address it further.

23 SIFMA Comment Letter, at p. 4 ("It is also critical for any such disclosures to be accurate. If a placement agent is a fiduciary, the Rule G-17 disclosures should not require an entity to state they are not. The MSRB's point could be more simply made by merely noting, 'If the nature of the engagement makes one or more of the required disclosures not true, than (sic) it should be permissible to omit such disclosure and disclaim such in the relevant engagement letter.").

and replaced with the following statement, "[i]f the nature of the engagement makes one or more of the required disclosures not true, then it should be permissible to omit such disclosures and disclaim such in the relevant engagement letter."[24]

The MSRB believes there is merit to SIFMA's concern that the amended revised interpretive notice should not be interpreted to require a dealer to deliver inaccurate disclosures when serving as an agent to an issuer in the placement of the issuer's municipal securities. More specifically, the MSRB believes that, without further revision, the language of the original proposed rule change could be misunderstood to require the delivery of disclosures that are inaccurate or misleading and desires to avoid any interpretive ambiguity in this regard. Accordingly, in Amendment No. 1, the MSRB revised the original proposed rule change to supplement the existing language with the following text, "[a]s a threshold matter, the disclosures delivered by an underwriter to an issuer must not be inaccurate or misleading, and nothing in this notice should be construed as requiring an underwriter to make a disclosure to an issuer that is false." The MSRB believes this revision to be a clarifying supplement responsive to SIFMA's comment, as the MSRB proposed the incorporation of existing language from the Implementation Guidance, in part, with intent of providing underwriters the sort of clarity and flexibility that SIFMA desires and to specifically avoid any misperception that an underwriter's duty of fair dealing requires it to deliver particular language in situations where such language is not actually true. Indeed, an underwriter's overarching fair dealing obligation under Rule G-17 prohibits it from engaging in any such deceptive or dishonest practice.

Application to Underwriters of Municipal Fund Securities. The original proposed rule change would revise the 2012 Interpretive Notice to incorporate existing language from the Implementation Guidance defining the application of the notice "to a dealer serving as a primary distributor (but not to dealers serving solely as selling group members) in a continuous offering of municipal fund securities, such as interests in 529 savings plans and Achieving a Better Life Experience (ABLE) programs."[25] The ICI Comment Letter requested that the MSRB revise the original proposed rule change to further "distinguish the disclosure required of 529 underwriters from those required of bond offering underwriters"[26] and recommended specific revisions in this regard. For example, the ICI requested that the standard disclosures concerning the underwriter's role under the original proposed rule change allow such disclosures to be amended "to the extent applicable to the nature of the relationship with the issuer."[27]

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24 Id.

25 84 FR 39647.

26 ICI Comment Letter, at p. 3.

27 Id.

The MSRB believes there is merit to ICI's comment that the proposed rule change "should provide additional guidance regarding its application to underwriters of 529 plans,"[28] but does not believe incorporating the specific revisions proposed by ICI would be prudent because such revisions may reduce the clarity of the disclosure obligations applicable to other underwriters and, thereby, reduce the overall clarity of the amended revised interpretive notice.[29] The MSRB believes that the ICI's comments regarding the need to provide more clarity would be better addressed in an interpretation or other guidance separately issued under Rule G-17 that more narrowly considers the fair dealing obligations of dealers serving as primary distributors in a continuous offering of municipal fund securities.

Consequently, rather than incorporating the specific text proposed by the ICI, the MSRB, in Amendment No. 1, incorporated a revision to the original proposed rule change that would delete the relevant text incorporated from the Implementation Guidance, which, as filed, would extend the application of the original proposed rule change to the circumstances of a continuous offering of municipal fund securities. The amended proposed rule change would replace this deleted language with a statement that, "[t]his notice does not apply to a dealer acting as a primary distributor in a continuous offering of municipal fund securities." Amendment No. 1, thus, intends to make clear that the specific fair practice duties outlined in the amended revised interpretive notice articulating the delivery of certain disclosures at particular times during the course of an underwriting transaction would not be applicable to the situations of a dealer serving as a primary distributor in a continuous offering of municipal fund securities.[30]

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28 Id., at p. 2.

29 Relatedly, the MSRB believes that many of the ICI suggestions are already addressed in the original proposed rule change. As one example, the ICI Comment Letter requests that the MSRB amend the original proposed rule change with the following underlined language: "The sole underwriter or syndicate manager must, to the extent applicable to the nature of the relationship with the issuer, disclose to the issuer [the standard disclosures]." ICI Comment Letter, at p. 3. The MSRB believes that the language of the original proposed rule change already incorporates the flexibility that the ICI Comment Letter requests. Specifically, the original proposed rule change states that, if a dealer takes on the role of acting as an agent to place securities on behalf of an issuer, then certain disclosure obligations may not be applicable and in such case may be omitted. The MSRB understands that dealers acting as primary distributors in the continuous offering of municipal fund securities may act as an agent to assist a municipal entity in the distribution of the entity's municipal fund securities. Thus, as filed, the original proposed rule change would permit a dealer in such circumstances to omit certain disclosures in order to tailor the disclosures to the specifics of the relationship.

30 Nevertheless, Amendment No. 1 retains existing language from the original proposed rule change stating that the fair dealing obligation outlined in the notice may serve as one of many bases for a dealer serving as a primary distributor in a continuous offering of municipal fund securities in determining how to establish appropriate policies and procedures for ensuring it meets its fair dealing obligations under Rule G-17.

Comments Not Incorporated into Amendment No. 1

Tiered Disclosure Requirements Based on Issuer Characteristics. The SIFMA Comment Letter requests that "the MSRB, either in [Amendment No. 1], or otherwise in a 'frequently asked questions document' or other implementation guidance, provide examples of concrete hypotheticals in order to provide clarity to regulated dealers regarding how the content of [the] transaction-based disclosures may potentially vary by issuer sophistication and still survive regulatory scrutiny." The original proposed rule change sets out a principles-based approach to an underwriter's fair dealing obligation to deliver certain disclosures and incorporates existing hypothetical examples from the Implementation Guidance and FAQs.[31] For example, the original proposed rule change states that an underwriter must deliver certain transaction-specific disclosures when it "reasonably believes" that an issuer's personnel "lack the requisite knowledge or experience" with a financing structure to fully evaluate it.[32] Similarly, the original proposed rule change states that an underwriter has an obligation under Rule G-17 "to communicate more particularized transaction-specific disclosures" in the case of a complex municipal securities financing "than those that may be required in the case of routine financing structures."[33] As stated in the original proposed rule change, the MSRB evaluated formal disclosure tiers and declined to adopt such tiers or other disclosure requirements based on rigid issuer classifications in response to prior stakeholder comments because the MSRB believes there is not an obvious, appropriate methodology for classifying issuers in a manner that would advance the policies underlying the 2012 Interpretive Notice or that would materially relieve burdens for underwriters or issuers, and requiring different disclosure standards for different issuers may have unintended consequences that compromise issuer protections.[34] The SIFMA Comment Letter does not alter the MSRB's conclusions in this regard.

Standard for the Disclosure of Potential Material Conflicts of Interest. The SIFMA Comment Letter requests that the MSRB amend the original proposed rule change "to require only disclosures of actual conflicts of interest." The 2012 Interpretive Notice currently requires the underwriter to disclose to the issuer any actual material conflicts of interest and any potential material conflicts of interest.[35] As described in the original proposed rule change, the requirement to provide such disclosure under the 2012 Interpretive Notice is triggered if: the new issue is sold in a negotiated underwriting; the matter to be disclosed represents a conflict of interest, either in reality or potentially; and any such actual or potential conflict of interest is

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31 84 FR 39653.

32 See Exhibit 5 of the original proposed rule change (link at supra note 16).

33 Id.

34 84 FR 39671.

35 84 FR 39654.

material.[36] These aspects of the 2012 Interpretive Notice would remain applicable under the original proposed rule change. However, the original proposed rule change would provide that an underwriter's potential material conflict of interest must be disclosed as part of the dealer-specific disclosures if, but only if, the potential material conflict of interest is "reasonably likely" to mature into an actual material conflict of interest during the course of that specific transaction.[37] This revision of the original proposed rule change would reduce a dealer's burden by narrowing the dealer-specific disclosures currently required under the 2012 Interpretive Notice from all potential material conflicts to those potential material conflicts that meet this more focused standard. As indicated in the original proposed rule change, the MSRB believes that the disclosure of material conflicts of interest remains significant to an issuer's evaluation of the dealer providing underwriting services, which justifies the obligation for underwriters to continue to provide these disclosures.[38] To the degree that an underwriter has knowledge that a material conflict of interest does not currently exist, but is reasonably likely to ripen into an actual material conflict of interest during the course of the underwriting transaction, the MSRB continues to believe that the municipal securities market is best served by the underwriter providing advanced notification to the issuer of the likelihood of such material conflict of interest, rather than waiting to disclose the conflict until it has ripened into an actual conflict. The SIFMA Comment Letter does not alter the MSRB's conclusions in this regard.

Standard Disclosure Regarding the Engagement of a Municipal Advisor. The SIFMA Comment Letter requests that the MSRB amend the original proposed rule change to eliminate the new standard disclosure that "the issuer may choose to engage the services of a municipal advisor with a fiduciary obligation to represent the issuer's interests in the transaction."[39] As more fully discussed in the original proposed rule change, the MSRB believes that this additional disclosure will further clarify the distinctions between an underwriter – who is subject to a duty of fair dealing when providing advice regarding the issuance of municipal securities to municipal entities – and a municipal advisor – who is subject to a federal statutory fiduciary duty when providing advice regarding the issuance of municipal securities to municipal entities – and, thereby, promotes the protection of municipal entity issuers in accordance with the MSRB's statutory mandate at a relatively minimal burden to underwriters.[40] The SIFMA Comment Letter does not alter the MSRB's conclusions in this regard.

The attachment to this letter sets forth Amendment No. 1.

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36 Id.

37 84 FR 39655.

38 84 FR 39674.

39 SIFMA Comment Letter, at p. 3.

40 84 FR 39656.

If you have any questions, please feel free to contact me or David Hodapp, Assistant General Counsel, at 202-838-1500.

Sincerely,

Gail Marshall
Chief Compliance Officer

The Municipal Securities Rulemaking Board ("MSRB") is filing this amendment ("Amendment No. 1") to File No. SR-MSRB-2019-10, originally filed with the Securities and Exchange Commission (the "SEC" or "Commission") on August 1, 2019 with respect to a proposed rule change to amend and restate the MSRB's August 2, 2012 interpretive notice[1] concerning the application of MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities, to underwriters of municipal securities (the "original proposed rule change" and together with Amendment No. 1, the "proposed rule change").

The proposed rule change (1) updates the 2012 Interpretive Notice in light of its implementation in the market since its first adoption and current market practices and (2) proposes a number of revisions to the 2012 Interpretive Notice to update and streamline certain of its disclosure obligations, such as incorporating certain implementation guidance[2] and frequently-asked-questions[3] issued subsequent to the 2012 Interpretive Notice in order to consolidate the MSRB's relevant guidance on this topic into a single publication. The SEC published notice of the original proposed rule change on August 5, 2019, and notice was then published in the Federal Register on August 9, 2019.[4] The Commission received three comment letters in response thereto.[5] After carefully considering the comment letters, this Amendment No. 1 makes several revisions to the original proposed rule change in response to these comments,[6] as well as other revisions of a technical nature to improve its clarity. Amendment No. 1 makes the following modifications to the original proposed rule change.

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1 The 2012 interpretive notice was approved by the SEC on May 4, 2012 and became effective on August 2, 2012 (hereinafter, the "2012 Interpretive Notice"). See Release No. 34-66927 (May 4, 2012); 77 FR 27509 (May 10, 2012) (File No. SR-MSRB-2011-09); and MSRB Notice 2012-25 (May 7, 2012).

2 See MSRB Notice 2012-38 (July 18, 2012) (hereinafter, the "Implementation Guidance").

3 See MSRB Notice 2013-08 (Mar. 25, 2013) (hereinafter, the "FAQs").

4 See Exchange Act Release No. 86572 (Aug. 5, 2019), 84 FR 39646 (Aug. 9, 2019). Except as otherwise defined herein, the terms defined in the original proposed rule change shall have the same meanings as used in this Amendment No. 1.

5 See letters from Tamara K. Salmon, Associate General Counsel, Investment Company Institute ("ICI") (Aug. 26, 2019) (the "ICI Comment Letter"), Leslie Norwood, Managing Director and Associate General Counsel, the Securities Industry and Financial Markets Association ("SIFMA") (Aug. 30, 2019) (the "SIFMA Comment Letter"), and Susan Gaffney, Executive Director, National Association of Municipal Advisors ("NAMA") (Aug. 30, 2019) (the "NAMA Comment Letter").

6 The MSRB this day submitted a response to comments discussing these amendments and other matters. See letter from Gail Marshall, Chief Compliance Officer, MSRB, to Secretary, Commission, dated October 7, 2019.

Delivery of Complex Municipal Securities Financing Disclosures. Amendment No. 1 modifies the original proposed rule change to state that the underwriter making a recommendation to an issuer regarding a financing structure or product, including, when applicable, a Complex Municipal Securities Financing Recommendation, has the fair dealing obligation to deliver the applicable transaction-specific disclosures. Consequently, when the syndicate manager (or any other underwriter in the syndicate) is not the underwriter making the recommendation of a financing structure or product to the issuer, Amendment No. 1 states that such underwriter does not have a fair dealing obligation under the proposed rule change to deliver the transaction-specific disclosures. Amendment No. 1, thus, revises the text of the original proposed rule change to clearly state and underscore that the transaction-specific disclosures "must be provided to the issuer by the underwriter who has recommended a financing structure or product to the issuer." Similarly, Amendment No. 1 also adds a footnote to the original proposed rule change stating: "Each underwriter, whether a sole underwriter, syndicate manager, or other member of the underwriting syndicate, has a fair dealing obligation under this notice to deliver transaction-specific disclosures where such underwriter has made a recommendation to an issuer regarding a financing structure or product." Consistent with this modification, Amendment No. 1 makes conforming revisions throughout the original proposed rule intended to emphasize and clearly articulate: (1) the circumstances when an underwriter has made a recommendation to an issuer regarding a financing structure and (2) that only an underwriter that has made such a recommendation to an issuer has the responsibility to deliver the applicable transaction-specific disclosures. As an example of the type of revisions resulting from this modification, Amendment No. 1 changes the original proposed rule change's references to the "sole underwriter" or "syndicate manager" under the section of the interpretive notice entitled "Timing and Manner of Disclosures" by replacing these references with revised references to an "underwriter," "the underwriter who has made a recommendation," and similar conforming language to emphasize that the transaction-specific disclosures must be provided by an underwriter who makes, or has made, a recommendation to an issuer regarding a financing structure.

Application to Underwriters Serving as Placement Agents. Amendment No. 1 modifies the original proposed rule change to further supplement the text incorporated into the 2012 Interpretive Notice by the original proposed rule change from the Implementation Guidance that describes the ability of dealers to modify certain standard disclosures when acting as an agent to place securities on behalf of an issuer. Pursuant to Amendment No. 1, the proposed rule change supplements this text with the following, "[a]s a threshold matter, the disclosures delivered by an underwriter to an issuer must not be inaccurate or misleading, and nothing in this notice should be construed as requiring an underwriter to make a disclosure to an issuer that is false." The MSRB believes this modification to be a clarifying change. By incorporating this additional language into the proposed rule change, the MSRB intends to further alleviate any potential misperceptions that an underwriter's duty of fair dealing requires it to deliver particular disclosure language in situations where such language is not actually true.

Application to Underwriters of Municipal Fund Securities. Amendment No. 1 modifies the original proposed rule change to delete text incorporated into the original proposed rule change from the Implementation Guidance that, as originally filed, defines the application of the original proposed rule change to the circumstances of a continuous offering of municipal

fund securities. Pursuant to Amendment No. 1, the proposed rule change now states, "[t]his notice does not apply to a dealer acting as a primary distributor in a continuous offering of municipal fund securities." The proposed rule change makes clear that the specific fair practice duties outlined in the proposed rule change – which articulate the delivery of certain disclosures at particular times during the course of an underwriting transaction – would not be applicable to the situations of a dealer serving as a primary distributor in a continuous offering of municipal fund securities.[7]

Conforming the Personnel to Whom Disclosures May Be Delivered. Amendment No. 1 modifies the original proposed rule change to clarify the particular issuer personnel to whom a disclosure must be delivered and to articulate a uniform and consistent standard in each section of the revised interpretive notice. Under the section entitled "Acknowledgement of Disclosure," the text of the original proposed rule change modified the language of the 2012 Interpretive Notice to state that, "[w]hen delivering a disclosure, the underwriter must attempt to receive a written acknowledgement by the official of the issuer identified by the issuer as the primary contact for the issuer of receipt of the foregoing disclosures. In the absence of such identification, an underwriter may seek acknowledgement from an official of the issuer whom the underwriter reasonably believes has authority to bind the issuer by contract with the underwriter." However, under the section entitled "Timing and Manner of Disclosures," the original proposed rule change maintains the original text of the 2012 Interpretive Notice without revision to state that the standard disclosures, transaction-specific disclosures, and dealer-specific disclosures, ". . . must be made in writing to an official of the issuer that the underwriter reasonably believes has the authority to bind the issuer by contract with the underwriter and that, to the knowledge of the underwriter, is not a party to a disclosed conflict." The MSRB believes that the relevant provisions could be misinterpreted as inconsistent and potentially understood to result in different disclosure outcomes. Accordingly, Amendment No. 1 modifies the proposed rule change to uniformly clarify the issuer personnel to whom a disclosure must be delivered, including by making revisions to portions of the text under the sections entitled "Timing and Manner of Disclosures," "Acknowledgement of Disclosure," and "Required Disclosures to Issuers." The MSRB believes this to be an amendment of a technical nature, merely intended to avoid potential confusion regarding an underwriter's fair dealing obligations to deliver certain disclosures to an issuer.

Other Conforming Technical Amendments. Amendment No. 1 modifies the original proposed rule change with technical revisions intended to improve the internal consistency of the

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7 Notably, Amendment No. 1 does not amend the text of the original proposed rule change indicating that the fair dealing obligations outlined in the notice may serve as one of many bases for dealers acting in a capacity not specifically addressed therein – such as a dealer serving as a primary distributor in a continuous offering of municipal fund securities – to determine how to establish appropriate policies and procedures for ensuring it meets its fair dealing obligations under Rule G-17. Accordingly, dealers acting as a primary distributor in a continuous offering of municipal fund securities could use the proposed rule change as a bases to determine how to establish appropriate policies and procedures for ensuring it meets its fair dealing obligations under Rule G-17, until such time as the MSRB issues more specific guidance.

proposed rule change and otherwise improve its clarity. For example, the original proposed rule change stated in a footnote that:

> For the avoidance of doubt, in offerings where a syndicate is formed, the disclosure obligation for an underwriter to make its dealer-specific disclosures is triggered – if any such actual material conflicts of interest or potential material conflicts of interest must be so disclosed –when such underwriter becomes engaged as a member of the underwriting syndicate (except with regard to conflicts discovered or arising after such co-managing underwriter has been engaged). Consistent with the obligation of sole underwriters and syndicate managers, each underwriter in the syndicate must make any applicable dealer-specific disclosures discovered or arising after being engaged as an underwriter in the syndicate as soon as practicable after being discovered and with sufficient time for the issuer to fully evaluate such a conflict and its implications.

Amendment No. 1 revises the original proposed rule change by deleting the "for avoidance of doubt" phrase and adds a comma to the final sentence to the improve clarity of the footnote. The MSRB believes this revision, and others similar to it, to be amendments of a technical nature. Similarly, the original proposed rule change defines the term "issuers" to mean "states and their political subdivisions that are issuers of municipal securities," but then uses the phrase "issuers of municipal securities" in many instances. The MSRB believes the phrases to be redundant with the term "issuers" as defined in the original proposed rule change and so revises the relevant text to just state "issuers" or "issuer," as appropriate. Relatedly, the original proposed rule change revised the 2012 Interpretive Notice to pluralize certain references to underwriters. Amendment No. 1 reverses these changes to promote clarity. The proposed rule change also incorporated various references from the Implementation Guidance related to an underwriter's recommendation of a "structure or product,"[8] but did not make conforming references throughout the text. Amendment No. 1 seeks to avoid potential confusion in this regard by revising relevant portions of the original proposed rule change to reference a "financing structure or product" where a conforming reference is appropriate. As a final example, the original proposed rule change defines the terms "complex municipal securities financing" and "Complex Municipal Financing Recommendation." Pursuant to Amendment No. 1, the proposed rule change promotes consistency of these concepts by redefining the latter term to "Complex Municipal Securities Financing Recommendation" and make conforming changes throughout the proposed rule change.

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[8] For example, the proposed rule change stated that underwriters, ". . . must make reasonable judgments regarding whether a financing structure recommendation has been made and whether a particular recommended financing structure or product is complex, understanding that the simple fact that a structure or product has become relatively common in the market does not automatically result in it being viewed as not complex" (emphasis added). It also stated that, an underwriter "cannot satisfy its fair dealing obligations by providing an issuer a single document setting out general descriptions of the various complex municipal securities financing structures or products" (emphasis added).

The changes made by Amendment No. 1 to the original proposed rule change are contained in the attached Exhibit 4. Material proposed to be added is underlined. Material proposed to be deleted is enclosed in brackets. The text of the proposed rule change is attached as Exhibit 5. Material proposed to be added is underlined. Material proposed to be deleted is enclosed in brackets.

The MSRB believes the Commission has good cause, pursuant to Section 19(b)(2) of the Securities Exchange Act of 1934, for granting accelerated approval of Amendment No. 1. Specifically, the modifications to the original proposed rule change are responsive to commenters. More specifically, Amendment No. 1 revises the original proposed rule change to state that (1) the underwriter making a recommendation to the issuer regarding a financing structure, including, when applicable, a Complex Municipal Securities Financing Recommendation, has the fair dealing obligation to deliver the applicable transaction-specific disclosures and (2) the notice does not apply to a dealer acting as a primary distributor in a continuous offering of municipal fund securities. Beyond these modifications, Amendment No. 1 otherwise revises the original proposed rule change with technical modifications intended to more precisely define the scope of its application and/or to promote clarity in its interpretation. These modifications are consistent with the original proposed rule change.

EXHIBIT 4

TEXT OF DRAFT AMENDMENTS*

INTERPRETIVE NOTICE CONCERNING THE APPLICATION OF MSRB RULE G-17 TO UNDERWRITERS OF MUNICIPAL SECURITIES – {DATE OF ISSUANCE TO BE SPECIFIED}

Under Rule G-17 of the Municipal Securities Rulemaking Board (the "MSRB"), brokers, dealers, and municipal securities dealers ([collectively,]"dealers") must, in the conduct of their municipal securities activities, deal fairly with all persons and must not engage in any deceptive, dishonest, or unfair practice. This rule is most often cited in connection with duties owed by dealers to investors; however, it also applies to their interactions with other market participants, including municipal entities[1] such as states and their political subdivisions that are issuers of municipal securities ("issuers").

The MSRB has previously observed that Rule G-17 requires dealers to deal fairly with issuers [in connection with the underwriting of their municipal securities].[2] With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[3] the MSRB was expressly directed by Congress to protect municipal entities. Accordingly, in 2012, the MSRB provided additional interpretive guidance that addressed how Rule G-17 applies to dealers acting in the capacity of underwriters in the municipal securities transactions described therein (the "2012 Interpretive Notice").[4]

This [interpretive] notice supersedes the MSRB's 2012 Interpretive Notice, dated August 2, 2012, concerning the application of Rule G-17 to underwriters of municipal securities, as well as the related implementation guidance, dated July 18, 2012, and frequently-asked questions, dated March 25, 2013 ([collectively,]the "prior guidance").[5] The prior guidance will remain applicable

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* Underlining indicates new language; brackets denote deletions.

1 For purposes of this notice, the term "municipal entity" is used as defined by Section 15B(e)(8) of the Securities Exchange Act of 1934 (the "Exchange Act"), 17 CFR 240.15Ba1-1(g), and other rules and regulations thereunder.

2 *See* Reminder Notice on Fair Practice Duties to Issuers of Municipal Securities, MSRB Notice 2009-54 (September 29, 2009); Rule G-17 Interpretive Letter – Purchase of new issue from issuer, MSRB interpretation of December 1, 1997, reprinted in MSRB Rule Book ("1997 Interpretation").

3 Pub. L. No. 111-203 § 975, 124 Stat. 1376 (2010).

4 *See* Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Aug. 2, 2012) (superseded upon the effective date of this notice as described below).

5 *See* MSRB Notice 2012-38 (July 18, 2012); MSRB Notice 2013-08 (Mar. 25, 2013).

to underwriting relationships commencing prior to {DATE TO BE SPECIFIED}. Underwriters will be subject to the amended guidance provided by this notice for all of their underwriting relationships beginning on or after that date. For purposes of this notice, an underwriting relationship is considered to have begun at the time the delivery of the first disclosure is triggered as described under "Timing and Manner of Disclosures" below (*i.e.*, the earliest stages of an underwriter's relationship with an issuer with respect to an issue, such as in a response to a request for proposal or in promotional materials provided to an issuer).

Applicability of the Notice

Except where a competitive underwriting is specifically mentioned, this notice applies to negotiated underwritings only.[6] This notice [also] applies to a primary offering of a new issue of municipal securities that is placed with investors by a dealer serving as placement agent, although certain disclosures may be omitted as described below. [This notice applies not only to a primary offering of a new issue of municipal securities by an underwriter, but also to a dealer serving as primary distributor (but not to dealers serving solely as selling dealers) in a continuous offering of municipal fund securities, such as interests in 529 savings plans and Achieving a Better Life Experience (ABLE) programs.]

This notice does not apply to a dealer acting as a primary distributor in a continuous in a continuous offering of municipal fund securities, such as interests in 529 savings plans and Achieving a Better Life Experience (ABLE) programs. [Furthermore, it]It does not apply to selling group members. This notice does not address a dealer's duties when the dealer is serving as an advisor to a municipal entity.

The fair practice duties outlined in this notice are those duties that a dealer owes to a municipal entity when the dealer underwrites a new issue of municipal securities. This notice does not set out the underwriter's fair-practice duties to other parties to a municipal securities financing (*e.g.,* conduit borrowers). The MSRB notes, however, that Rule G-17 does require that an underwriter deal fairly with all persons in the course of the dealer's municipal securities activities. What actions are considered fair will, of necessity, be dependent on the nature of the relationship between a dealer and such other parties, the particular actions undertaken, and all other relevant

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6 The MSRB has always viewed competitive offerings narrowly to mean new issues sold by the issuer to the underwriter on the basis of the lowest price bid by potential underwriters – that is, the fact that an issuer publishes a request for proposals and potential underwriters compete to be selected based on their professional qualifications, experience, financing ideas, and other subjective factors would not be viewed as representing a competitive offering for purposes of this notice. In light of this meaning of the term "competitive underwriting," it should be clear that, although most of the examples relating to misrepresentations and fairness of financial aspects of an offering consist of situations that would only arise in a negotiated offering, Rule G-17 should not be viewed as allowing an underwriter in a competitive underwriting to make misrepresentations to the issuer or to act unfairly in regard to the financial aspects of the new issue.

facts and circumstances. Although this notice does not address what an underwriter's fair-dealing duties may be with respect to other parties, it may serve as one of many bases for an underwriter to consider how to establish appropriate policies and procedures for ensuring that it meets such fair-practice obligations, in light of its relationship with such other participants and their particular roles.

The examples discussed in this notice are illustrative only and are not meant to encompass all obligations of dealers to municipal entities under Rule G-17. [The notice also does not address a dealer's duties when the dealer is serving as an advisor to a municipal entity.]Furthermore, when municipal entities are customers[7] of dealers, they are subject to the same protections under MSRB rules, including Rule G-17, that apply to other customers.[8] The MSRB notes that an underwriter has a duty of fair dealing to investors in addition to its duty of fair dealing to issuers. An underwriter also has a duty to comply with other MSRB rules as well as other federal and state securities laws.

Basic Fair Dealing Principle

As noted above, Rule G-17 precludes a dealer, in the conduct of its municipal securities activities, from engaging in any deceptive, dishonest, or unfair practice with any person, including an issuer[of municipal securities]. The rule contains an anti-fraud prohibition. Thus, an underwriter must not misrepresent or omit the facts, risks, potential benefits, or other material information about municipal securities activities undertaken with a municipal issuer[. H]; however, Rule G-17 does not merely prohibit deceptive conduct on the part of the dealer. It also establishes a general duty of a dealer to deal fairly with all persons (including, but not limited to, issuers[of municipal securities]), even in the absence of fraud.

Role of Underwriters and Conflicts of Interest

In negotiated underwritings, underwriters' Rule G-17 duty to deal fairly with an issuer[of municipal securities] requires certain disclosures to the issuer in connection with an issue or proposed issue of municipal securities, as provided below.[9]

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7 MSRB Rule D-9 defines the term "customer" as follows: "Except as otherwise specifically provided by rule of the Board, the term 'Customer' shall mean any person other than a broker, dealer, or municipal securities dealer acting in its capacity as such or an issuer in transactions involving the sale by the issuer of a new issue of its securities."

8 *See* MSRB Reminds Firms of Their Sales Practice and Due Diligence Obligations When Selling Municipal Securities in the Secondary Market, MSRB Notice 2010-37 (September 20, 2010).

9 For purposes of this notice, underwriters are only required to provide written disclosure of their applicable conflicts and are not required to make any written disclosures on the part of issuer personnel or any other parties to the transaction as part of the standard disclosures, dealer-specific disclosures, or the transaction-specific disclosures.

- The disclosures discussed under "Disclosures Concerning the Underwriters' Role" and "Disclosures Concerning Underwriters' Compensation" ([collectively,]the "standard disclosures") must be provided by the sole underwriter or the syndicate manager[10] to the issuer as [more fully] described below.

- The disclosures discussed under "Required Disclosures to Issuers" (the "transaction-specific disclosures") must be provided to the issuer by the [sole]underwriter who has recommended a financing structure or product [or syndicate manager]to the issuer as described below.[11]

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10 For purposes of this notice, the term "syndicate manager" refers to the lead manager, senior manager, or bookrunning manager of the syndicate. In circumstances where an underwriting syndicate is formed, only that single syndicate manager is obligated to make the standard disclosures [and transaction-specific disclosures]under this notice. In the event that there are joint-bookrunning senior managers, only one of the joint-bookrunning senior managers would be obligated under this notice to make the standard disclosures[and transaction-specific disclosures]. Unless otherwise agreed to, such as pursuant to an agreement among underwriters, the joint-bookrunning senior manager responsible for maintaining the order book of the syndicate would be responsible for providing the standard disclosures[and transaction-specific disclosures]. Notwithstanding the fair dealing obligation of a syndicate manager to deliver the standard disclosures[and transaction-specific disclosures] under this notice, nothing herein would prohibit an underwriter from making a disclosure in order to, for example, comply with another regulatory or statutory obligation.

11 Where an underwriting syndicate is formed, the syndicate manager has the sole responsibility hereunder for providing the standard disclosures. Consistent with this obligation placed on the syndicate manager, only the syndicate manager must maintain and preserve records of the standard disclosures in accordance with MSRB rules. Further, the MSRB acknowledges that an underwriter may not know if a syndicate will form at the time that certain disclosures are sent. In instances in which an underwriter has provided a standard disclosure prior to or concurrent with the formation of a syndicate, it shall suffice that the then-underwriter (later syndicate manager) has delivered a standard disclosure, and no affirmative statement is necessary that a disclosure is being made on behalf of any existing or future syndicate members for the syndicate manager to have met its fair dealing obligations in this regard. Notwithstanding the obligation of a syndicate manager to deliver the standard disclosures, nothing herein would prohibit, or should be construed as prohibiting, another underwriter from delivering a standard disclosure in order to, for example, comply with another regulatory or statutory obligation. [Where an underwriting syndicate is formed or expected to be formed, the syndicate manager has the sole responsibility hereunder for providing the standard disclosures and transaction-specific disclosures, including, but not limited to, determining the level of disclosure required based on the type of financing recommended and a reasonable belief of the issuer's knowledge and experience regarding that type of financing. In such cases, as further described below, no other syndicate member would need to deliver standard disclosures or transaction-specific disclosures in order to meet its fair dealing obligations

- The disclosures discussed under "Other Conflicts Disclosures" (the "dealer-specific disclosures") must be provided by the sole underwriter or each underwriter in a syndicate (as applicable) as described below.[12]

Disclosures Concerning the Underwriter's Role. The sole underwriter or the syndicate manager[13] must disclose to the issuer that:

(i) Municipal Securities Rulemaking Board Rule G-17 requires an underwriter[s] to deal fairly at all times with both [municipal]issuers and investors;

(ii) the underwriter[s']'s primary role is to purchase securities with a view to distribution in an arm's-length commercial transaction with the issuer and [they have] it has financial and other interests that differ from those of the issuer;[14]

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hereunder. In light of, and consistent with, the obligations placed on the syndicate manager, only the syndicate manager must maintain and preserve records of the standard disclosures and transaction-specific disclosures in accordance with MSRB rules. Further, the MSRB acknowledges that an underwriter may not know if a syndicate will form at the time that certain disclosures are sent. In instances in which an underwriter has provided the standard disclosures and/or the transaction-specific disclosures prior to or concurrent with the formation of a syndicate, it shall suffice that the then-underwriter (later syndicate manager) has made the standard disclosures and the transaction-specific disclosures, and no affirmative statement is necessary that such disclosures are being made on behalf of any existing or future syndicate members.]

12 Each underwriter, whether a sole underwriter, syndicate manager, or other member of the underwriting syndicate, has a fair dealing obligation under this notice to deliver transaction-specific disclosures where such underwriter has made a recommendation to an issuer regarding a financing structure or product. The fair dealing obligation to deliver such a transaction-specific disclosure, includes, but is not limited to, determining the level of disclosure required based on the type of financing structure or product recommended and a reasonable belief of the issuer's knowledge and experience regarding that particular type of financing structure or product. In such cases, as further discussed below, a sole underwriter, syndicate manager, or other member of the underwriting syndicate who has not made such a recommendation would not need to deliver transaction-specific disclosures in order to meet its fair dealing obligation under this notice.

13 *See also* note 30 *infra*.

14[12] As a threshold matter, the disclosures delivered by an underwriter to an issuer must not be inaccurate or misleading, and nothing in this notice should be construed as requiring an underwriter to make a disclosure to an issuer that is false. For example, [I]in a private placement where a dealer acting as [placement]an agent to place securities [takes]on behalf of an [a true agency role with the]issuer and does not take a principal position

(iii) unlike a municipal advisor[s], an underwriter[s] does not have a fiduciary duty to the issuer under the federal securities laws and [are]is, therefore, not required by federal law to act in the best interests of the issuer without regard to [their]its own financial or other interests;[15]

(iv) the issuer may choose to engage the services of a municipal advisor with a fiduciary obligation to represent the issuer's interests in the transaction;

(v) the underwriter[s have]has a duty to purchase securities from the issuer at a fair and reasonable price, but must balance that duty with [their]its duty to sell municipal securities to investors at prices that are fair and reasonable; and

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(including not taking a "riskless principal" position) in the securities being placed, the standard disclosure relating to an "arm's length" relationship [would]may be inapplicable and in such case may be omitted due to the agent-principal relationship between the dealer and issuer that commonly gives rise to other duties as a matter of common law or another statutory or regulatory regime – whether termed as a fiduciary or other obligation of trust. *See* Exchange Act Release No. 66927 (May 4, 2012), 77 FR 27509 (May 10, 2012) (SR-MSRB-2011-09). In certain other contexts, depending on the specific facts and circumstances, a dealer acting as an underwriter [or primary distributor]may take on, either through an agency arrangement or other purposeful understanding, [such]a fiduciary relationship with the issuer. In such case[s], it would [also]be appropriate for an underwriter to omit those disclosures deemed inapplicable as a result of such relationship[and the existence of any analogous legal obligations under other law, such as certain fiduciary duties existing pursuant to applicable state law].

A dealer acting as a placement agent in the primary offering of a new issuance of municipal securities should also consider how the scope of its activities may interact with the registration and record-keeping requirements for municipal advisors adopted by the Securities and Exchange Commission (the "Commission") under Section 15B of the Exchange Act (15 U.S.C. 78o-4), including the application of the exclusion from the definition of "municipal advisor" applicable to a dealer acting as an underwriter pursuant to Exchange Act Rule 15Ba1-1(d)(2)(i). See Registration of Municipal Advisors, Exchange Act Release No. 70462 (September 20, 2013), 78 FR 67467 (hereinafter, the "MA Rule Adopting Release"), at 67515 – 67516 (November 12, 2013) (available at http://www.sec.gov/rules/final/2013/34-70462.pdf) (stating: "The Commission does not believe that the underwriter exclusion should be limited to a particular type of underwriting or a particular type of offering. Therefore, if a registered broker-dealer, acting as a placement agent, performs municipal advisory activities that otherwise would be considered within the scope of the underwriting of a particular issuance of municipal securities as discussed, the broker-dealer would not have to register as a municipal advisor."); see also the MA Rule Adopting Release, 78 FR at 67513 – 67514 (discussing activities within and outside the scope of serving as an underwriter of a particular issuance of municipal securities for purposes of the underwriter exclusion).

15[13] *Id.*

(vi) the underwriter[s] will review the official statement for the issuer's securities in accordance with, and as part of, its [their respective]responsibilities to investors under the federal securities laws, as applied to the facts and circumstances of the transaction.[16]

The [U]underwriters also must not recommend that the issuer[s] not retain a municipal advisor. Accordingly, underwriters may not discourage issuers from using a municipal advisor or otherwise imply that the hiring of a municipal advisor would be redundant because the sole underwriter or underwriting syndicate can provide the services that a municipal advisor would.

Disclosure Concerning the Underwriters' Compensation. The sole underwriter or syndicate manager must disclose to issuers whether underwriting compensation will be contingent on the closing of a transaction. Sole underwriters or syndicate managers must also disclose that compensation that is contingent on the closing of a transaction or the size of a transaction presents a conflict of interest because it may cause underwriters to recommend a transaction that is unnecessary or to recommend that the size of a transaction be larger than is necessary.

Other Conflicts Disclosures. The sole underwriter or each underwriter in a syndicate must also, when and if applicable, disclose other dealer-specific actual material conflicts of interest and potential material conflicts of interest,[17] including, but not limited to, the following:

(i) any payments described below under "Conflicts of Interest/ Payments to or from Third Parties";[18]

(ii) any arrangements described below under "Conflicts of Interest/Profit-Sharing with Investors";

(iii) the credit default swap disclosures described below under "Conflicts of Interest/Credit Default Swaps"; and

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16[14] In many private placements, as well as in certain other types of new issue offerings, no official statement may be produced, so that, to the extent that such an offering occurs without the production of an official statement, a dealer would not be required to disclose its role with regard to the review of an official statement.

17[15] For purposes hereof, a potential material conflict of interest must be disclosed if, but only if, it is *reasonably likely* to mature into an actual material conflict of interest during the course of the transaction between the issuer and the underwriter.

18[16] The third-party payments to which the disclosure standard would apply are those that give rise to actual material conflicts of interest or potential material conflicts of interest only.

(iv) any incentives for the underwriter to recommend a complex municipal securities financing and other associated conflicts of interest (as described below under "Required Disclosures to Issuers").[19]

These categories of conflicts of interest are not mutually exclusive and, in some cases, a specific conflict may reasonably be viewed as falling into two or even more categories. An underwriter making disclosures of dealer-specific conflicts of interest to an issuer should concentrate on making them in a complete and understandable manner and need not necessarily organize them according to the categories listed above, particularly if adhering to a strict categorization process might interfere with the clarity and conciseness of disclosures.

Where there is a syndicate, each underwriter in the syndicate has a duty to provide its dealer-specific disclosures to the issuer. In general, dealer-specific disclosures for one dealer cannot be satisfied by disclosures made by another dealer (*e.g.,* the syndicate manager) because such disclosures are, by their nature, not uniform, and must be prepared by each dealer. However, a syndicate manager may deliver each of the dealer-specific disclosures to the issuer as part of a single package of disclosures, as long as it is clear to which dealer each disclosure is attributed. An underwriter in the syndicate is not required to notify an issuer if it has determined that it does not have any dealer-specific disclosures to make. However, the obligation to provide dealer-specific disclosures includes material conflicts of interest arising after the time of engagement with the issuer, as noted below.

Timing and Manner of Disclosures. The standard disclosures, transaction-specific disclosures, and dealer-specific disclosures must be made in writing to an official of the issuer identified by the issuer as a primary contact for that issuer for the receipt of the foregoing disclosures. In the absence of such identification, an underwriter may make such disclosures in writing to an official of the issuer that the underwriter reasonably believes has the authority to bind the issuer by contract with the underwriter and that, to the knowledge of the underwriter, is not a party to a disclosed conflict.[20] If provided within the same document as the dealer-specific disclosures and/or transaction-specific disclosures, the standard disclosures must be identified clearly as such and provided apart from the other disclosures (*e.g*., in an appendix).

19[17] The specific standard with respect to complex financings does not obviate a dealer's fair dealing obligation to disclose the existence of payments, values, or credits received by the underwriter or of other material conflicts of interest in connection with any negotiated underwriting, whether it be complex or routine.

20[18] Absent red flags, an underwriter may reasonably rely on a written statement from an issuer official that he or she is not a party to a disclosed conflict. The reasonableness of an underwriter's reliance on such a written statement will depend on all the relevant facts and circumstances, including the facts revealed in connection with the underwriter's due diligence in regards to the transaction generally or in determining whether the underwriter itself has any actual material conflicts of interest or potential material conflicts of interest that must be disclosed.

Disclosures must be made in a clear and concise manner designed to make clear to such official the subject matter of such disclosures and their implications for the issuer in accordance with the following timelines.

- A sole underwriter or syndicate manager must make the standard disclosure concerning the arm's-length nature of the underwriter-issuer relationship at the earliest stages of the underwriter's relationship with the issuer with respect to an issue (*e.g.*, in a response to a request for proposals or in promotional materials provided to an issuer).[21]

- A sole underwriter or syndicate manager must make the other standard disclosures regarding the underwriter's role and compensation at or before the time the underwriter is engaged to perform underwriting services (*e.g.*, in an engagement letter), not solely in a bond purchase agreement.

- An underwriter must make the dealer-specific disclosures at or before the time the underwriter has been engaged to perform the underwriting services.[22] Thereafter, an underwriter must make any applicable dealer-specific disclosures discovered or arising after being engaged as an underwriter as soon as practicable after being discovered and with sufficient time for the issuer to fully evaluate any such conflict and its implications.[23]

- An [sole]underwriter [or syndicate manager]who recommends a financing structure or product to an issuer must make the transaction-specific disclosures in sufficient time before the execution of a commitment by an issuer (which may include a bond purchase agreement) relating to the financing and with sufficient time to allow the issuer to fully evaluate the features of the financing.

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21 *See also* note 30 *infra*.

22[19] [For the avoidance of doubt, i]In offerings where a syndicate is formed, the disclosure obligation for an underwriter to make its dealer-specific disclosures is triggered – if any such actual material conflicts of interest or potential material conflicts of interest must be so disclosed – when such underwriter becomes engaged as a member of the underwriting syndicate (except with regard to conflicts discovered or arising after such co-managing underwriter has been engaged). Consistent with the obligation of sole underwriters and syndicate managers, each underwriter in the syndicate must make any applicable dealer-specific disclosures discovered or arising after being engaged as an underwriter in the syndicate as soon as practicable after being discovered and with sufficient time for the issuer to fully evaluate such a conflict and its implications.

23[20] For example, an actual material conflict of interest or potential material conflict of interest may not be present until an underwriter has recommended a particular financing structure. In that case, the disclosure must be provided in sufficient time before the execution of a contract with the underwriter to allow the issuer official to fully evaluate the recommendation, as described under "Required Disclosures to Issuers."

Unless directed otherwise by an issuer, an underwriter may update selected portions of disclosures previously provided so long as such updates clearly identify the additions or deletions and are capable of being read independently of the prior disclosures.[24]

Acknowledgement of Disclosures. When delivering a disclosure, the underwriter must attempt to receive written acknowledgement[25] by the official of the issuer identified by the issuer as [the]a primary contact for the issuer's [of]receipt of the foregoing disclosures.[26] In the absence

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24[21] The MSRB acknowledges that not all transactions proceed along the same timeline or pathway. The timeframes expressed herein should be viewed in light of the overarching goals of Rule G-17 and the purposes that the disclosures are intended to serve as further described in this notice. The various timeframes set out in this notice are not intended to establish strict, hair-trigger tripwires resulting in mere technical rule violations, so long as an underwriter acts in substantial compliance with such timeframes and meets the key objectives for providing disclosure under the notice. Nevertheless, an underwriter's fair dealing obligation to an issuer[of municipal securities] in particular facts and circumstances may demand prompt adherence to the timelines set out in this notice. Stated differently, if an underwriter does not timely deliver a disclosure and, as a result, the issuer: (i) does not have clarity throughout all substantive stages of a financing regarding the roles of its professionals, (ii) is not aware of conflicts of interest promptly after they arise and well before the issuer effectively becomes fully committed – either formally (*e.g.*, through execution of a contract) or informally (e.g., due to having already expended substantial time and effort) – to completing the transaction with the underwriter, and/or (iii) does not have the information required to be disclosed with sufficient time to take such information into consideration and, thereby, to make an informed decision about the key decisions on the financing, then the underwriter generally will have violated its fair-dealing obligations under Rule G-17, absent other mitigating facts and circumstances.

25[22] An underwriter delivering a disclosure in order to meet a fair dealing obligation must obtain (or attempt to obtain) proper acknowledgement. When there is an underwriting syndicate, only the syndicate manager, as the dealer responsible for delivering the standard disclosures [and transaction-specific disclosures]to the issuer, must obtain (or attempt to obtain) [the]proper acknowledgement from [of]the issuer for such disclosures. [For the avoidance of doubt, any underwriter delivering a dealer-specific disclosure must obtain (or attempt to obtain) proper acknowledgement under this notice.]

26[24] Absent red flags, and subject to an underwriter's ability to reasonably rely on a representation from an issuer official that he or she has the authority to bind the issuer by contract with the underwriter, an underwriter may reasonably rely on a written delegation by an authorized issuer official in, among other things, the issuer's request for proposals to another issuer official to receive and acknowledge receipt of a disclosure. The reasonableness of an underwriter's reliance upon an issuer's representation as to these matters will depend on all of the relevant facts and circumstances, including the facts revealed in connection with the underwriter's due diligence in regards to the transaction generally.

of such identification, an underwriter may seek acknowledgement from an official of the issuer whom the underwriter reasonably believes has the authority to bind the issuer by contract with the underwriter, and that, to the knowledge of the underwriter, is not party to a disclosed conflict. This notice does not specify the particular form of acknowledgement, but may include, for example, an e-mail read receipt.[27] An underwriter may proceed with a receipt of a written acknowledgement that includes an issuer's reservation of rights or other self-protective language. If the official of the issuer agrees to proceed with the underwriting engagement after receipt of the disclosures but will not provide written acknowledgement of receipt, the [sole]underwriter [or syndicate manager]responsible for making the requisite disclosure may proceed with the engagement after documenting with specificity why it was unable to obtain such written acknowledgement. Additionally, an underwriter must be able to produce evidence (including, for example, by automatic e-mail delivery receipt) that the disclosures were delivered with sufficient time for evaluation by the issuer before proceeding with the transaction. An issuer's written acknowledgement of the receipt of disclosure is not dispositive of whether such disclosures were made with an appropriate amount of time. The analysis of whether disclosures were provided with sufficient time for an issuer's review is based on the totality of the facts and circumstances.

Representations to Issuers

All representations made by underwriters to issuers[of municipal securities] in connection with municipal securities underwritings, whether written or oral, must be truthful and accurate and must not misrepresent or omit material facts. Underwriters must have a reasonable basis for the representations and other material information contained in documents they prepare and must refrain from including representations or other information they know or should know is inaccurate or misleading. For example, in connection with a certificate signed by the underwriter that will be relied upon by the issuer or other relevant parties to an underwriting (*e.g.*, an issue price certificate), the dealer must have a reasonable basis for the representations and other material information contained therein.[28] In addition, an underwriter's response to an issuer's

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27[24] For purposes of this notice, the term "e-mail read receipt" means an automatic response generated by a recipient issuer official confirming that an e-mail has been opened. While an e-mail read receipt may generally be an acceptable form of an issuer's written acknowledgement under this notice, an underwriter may not rely on such an e-mail read receipt as an issuer's written acknowledgement where such reliance is unreasonable under all of the facts and circumstances, such as where the underwriter is on notice that the issuer official to whom the e-mail is addressed has not in fact received or opened the e-mail.

28[25] The need for underwriters to have a reasonable basis for representations and other material information provided to issuers extends to the reasonableness of assumptions underlying the material information being provided. If an underwriter would not rely on any statements made or information provided for its own purposes, it should refrain from making the statement or providing the information to the issuer, or should provide any appropriate disclosures or other information that would allow the issuer to adequately assess the reliability of the statement or information before relying upon it. Further,

request for proposals or qualifications must fairly and accurately describe the underwriter's capacity, resources, and knowledge to perform the proposed underwriting as of the time the proposal is submitted and must not contain any representations or other material information about such capacity, resources, or knowledge that the underwriter knows or should know to be inaccurate or misleading.[29] Matters not within the personal knowledge of those preparing the response (*e.g.*, pending litigation) must be confirmed by those with knowledge of the subject matter. An underwriter must not represent that it has the requisite knowledge or expertise with respect to a particular financing if the personnel that it intends to work on the financing do not have the requisite knowledge or expertise.

Required Disclosures to Issuers

Many municipal securities are issued using financing structures that are routine and well understood by the typical municipal market professional, including most issuer personnel that have the lead responsibilities in connection with the issuance of municipal securities. For example, absent unusual circumstances or features, the typical fixed rate offering may be presumed to be well understood. Nevertheless, in the case of issuer personnel that the underwriter reasonably believes lack the requisite knowledge or experience to fully understand or assess the implication of a [with such]financing structure[s] or product, the underwriter [or syndicate manager]making such recommendation must provide disclosures on the material aspects of such financing structures or products that [are]it recommends[ed] (*i.e.*, the "transaction-specific disclosures").[30]

[However, i]In some cases, issuer personnel responsible for the issuance of municipal securities would not be well positioned to fully understand or assess the implications of a recommended financing structure in its totality, because the [financing] it is structured in a unique, atypical, or

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underwriters should be careful to distinguish statements made to issuers that represent opinion rather than factual information and to ensure that the issuer is aware of this distinction.

29[26] As a general matter, a response to a request for proposal should not be treated as merely a sales pitch without regulatory consequence, but instead should be treated with full seriousness that issuers have the expectation that representations made in such responses are true and accurate.

30[27] In the circumstance where a dealer proposing to act as an underwriter in a negotiated offering recommends a financing structure or product prior to the time at which an underwriting syndicate is formed, such dealer shall have the same obligations to make any applicable standard disclosures as if it were a sole underwriter or syndicate manager for purposes of their obligations described under "Required Disclosure to the Issuer" (*e.g.*, to make the standard disclosure concerning the arm's-length nature of the underwriter-issuer relationship at the earliest stages of the underwriter's relationship with the issuer with respect to an issue), including complying with corresponding requirements to maintain and preserve records. [Investor."]

otherwise complex manner or incorporates unique, atypical, or otherwise complex features or products (a "complex municipal securities financing").[31] Examples of complex municipal securities financings include, but are not limited to, variable rate demand obligations ("VRDOs"), financings involving derivatives (such as swaps), and financings in which interest rates are benchmarked to an index (such as LIBOR, SIFMA, or SOFR).[32] When a recommendation regarding a complex municipal securities financing [structure]has been made by an underwriter in a negotiated offering,[33] the [sole]underwriter [or syndicate manager]making the recommendation has an obligation under Rule G-17 to communicate more particularized transaction-specific disclosures than those that may be required in the case of the

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31[28] If a complex municipal securities financing consists of an otherwise routine financing structure that incorporates a unique, atypical, or complex element or product and the issuer personnel have knowledge or experience with respect to the routine elements of the financing, the disclosure of material risks and characteristics may be limited to those relating to such specific element and any material impact such element may have on other features that would normally be viewed as routine.

32[29] Respectively, the London Inter-bank Offered Rate (*i.e.*, "LIBOR"), the SIFMA Municipal Swap Index (*i.e.*, "SIFMA"), and Secured Overnight Financing Rate ("SOFR"). The MSRB notes that its references to LIBOR, SIFMA, and SOFR are illustrative only and non-exclusive. Any financings involving a benchmark interest rate index may be complex, particularly if an issuer is unlikely to fully understand the components of that index, its material risks, or its possible interaction with other indexes.

33[30] For purposes of determining when an underwriter recommends a [complex municipal] financing structure in a negotiated offering or recommends a complex municipal securities financing in a negotiated offering (a "Complex Municipal Securities Financing Recommendation"), the MSRB's guidance on the meaning of "recommendation" for dealers in MSRB Notice 2014-07: SEC Approves MSRB Rule G-47 on Time-of-Trade Disclosure Obligations, MSRB Rules D-15 and G-48 on Sophisticated Municipal Market Professionals, and Revisions to MSRB Rule G-19 on Suitability of Recommendations and Transactions (March 12, 2014) is applicable by analogy. [Specifically]For example, whether an underwriter has made a Complex Municipal Securities Financing Recommendation is not susceptible to a bright line definition, but turns on the facts and circumstances of the particular situation. An important factor in determining whether a Complex Municipal Securities Financing Recommendation has been made is whether – given its content, context, and manner of presentation— a particular communication from an underwriter to an issuer regarding a financing structure or product reasonably would be viewed as a call to action or reasonably would influence an issuer to engage in such a financing structure or product deemed a complex municipal securities financing [structure]. In general, the more individually tailored the underwriter's communication is to a specific issuer about a complex municipal securities financing[structure], the greater the likelihood that the communication reasonably would be viewed as a Complex Municipal Securities Financing Recommendation.

recommendation of routine financing structures or products.[34] [The sole underwriter or syndicate manager]The underwriter making the recommendation must also disclose the material financial characteristics of the complex municipal securities financing, as well as the material financial risks of the financing that are known to [the sole]underwriter [or syndicate manager]and reasonably foreseeable at the time of the disclosure.[35] It must also disclose any incentives for the

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34[31] [Sole underwriters and syndicate managers]An underwriter must make reasonable judgments regarding whether it has recommended a financing structure or product to an issuer[recommendation has been made] and whether a particular [recommended]financing structure or product recommended by the underwriter to the issuer is complex, understanding that the [simple]fact that a structure or product has become relatively common in the market does not [automatically result in]reduce its [being viewed as not]complexity. Not all negotiated offerings involve a recommendation by the underwriter(s), such as where a sole underwriter merely executes a transaction already structured by the issuer or its [financial] municipal advisor.

35[32] For example, when a Complex Municipal Securities Financing Recommendation to an issuer for a VRDO is made, the [sole]underwriter [or syndicate manager]who recommends the VRDO should inform the issuer of the risk of interest rate fluctuations and material risks of any associated credit or liquidity facilities (*e.g.*, the risk that the issuer might not be able to replace the facility upon its expiration and might be required to repay the facility provider over a short period of time). As an additional example, if the underwriter recommends[it is recommended] that the issuer swap the floating rate interest payments on the VRDOs to fixed rate payments under a swap, the [sole]underwriter[or syndicate manager] must disclose the material financial risks (including market, credit, operational, and liquidity risks) and material financial characteristics of the recommended swap (*e.g.*, the material economic terms of the swap, the material terms relating to the operation of the swap, and the material rights and obligations of the parties during the term of the swap), as well as the material financial risks associated with the VRDO. Such disclosures should be sufficient to allow the issuer to assess the magnitude of its potential exposure as a result of the complex municipal securities financing. Such disclosures must also inform the issuer that there may be accounting, legal, and other risks associated with the swap and that the issuer should consult with other professionals concerning such risks. If the [sole]underwriter['s] who has made a Complex Municipal Securities Financing Recommendation is[or syndicate manager's]affiliated with the swap dealer [is]proposed to be the executing swap dealer, [such]the underwriter may satisfy its disclosure obligation under this notice with respect to the swap if such disclosure has been provided to the issuer by the affiliated swap dealer or the issuer's swap or other financial advisor that is independent of such underwriter and the swap dealer, as long as the underwriter has a reasonable basis for belief in the truthfulness and completeness of such disclosure. If the issuer decides to enter into a swap with another dealer, the sole underwriter or syndicate manager is not required to make disclosures with regard to that swap product under this notice. The MSRB notes that a dealer[s] [that]who recommends a swap[s] or security-based swap[s] to an issuer [municipal entities] may also be subject to rules of the Commodity Futures Trading Commission or those of the Securities and Exchange Commission ("SEC").

recommendation of the complex municipal securities financing and other associated material conflicts of interest.[36] Such disclosures must be made in a fair and balanced manner based on principles of fair dealing and good faith.

The level of transaction-specific disclosure required may vary according to the issuer's knowledge or experience with the proposed financing structure or similar structures, capability of evaluating the risks of the recommended financing structure or product, and financial ability to bear the risks of the recommended financing structure or product, in each case based on the reasonable belief of the [sole]underwriter [or the syndicate manager].[37] Consequently, the level of transaction-specific disclosure to be provided to a particular issuer also can vary over time. In all events, the [sole]underwriter [or syndicate manager]must disclose any incentives for the recommendation of the complex municipal securities financing and other associated conflicts of interest.

As previously mentioned, the transaction-specific disclosures must be made in writing to an official of the issuer identified by the issuer as a primary contact for that issuer for the receipt of such disclosures, or, in the case of the absence of such identification, an underwriter may make such disclosures in writing to an official whom the [sole]underwriter [or syndicate manager]reasonably believes has the authority to bind the issuer by contract with the underwriter(s), and that, to the knowledge of the underwriter delivering the disclosure, is not a party to a disclosed conflict: (i) in sufficient time before the execution of a contract with the underwriter to allow the official to evaluate the recommendation (including consultation with any of its counsel or advisors) and (ii) in a manner designed to make clear to such official the subject matter of such disclosures and their implications for the issuer.

The disclosures concerning a complex municipal securities financing must address the specific elements of, and/or relevant products incorporated into, the recommended financing structure, rather than being general in nature.[38] [A sole underwriter or syndicate manager]An underwriter making a Complex Municipal Securities Financing Recommendation to an issuer regarding a complex municipal securities financing structure cannot satisfy its fair dealing obligations by providing an issuer a single document setting out general descriptions of the various [complex municipal securities] financing structures and/or products that may be recommended from time

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36[33] For example, a conflict of interest may exist when [a sole underwriter or syndicate manager] the underwriter who makes a Complex Municipal Securities Financing Recommendation to an issuer is also the provider, or an affiliate of the provider, of a swap used by an issuer to hedge a municipal securities offering or when an underwriter receives compensation from a swap provider for recommending the swap[provider to the issuer]. *See also* "Conflicts of Interest/Payments to or from Third Parties" herein.

37[34] Even a financing in which the interest rate is benchmarked to an index that is commonly used in the municipal marketplace (*e.g.*, SIFMA) may be complex to an issuer that does not understand the components of that index or its possible interaction with other indexes.

38[35] *See* note 18 *supra*.

to time to various issuer clients that would effectively require issuer personnel to discover which disclosures apply to a particular recommendation and to the particular circumstances of that issuer. Underwriters can create, in anticipation of making such a recommendation[serving as sole underwriter or syndicate manager], individualized descriptions, with appropriate levels of detail, of the material financial characteristics and risks for each of the various complex municipal securities financing structures and/or products (including any typical variations) they may recommend from time to time to its various issuer clients, with such standardized descriptions serving as the base for more particularized disclosures for the specific complex financing the underwriter recommends to particular issuers.[39] In making a recommendation to an issuer, an [U]underwriter[s] could incorporate, to the extent applicable, any refinements to the base description needed to fully describe the material financial features and risks unique to that financing.[40]

If the [sole]underwriter who has made a recommendation[or syndicate manager]does not reasonably believe that the official to whom the disclosures are addressed is capable of independently evaluating the disclosures, the [sole]underwriter [or syndicate manager] must make additional efforts reasonably designed to inform the official or its employees or agent. The[sole] underwriter [or syndicate manager]also must make an independent assessment that such disclosures are appropriately tailored to the issuer's level of sophistication.

Underwriter Duties in Connection with Issuer Disclosure Documents

Underwriters often play an important role in assisting issuers in the preparation of disclosure documents, such as preliminary official statements and official statements.[41] These documents

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39[36] Page after page of complex legal jargon in small print would not be consistent with an underwriter's fair dealing obligation under this notice.

40[37] Underwriters should be able to leverage such materials for internal training and risk management purposes.

41[38] Underwriters that assist issuers in preparing official statements must remain cognizant of their duties under federal securities laws. With respect to primary offerings of municipal securities, the SEC has noted, "By participating in an offering, an underwriter makes an implied recommendation about the securities." *See* Exchange Act Release No. 26100 (Sept. 22, 1988) (proposing Exchange Act Rule 15c2-12) at text following [note]fn. 70. The SEC has stated that "this recommendation itself implies that the underwriter has a reasonable basis for belief in the truthfulness and completeness of the key representations made in any disclosure documents used in the offerings." Furthermore, pursuant to Exchange Act Rule 15c2-12(b)(5), an underwriter may not purchase or sell municipal securities in most primary offerings unless the underwriter has reasonably determined that the issuer or an obligated person has entered into a written undertaking to provide certain types of secondary market disclosure and has a reasonable basis for relying on the accuracy of the issuer's ongoing disclosure representations. Exchange Act Release No. 34961 (Nov. 10, 1994) (adopting continuing disclosure provisions of Exchange Act Rule 15c2-12) at text following [note]fn. 52.

are critical to the municipal securities transaction, because investors rely on the representations contained in such documents in making their investment decisions. Moreover, investment professionals, such as municipal securities analysts and ratings services, rely on the representations in forming an opinion regarding the credit. A dealer's duty to have a reasonable basis for the representations it makes, and other material information it provides, to an issuer and to ensure that such representations and information are accurate and not misleading, as described above, extends to representations and information provided by the underwriter in connection with the preparation by the issuer of its disclosure documents (*e.g.*, cash flows).

Underwriter Compensation and New Issue Pricing

Excessive Compensation. An underwriter's compensation for a new issue (including both direct compensation paid by the issuer and other separate payments, values, or credits received by the underwriter from the issuer or any other party in connection with the underwriting), in certain cases and depending upon the specific facts and circumstances of the offering, may be so disproportionate to the nature of the underwriting and related services performed as to constitute an unfair practice with regard to the issuer that it is a violation of Rule G-17. Among the factors relevant to whether an underwriter's compensation is disproportionate to the nature of the underwriting and related services performed, are the credit quality of the issue, the size of the issue, market conditions, the length of time spent structuring the issue, and whether the underwriter is paying the fee of the underwriter's counsel or any other relevant costs related to the financing.

Fair Pricing. The duty of fair dealing under Rule G-17 includes an implied representation that the price an underwriter pays to an issuer is fair and reasonable, taking into consideration all relevant factors, including the best judgment of the underwriter as to the fair market value of the issue at the time it is priced.[42] In general, a dealer purchasing bonds in a competitive underwriting for which the issuer may reject any and all bids will be deemed to have satisfied its duty of fairness to the issuer with respect to the purchase price of the issue as long as the dealer's bid is a bona fide bid (as defined in MSRB Rule G-13)[43] that is based on the dealer's best judgment of the fair market value of the securities that are the subject of the bid. In a negotiated underwriting, the underwriter has a duty under Rule G-17 to negotiate in good faith with the issuer. This duty includes the obligation of the dealer to ensure the accuracy of representations

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42[39] The MSRB has previously observed that whether an underwriter has dealt fairly with an issuer for purposes of Rule G-17 is dependent upon all of the facts and circumstances of an underwriting and is not dependent solely on the price of the issue. *See* MSRB Notice 2009-54 (Sept. 29, 2009) and the 1997 Interpretation (note 2 *supra*). *See also* "Retail Order Periods" herein.

43[40] Rule G-13(b)(iii) provides: "For purposes of subparagraph (i), a quotation shall be deemed to represent a 'bona fide bid for, or offer of, municipal securities' if the broker, dealer or municipal securities dealer making the quotation is prepared to purchase or sell the security which is the subject of the quotation at the price stated in the quotation and under such conditions, if any, as are specified at the time the quotation is made."

made during the course of such negotiations, including representations regarding the price negotiated and the nature of investor demand for the securities (*e.g.*, the status of the order period and the order book). If, for example, the dealer represents to the issuer that it is providing the "best" market price available on the new issue, or that it will exert its best efforts to obtain the "most favorable" pricing, the dealer may violate Rule G-17 if its actions are inconsistent with such representations.[44]

Conflicts of Interest

Payments to or from Third Parties. In certain cases, compensation received by an underwriter from third parties, such as the providers of derivatives and investments (including affiliates of an underwriter), may color the underwriter's judgment and cause it to recommend products, structures, and pricing levels to an issuer when it would not have done so absent such payments. The MSRB views the failure of an underwriter to disclose to the issuer the existence of payments, values, or credits received by an underwriter in connection with its underwriting of the new issue from parties other than the issuer, and payments made by the underwriter in connection with such new issue to parties other than the issuer (in either case including payments, values, or credits that relate directly or indirectly to collateral transactions integrally related to the issue being underwritten), to be a violation of an underwriter's obligation to the issuer under Rule G-17.[45] For example, it would be a violation of Rule G-17 for an underwriter to compensate an undisclosed third party in order to secure municipal securities business. Similarly, it would be a violation of Rule G-17 for an underwriter to receive undisclosed compensation from a third party in exchange for recommending that third party's services or product to an issuer, including business related to municipal securities derivative transactions. This notice does not require that the amount of such third-party payments be disclosed. The underwriter must also disclose to the issuer whether it has entered into any third-party arrangements for the marketing of the issuer's securities.

Profit-Sharing with Investors. Arrangements between the underwriter and an investor purchasing new issue securities from the underwriter (including purchases that are contingent upon the delivery by the issuer to the underwriter of the securities) according to which profits realized from the resale by such investor of the securities are directly or indirectly split or otherwise shared with the underwriter also would, depending on the facts and circumstances (including in particular if such resale occurs reasonably close in time to the original sale by the underwriter to the investor), constitute a violation of the underwriter's fair dealing obligation under Rule G-17.[46] Such arrangements could also constitute a violation of Rule G-25(c), which

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44[41] *See* 1997 Interpretation (note 2 *supra*).

45[42] *See also* "Required Disclosures to Issuers" herein.

46[43] Underwriters should be mindful that, depending on the facts and circumstances, such an arrangement may be inferred from a purposeful but not otherwise justified pattern of transactions or other course of action, even without the existence of a formal written agreement.

precludes a dealer from sharing, directly or indirectly, in the profits or losses of a transaction in municipal securities with or for a customer. An underwriter should carefully consider whether any such arrangement, regardless of whether it constitutes a violation of Rule G-25(c), may evidence a potential failure of the underwriter's duty with regard to new issue pricing described above.

Credit Default Swaps. The issuance or purchase by a dealer of credit default swaps for which the reference is the issuer for which the dealer is serving as underwriter, or an obligation of that issuer, may pose a conflict of interest, including a dealer-specific conflict of interest, because trading in such municipal credit default swaps has the potential to affect the pricing of the underlying reference obligations, as well as the pricing of other obligations brought to market by that issuer. Rule G-17 requires, therefore, that a dealer disclose the fact that it engages in such activities to the issuers for which it serves as underwriter. Activities with regard to credit default swaps based on baskets or indexes of municipal issuers that include the issuer or its obligation(s) need not be disclosed, unless the issuer or its obligation(s) represents more than 2% of the total notional amount of the credit default swap or the underwriter otherwise caused the issuer or its obligation(s) to be included in the basket or index.

Retail Order Periods

Rule G-17 requires an underwriter that has agreed to underwrite a transaction with a retail order period to, in fact, honor such agreement.[47] A dealer that wishes to allocate securities in a manner that is inconsistent with an issuer's requirements must not do so without the issuer's consent. In addition, Rule G-17 requires an underwriter that has agreed to underwrite a transaction with a retail order period to take reasonable measures to ensure that retail clients are bona fide. An underwriter that knowingly accepts an order that has been framed as a retail order when it is not (*e.g.*, a number of small orders placed by an institutional investor that would otherwise not qualify as a retail customer) would violate Rule G-17 if its actions are inconsistent with the issuer's expectations regarding retail orders. In addition, a dealer that places an order that is framed as a qualifying retail order but in fact represents an order that does not meet the qualification requirements to be treated as a retail order (*e.g.*, an order by a retail dealer without "going away" orders[48] from retail customers, when such orders are not within the issuer's definition of "retail") violates its Rule G-17 duty of fair dealing. The MSRB will continue to review activities relating to retail order periods to ensure that they are conducted in a fair and

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47[44] *See* MSRB Interpretation on Priority of Orders for Securities in a Primary Offering under Rule G-17, MSRB interpretation of October 12, 2010, reprinted in MSRB Rule Book. The MSRB also reminds underwriters of previous MSRB guidance on the pricing of securities sold to retail investors. *See* Guidance on Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities, MSRB Notice 2009-42 (July 14, 2009).

48[45] In general, a "going away" order is an order for new issue securities for which a customer is already conditionally committed. *See* Exchange Act Release No. 62715, File No. SR-MSRB-2009-17 (August 13, 2010).

orderly manner consistent with the intent of the issuer and the MSRB's investor protection mandate.

Dealer Payments to Issuer Personnel

Dealers are reminded of the application of MSRB Rule G-20, on gifts, gratuities, and non-cash compensation, and Rule G-17, in connection with certain payments made to, and expenses reimbursed for, issuer personnel during the municipal bond issuance process.[49] These rules are designed to avoid conflicts of interest and to promote fair practices in the municipal securities market.

Dealers should consider carefully whether payments they make in regard to expenses of issuer personnel in the course of the bond issuance process, including in particular, but not limited to, payments for which dealers seek reimbursement from bond proceeds or issuers, comport with the requirements of Rule G-20. For example, a dealer acting as a financial advisor or underwriter may violate Rule G-20 by paying for excessive or lavish travel, meal, lodging and entertainment expenses in connection with an offering (such as may be incurred for rating agency trips, bond closing dinners, and other functions) that inure to the personal benefit of issuer personnel and that exceed the limits or otherwise violate the requirements of the rule.[50][47]

{DATE TO BE SPECIFIED}

49[46] *See* MSRB Rule G-20 Interpretation — Dealer Payments in Connection With the Municipal Securities Issuance Process (January 29, 2007), reprinted in MSRB Rule Book.

50[47] *See* In the Matter of RBC Capital Markets Corporation, Exchange Act Release No. 59439 (Feb. 24, 2009) (settlement in connection with broker-dealer alleged to have violated MSRB Rules G-20 and G-17 for payment of lavish travel and entertainment expenses of city officials and their families associated with rating agency trips, which expenditures were subsequently reimbursed from bond proceeds as costs of issuance); In the Matter of Merchant Capital, L.L.C., Exchange Act Release No. 60043 (June 4, 2009) (settlement in connection with broker-dealer alleged to have violated MSRB rules for payment of travel and entertainment expenses of family and friends of senior officials of issuer and reimbursement of the expenses from issuers and from proceeds of bond offerings).

EXHIBIT 5

TEXT OF DRAFT AMENDMENTS*

INTERPRETIVE NOTICE CONCERNING THE APPLICATION OF MSRB RULE G-17 TO UNDERWRITERS OF MUNICIPAL SECURITIES – [August 2, 2012] – DATE OF ISSUANCE TO BE SPECIFIED

Under Rule G-17 of the Municipal Securities Rulemaking Board ([the "]MSRB["]), brokers, dealers, and municipal securities dealers ("dealers") must, in the conduct of their municipal securities activities, deal fairly with all persons and must not engage in any deceptive, dishonest, or unfair practice. This rule is most often cited in connection with duties owed by dealers to investors; however, it also applies to their interactions with other market participants, including municipal entities[1] such as states and their political subdivisions that are issuers of municipal securities ("issuers").

The MSRB has previously observed that Rule G-17 requires dealers to deal fairly with issuers [in connection with the underwriting of their municipal securities].[2] [More recently, w]With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[3] the MSRB was expressly directed by Congress to protect municipal entities. Accordingly, in 2012, the MSRB provided[is providing] additional interpretive guidance that [addresses]addressed how Rule G-17

* Underlining indicates new language; brackets denote deletions.

1 [The term "municipal entity" is defined by Section 15B(e)(8) of the Securities Exchange Act (the "Exchange Act") to mean: "any State, political subdivision of a State, or municipal corporate instrumentality of a State, including—(A) any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (B) any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and (C) any other issuer of municipal securities.] For purposes of this notice, the term "municipal entity" is used as defined by Section 15B(e)(8) of the Securities Exchange Act of 1934 (the "Exchange Act"), 17 CFR 240.15Ba1-1(g), and other rules and regulations thereunder.

2 *See* Reminder Notice on Fair Practice Duties to Issuers of Municipal Securities, MSRB Notice 2009-54 (September 29, 2009); Rule G-17 Interpretive Letter – Purchase of new issue from issuer, MSRB interpretation of December 1, 1997, reprinted in MSRB Rule Book ("1997 Interpretation").

3 [Dodd-Frank Wall Street Reform and Consumer Protection Act,]Pub. L. No. 111-203 § 975, 124 Stat. 1376 (2010).

applies to dealers acting in the capacity of underwriters in the municipal securities transactions described [below]therein (the "2012 Interpretive Notice").[4]

This notice supersedes the MSRB's 2012 Interpretive Notice, dated August 2, 2012, concerning the application of Rule G-17 to underwriters of municipal securities, as well as the related implementation guidance, dated July 18, 2012, and frequently-asked questions, dated March 25, 2013 (the "prior guidance").[5] The prior guidance will remain applicable to underwriting relationships commencing prior to {DATE TO BE SPECIFIED}. Underwriters will be subject to the amended guidance provided by this notice for all of their underwriting relationships beginning on or after that date. For purposes of this notice, an underwriting relationship is considered to have begun at the time the delivery of the first disclosure is triggered as described under "Timing and Manner of Disclosures" below (*i.e.*, the earliest stages of an underwriter's relationship with an issuer with respect to an issue, such as in a response to a request for proposal or in promotional materials provided to an issuer).

Applicability of the Notice

Except where a competitive underwriting is specifically mentioned, this notice applies to negotiated underwritings only.[6] This notice does not apply to a dealer acting as a primary distributor in a continuous in a continuous offering of municipal fund securities, such as interests in 529 savings plans and Achieving a Better Life Experience (ABLE) programs. [Furthermore, it]It does not apply to selling group members. This notice does not address a dealer's duties when the dealer is serving as an advisor to a municipal entity. This notice applies to a primary offering of a new issue of municipal securities that is placed with investors by a dealer serving as placement agent, although certain disclosures may be omitted as described below.

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4 *See* Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Aug. 2, 2012) (superseded upon the effective date of this notice as described below).

5 *See* MSRB Notice 2012-38 (July 18, 2012); MSRB Notice 2013-08 (Mar. 25, 2013).

6 The MSRB has always viewed competitive offerings narrowly to mean new issues sold by the issuer to the underwriter on the basis of the lowest price bid by potential underwriters – that is, the fact that an issuer publishes a request for proposals and potential underwriters compete to be selected based on their professional qualifications, experience, financing ideas, and other subjective factors would not be viewed as representing a competitive offering for purposes of this notice. In light of this meaning of the term "competitive underwriting," it should be clear that, although most of the examples relating to misrepresentations and fairness of financial aspects of an offering consist of situations that would only arise in a negotiated offering, Rule G-17 should not be viewed as allowing an underwriter in a competitive underwriting to make misrepresentations to the issuer or to act unfairly in regard to the financial aspects of the new issue.

The fair practice duties outlined in this notice are those duties that a dealer owes to a municipal entity when the dealer underwrites a new issue of municipal securities. This notice does not set out the underwriter's fair-practice duties to other parties to a municipal securities financing (*e.g.*, conduit borrowers). The MSRB notes, however, that Rule G-17 does require that an underwriter deal fairly with all persons in the course of the dealer's municipal securities activities. What actions are considered fair will, of necessity, be dependent on the nature of the relationship between a dealer and such other parties, the particular actions undertaken, and all other relevant facts and circumstances. Although this notice does not address what an underwriter's fair-dealing duties may be with respect to other parties, it may serve as one of many bases for an underwriter to consider how to establish appropriate policies and procedures for ensuring that it meets such fair-practice obligations, in light of its relationship with such other participants and their particular roles.

The examples discussed in this notice are illustrative only and are not meant to encompass all obligations of dealers to municipal entities under Rule G-17. [The notice also does not address a dealer's duties when the dealer is serving as an advisor to a municipal entity.] Furthermore, when municipal entities are customers[7][4] of dealers, they are subject to the same protections under MSRB rules, including Rule G-17, that apply to other customers.[8][5] The MSRB notes that an underwriter has a duty of fair dealing to investors in addition to its duty of fair dealing to issuers. An underwriter also has a duty to comply with other MSRB rules as well as other federal and state securities laws.

Basic Fair Dealing Principle

As noted above, Rule G-17 precludes a dealer, in the conduct of its municipal securities activities, from engaging in any deceptive, dishonest, or unfair practice with any person, including an issuer[of municipal securities]. The rule contains an anti-fraud prohibition. Thus, an underwriter must not misrepresent or omit the facts, risks, potential benefits, or other material information about municipal securities activities undertaken with a municipal issuer. However, Rule G-17 does not merely prohibit deceptive conduct on the part of the dealer[. It]; it also establishes a general duty of a dealer to deal fairly with all persons (including, but not limited to, issuers[of municipal securities]), even in the absence of fraud.

Role of [the]Underwriters[/] and Conflicts of Interest

7[4] MSRB Rule D-9 defines the term "customer" as follows: "Except as otherwise specifically provided by rule of the Board, the term 'Customer' shall mean any person other than a broker, dealer, or municipal securities dealer acting in its capacity as such or an issuer in transactions involving the sale by the issuer of a new issue of its securities."

8[5] *See* MSRB Reminds Firms of Their Sales Practice and Due Diligence Obligations When Selling Municipal Securities in the Secondary Market, MSRB Notice 2010-37 (September 20, 2010).

In [a]negotiated underwritings, [the]underwriters'['s] Rule G-17 duty to deal fairly with an issuer [of municipal securities]requires [the underwriter to make]certain disclosures to the issuer [to clarify its role]in connection with an issue or proposed issue[issuance] of municipal securities, as provided below.[9][and its actual or potential material conflicts of interest with respect to such issuance.]

- The disclosures discussed under "Disclosures Concerning the Underwriters' Role" and "Disclosures Concerning Underwriters' Compensation" (the "standard disclosures") must be provided by the sole underwriter or the syndicate manager[10] to the issuer as described below.

- The disclosures discussed under "Required Disclosures to Issuers" (the "transaction-specific disclosures") must be provided to the issuer by the underwriter who has recommended a financing structure or product to the issuer as described below.[11]

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9 For purposes of this notice, underwriters are only required to provide written disclosure of their applicable conflicts and are not required to make any written disclosures on the part of issuer personnel or any other parties to the transaction as part of the standard disclosures, dealer-specific disclosures, or the transaction-specific disclosures.

10 For purposes of this notice, the term "syndicate manager" refers to the lead manager, senior manager, or bookrunning manager of the syndicate. In circumstances where an underwriting syndicate is formed, only that single syndicate manager is obligated to make the standard disclosures under this notice. In the event that there are joint-bookrunning senior managers, only one of the joint-bookrunning senior managers would be obligated under this notice to make the standard disclosures. Unless otherwise agreed to, such as pursuant to an agreement among underwriters, the joint-bookrunning senior manager responsible for maintaining the order book of the syndicate would be responsible for providing the standard disclosures. Notwithstanding the fair dealing obligation of a syndicate manager to deliver the standard disclosures under this notice, nothing herein would prohibit an underwriter from making a disclosure in order to, for example, comply with another regulatory or statutory obligation.

11 Where an underwriting syndicate is formed, the syndicate manager has the sole responsibility hereunder for providing the standard disclosures. Consistent with this obligation placed on the syndicate manager, only the syndicate manager must maintain and preserve records of the standard disclosures in accordance with MSRB rules. Further, the MSRB acknowledges that an underwriter may not know if a syndicate will form at the time that certain disclosures are sent. In instances in which an underwriter has provided a standard disclosure prior to or concurrent with the formation of a syndicate, it shall suffice that the then-underwriter (later syndicate manager) has delivered a standard disclosure, and no affirmative statement is necessary that a disclosure is being made on behalf of any existing or future syndicate members for the syndicate manager to have met

- The disclosures discussed under "Other Conflicts Disclosures" (the "dealer-specific disclosures") must be provided by the sole underwriter or each underwriter in a syndicate (as applicable) as described below.[12]

Disclosures Concerning the Underwriter's Role. The sole underwriter or the syndicate manager[13] must disclose to the issuer that:

(i) Municipal Securities Rulemaking Board Rule G-17 requires an underwriter to deal fairly at all times with both [municipal]issuers and investors;

(ii) the underwriter's primary role is to purchase securities with a view 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;[14]

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its fair dealing obligations in this regard. Notwithstanding the obligation of a syndicate manager to deliver the standard disclosures, nothing herein would prohibit, or should be construed as prohibiting, another underwriter from delivering a standard disclosure in order to, for example, comply with another regulatory or statutory obligation.

12 Each underwriter, whether a sole underwriter, syndicate manager, or other member of the underwriting syndicate, has a fair dealing obligation under this notice to deliver transaction-specific disclosures where such underwriter has made a recommendation to an issuer regarding a financing structure or product. The fair dealing obligation to deliver such a transaction-specific disclosure, includes, but is not limited to, determining the level of disclosure required based on the type of financing structure or product recommended and a reasonable belief of the issuer's knowledge and experience regarding that particular type of financing structure or product. In such cases, as further discussed below, a sole underwriter, syndicate manager, or other member of the underwriting syndicate who has not made such a recommendation would not need to deliver transaction-specific disclosures in order to meet its fair dealing obligation under this notice.

13 *See also* note 30 *infra.*

14 As a threshold matter, the disclosures delivered by an underwriter to an issuer must not be inaccurate or misleading, and nothing in this notice should be construed as requiring an underwriter to make a disclosure to an issuer that is false. For example, in a private placement where a dealer acting as an agent to place securities on behalf of an issuer does not take a principal position (including not taking a "riskless principal" position) in the securities being placed, the standard disclosure relating to an "arm's length" relationship may be inapplicable and in such case may be omitted due to the agent-principal relationship between the dealer and issuer that commonly gives rise to other duties as a matter of common law or another statutory or regulatory regime – whether termed as a fiduciary or other obligation of trust. *See* Exchange Act Release No. 66927 (May 4, 2012), 77 FR 27509 (May 10, 2012) (SR-MSRB-2011-09). In certain other contexts,

(iii) 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;[15]

(iv) the issuer may choose to engage the services of a municipal advisor with a fiduciary obligation to represent the issuer's interests in the transaction;

(v) the underwriter has a duty to purchase securities from the issuer at a fair and reasonable price, but must balance that duty with its duty to sell municipal securities to investors at prices that are fair and reasonable; and

(vi) the underwriter will review the official statement for the issuer's securities in accordance with, and as part of, its responsibilities to investors under the federal securities laws, as applied to the facts and circumstances of the transaction.[16]

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depending on the specific facts and circumstances, a dealer acting as an underwriter may take on, either through an agency arrangement or other purposeful understanding, a fiduciary relationship with the issuer. In such case, it would be appropriate for an underwriter to omit those disclosures deemed inapplicable as a result of such relationship.

A dealer acting as a placement agent in the primary offering of a new issuance of municipal securities should also consider how the scope of its activities may interact with the registration and record-keeping requirements for municipal advisors adopted by the Securities and Exchange Commission (the "Commission") under Section 15B of the Exchange Act (15 U.S.C. 78o-4), including the application of the exclusion from the definition of "municipal advisor" applicable to a dealer acting as an underwriter pursuant to Exchange Act Rule 15Ba1-1(d)(2)(i). See Registration of Municipal Advisors, Exchange Act Release No. 70462 (September 20, 2013), 78 FR 67467 (hereinafter, the "MA Rule Adopting Release"), at 67515 – 67516 (November 12, 2013) (available at http://www.sec.gov/rules/final/2013/34-70462.pdf) (stating: "The Commission does not believe that the underwriter exclusion should be limited to a particular type of underwriting or a particular type of offering. Therefore, if a registered broker-dealer, acting as a placement agent, performs municipal advisory activities that otherwise would be considered within the scope of the underwriting of a particular issuance of municipal securities as discussed [therein], the broker-dealer would not have to register as a municipal advisor."); see also the MA Rule Adopting Release, 78 FR at 67513 – 67514 (discussing activities within and outside the scope of serving as an underwriter of a particular issuance of municipal securities for purposes of the underwriter exclusion).

15 *Id.*

16 In many private placements, as well as in certain other types of new issue offerings, no official statement may be produced, so that, to the extent that such an offering occurs without the production of an official statement, a dealer would not be required to disclose its role with regard to the review of an official statement.

[The underwriter]Underwriters also must not recommend that [the]issuers not retain a municipal advisor. Accordingly, underwriters may not discourage issuers from using a municipal advisor or otherwise imply that the hiring of a municipal advisor would be redundant because the sole underwriter or underwriting syndicate can provide the services that a municipal advisor would.

Disclosure Concerning the Underwriters'['s] Compensation. The sole underwriter or syndicate manager must disclose to [the]issuers whether [its]underwriting compensation will be contingent on the closing of a transaction. [It]Sole underwriters or syndicate managers must also disclose that compensation that is contingent on the closing of a transaction or the size of a transaction presents a conflict of interest[,] because it may cause [the]underwriters to recommend a transaction that [it]is unnecessary or to recommend that the size of [the]a transaction be larger than is necessary.

Other Conflicts Disclosures. The sole underwriter or each underwriter in a syndicate must also, when and if applicable, disclose other dealer-specific [potential or]actual material conflicts of interest and potential material conflicts of interest,[17] including, but not limited to, the following:

(i) any payments described below under "Conflicts of Interest/ Payments to or from Third Parties";[18]

(ii) any arrangements described below under "Conflicts of Interest/Profit-Sharing with Investors";

(iii) the credit default swap disclosures described below under "Conflicts of Interest/Credit Default Swaps"; and

(iv) any incentives for the underwriter to recommend a complex municipal securities financing and other associated conflicts of interest (as described below under "Required Disclosures to Issuers").[19]

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[17] For purposes hereof, a potential material conflict of interest must be disclosed if, but only if, it is *reasonably likely* to mature into an actual material conflict of interest during the course of the transaction between the issuer and the underwriter.

[18] The third-party payments to which the disclosure standard would apply are those that give rise to actual material conflicts of interest or potential material conflicts of interest only.

[19] The specific standard with respect to complex financings does not obviate a dealer's fair dealing obligation to disclose the existence of payments, values, or credits received by the underwriter or of other material conflicts of interest in connection with any negotiated underwriting, whether it be complex or routine.

[Disclosures concerning the role of the underwriter and the underwriter's compensation may be made by a syndicate manager on behalf of other syndicate members. Other conflicts disclosures must be made by the particular underwriters subject to such conflicts.]

These categories of conflicts of interest are not mutually exclusive and, in some cases, a specific conflict may reasonably be viewed as falling into two or even more categories. An underwriter making disclosures of dealer-specific conflicts of interest to an issuer should concentrate on making them in a complete and understandable manner and need not necessarily organize them according to the categories listed above, particularly if adhering to a strict categorization process might interfere with the clarity and conciseness of disclosures.

Where there is a syndicate, each underwriter in the syndicate has a duty to provide its dealer-specific disclosures to the issuer. In general, dealer-specific disclosures for one dealer cannot be satisfied by disclosures made by another dealer (*e.g.,* the syndicate manager) because such disclosures are, by their nature, not uniform, and must be prepared by each dealer. However, a syndicate manager may deliver each of the dealer-specific disclosures to the issuer as part of a single package of disclosures, as long as it is clear to which dealer each disclosure is attributed. An underwriter in the syndicate is not required to notify an issuer if it has determined that it does not have any dealer-specific disclosures to make. However, the obligation to provide dealer-specific disclosures includes material conflicts of interest arising after the time of engagement with the issuer, as noted below.

Timing and Manner of Disclosures. [All of the foregoing disclosures]The standard disclosures, transaction-specific disclosures, and dealer-specific disclosures must be made in writing to an official of the issuer identified by the issuer as a primary contact for that issuer for the receipt of the foregoing disclosures. In the absence of such identification, an underwriter may make such disclosures in writing to an official of the issuer that the underwriter reasonably believes has the authority to bind the issuer by contract with the underwriter and that, to the knowledge of the underwriter, is not a party to a disclosed conflict.[20] If provided within the same document as the dealer-specific disclosures and/or transaction-specific disclosures, the standard disclosures must be identified clearly as such and provided apart from the other disclosures (*e.g.*, in an appendix).

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[20] Absent red flags, an underwriter may reasonably rely on a written statement from an issuer official that he or she is not a party to a disclosed conflict. The reasonableness of an underwriter's reliance on such a written statement will depend on all the relevant facts and circumstances, including the facts revealed in connection with the underwriter's due diligence in regards to the transaction generally or in determining whether the underwriter itself has any actual material conflicts of interest or potential material conflicts of interest that must be disclosed.

Disclosures must be made in a clear and concise manner designed to make clear to such official the subject matter of such disclosures and their implications for the issuer in accordance with the following timelines.

- A sole underwriter or syndicate manager must make the standard disclosure concerning the arm's-length nature of the underwriter-issuer relationship at the earliest stages of the underwriter's relationship with the issuer with respect to an issue (*e.g.*, in a response to a request for proposals or in promotional materials provided to an issuer).[21]

- A sole underwriter or syndicate manager must make the other standard disclosures regarding the underwriter's role and compensation at or before the time the underwriter is engaged to perform underwriting services (*e.g.*, in an engagement letter), not solely in a bond purchase agreement.

- An underwriter must make the dealer-specific disclosures at or before the time the underwriter has been engaged to perform the underwriting services.[22] Thereafter, an underwriter must make any applicable dealer-specific disclosures discovered or arising after being engaged as an underwriter as soon as practicable after being discovered and with sufficient time for the issuer to fully evaluate any such conflict and its implications.[23]

- An underwriter who recommends a financing structure or product to an issuer must make the transaction-specific disclosures in sufficient time before the execution of a commitment by an issuer (which may include a bond purchase agreement) relating to the

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[21] *See also* note 30 *infra.*

[22] In offerings where a syndicate is formed, the disclosure obligation for an underwriter to make its dealer-specific disclosures is triggered – if any such actual material conflicts of interest or potential material conflicts of interest must be so disclosed – when such underwriter becomes engaged as a member of the underwriting syndicate (except with regard to conflicts discovered or arising after such co-managing underwriter has been engaged). Consistent with the obligation of sole underwriters and syndicate managers, each underwriter in the syndicate must make any applicable dealer-specific disclosures discovered or arising after being engaged as an underwriter in the syndicate as soon as practicable after being discovered and with sufficient time for the issuer to fully evaluate such a conflict and its implications.

[23] For example, an actual material conflict of interest or potential material conflict of interest may not be present until an underwriter has recommended a particular financing structure. In that case, the disclosure must be provided in sufficient time before the execution of a contract with the underwriter to allow the issuer official to fully evaluate the recommendation, as described under "Required Disclosures to Issuers."

financing, and with sufficient time to allow the issuer to fully evaluate the features of the financing.

[The disclosure concerning the arm's-length nature of the underwriter-issuer relationship must be made in the earliest stages of the underwriter's relationship with the issuer with respect to an issue (*e.g.*, in a response to a request for proposals or in promotional materials provided to an issuer). Other disclosures concerning the role of the underwriter and the underwriter's compensation generally must be made when the underwriter is engaged to perform underwriting services (*e.g.*, in an engagement letter), not solely in a bond purchase agreement. Other conflicts disclosures must be made at the same time, except with regard to conflicts discovered or arising after the underwriter has been engaged. For example, a conflict may not be present until an underwriter has recommended a particular financing. In that case, the disclosure must be provided in sufficient time before the execution of a contract with the underwriter to allow the official to evaluate the recommendation, as described below under "Required Disclosures to Issuers."]

Unless directed otherwise by an issuer, an underwriter may update selected portions of disclosures previously provided so long as such updates clearly identify the additions or deletions and are capable of being read independently of the prior disclosures.[24]

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[24] The MSRB acknowledges that not all transactions proceed along the same timeline or pathway. The timeframes expressed herein should be viewed in light of the overarching goals of Rule G-17 and the purposes that the disclosures are intended to serve as further described in this notice. The various timeframes set out in this notice are not intended to establish strict, hair-trigger tripwires resulting in mere technical rule violations, so long as an underwriter acts in substantial compliance with such timeframes and meets the key objectives for providing disclosure under the notice. Nevertheless, an underwriter's fair dealing obligation to an issuer[of municipal securities] in particular facts and circumstances may demand prompt adherence to the timelines set out in this notice. Stated differently, if an underwriter does not timely deliver a disclosure and, as a result, the issuer: (i) does not have clarity throughout all substantive stages of a financing regarding the roles of its professionals, (ii) is not aware of conflicts of interest promptly after they arise and well before the issuer effectively becomes fully committed – either formally (*e.g.*, through execution of a contract) or informally (e.g., due to having already expended substantial time and effort) – to completing the transaction with the underwriter, and/or (iii) does not have the information required to be disclosed with sufficient time to take such information into consideration and, thereby, to make an informed decision about the key decisions on the financing, then the underwriter generally will have violated its fair-dealing obligations under Rule G-17, absent other mitigating facts and circumstances.

Acknowledgement of Disclosures. When delivering a disclosure, [T]the underwriter must attempt to receive written acknowledgement[25] [(other than by automatic e-mail receipt) by the] from an official of the issuer identified by the issuer as a primary contact for the issuer's [of] receipt of the foregoing disclosures.[26] In the absence of such identification, an underwriter may seek acknowledgement from an official of the issuer whom the underwriter reasonably believes has the authority to bind the issuer by contract with the underwriter and that, to the knowledge of the underwriter, is not party to a disclosed conflict. This notice does not specify the particular form of acknowledgement, but may include, for example, an e-mail read receipt.[27] An underwriter may proceed with a receipt of a written acknowledgement that includes an issuer's reservation of rights or other self-protective language. If the official of the issuer agrees to proceed with the underwriting engagement after receipt of the disclosures but will not provide written acknowledgement of receipt, the underwriter responsible for making the requisite disclosure may proceed with the engagement after documenting with specificity why it was unable to obtain such written acknowledgement. Additionally, an underwriter must be able to produce evidence (including, for example, by automatic e-mail delivery receipt) that the disclosures were delivered with sufficient time for evaluation by the issuer before proceeding with the transaction. An issuer's written acknowledgement of the receipt of disclosure is not dispositive of whether such disclosures were made with an appropriate amount of time. The

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[25] An underwriter delivering a disclosure in order to meet a fair dealing obligation must obtain (or attempt to obtain) proper acknowledgement. When there is an underwriting syndicate, only the syndicate manager, as the dealer responsible for delivering the standard disclosures to the issuer, must obtain (or attempt to obtain) proper acknowledgement from the issuer for such disclosures.

[26] Absent red flags, and subject to an underwriter's ability to reasonably rely on a representation from an issuer official that he or she has the authority to bind the issuer by contract with the underwriter, an underwriter may reasonably rely on a written delegation by an authorized issuer official in, among other things, the issuer's request for proposals to another issuer official to receive and acknowledge receipt of a disclosure. The reasonableness of an underwriter's reliance upon an issuer's representation as to these matters will depend on all of the relevant facts and circumstances, including the facts revealed in connection with the underwriter's due diligence in regards to the transaction generally.

[27] For purposes of this notice, the term "e-mail read receipt" means an automatic response generated by a recipient issuer official confirming that an e-mail has been opened. While an e-mail read receipt may generally be an acceptable form of an issuer's written acknowledgement under this notice, an underwriter may not rely on such an e-mail read receipt as an issuer's written acknowledgement where such reliance is unreasonable under all of the facts and circumstances, such as where the underwriter is on notice that the issuer official to whom the e-mail is addressed has not in fact received or opened the e-mail.

analysis of whether disclosures were provided with sufficient time for an issuer's review is based on the totality of the facts and circumstances.

Representations to Issuers

All representations made by underwriters to issuers [of municipal securities] in connection with municipal securities underwritings, whether written or oral, must be truthful and accurate and must not misrepresent or omit material facts. Underwriters must have a reasonable basis for the representations and other material information contained in documents they prepare and must refrain from including representations or other information they know or should know is inaccurate or misleading. For example, in connection with a certificate signed by the underwriter that will be relied upon by the issuer or other relevant parties to an underwriting (*e.g.*, an issue price certificate), the dealer must have a reasonable basis for the representations and other material information contained therein.[28] In addition, an underwriter's response to an issuer's request for proposals or qualifications must fairly and accurately describe the underwriter's capacity, resources, and knowledge to perform the proposed underwriting as of the time the proposal is submitted and must not contain any representations or other material information about such capacity, resources, or knowledge that the underwriter knows or should know to be inaccurate or misleading.[29] Matters not within the personal knowledge of those preparing the response (*e.g.*, pending litigation) must be confirmed by those with knowledge of the subject matter. An underwriter must not represent that it has the requisite knowledge or expertise with respect to a particular financing if the personnel that it intends to work on the financing do not have the requisite knowledge or expertise.

Required Disclosures to Issuers

Many municipal securities are issued using financing structures that are routine and well understood by the typical municipal market professional, including most issuer personnel that

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[28] The need for underwriters to have a reasonable basis for representations and other material information provided to issuers extends to the reasonableness of assumptions underlying the material information being provided. If an underwriter would not rely on any statements made or information provided for its own purposes, it should refrain from making the statement or providing the information to the issuer, or should provide any appropriate disclosures or other information that would allow the issuer to adequately assess the reliability of the statement or information before relying upon it. Further, underwriters should be careful to distinguish statements made to issuers that represent opinion rather than factual information and to ensure that the issuer is aware of this distinction.

[29] As a general matter, a response to a request for proposal should not be treated as merely a sales pitch without regulatory consequence, but instead should be treated with full seriousness that issuers have the expectation that representations made in such responses are true and accurate.

have the lead responsibilities in connection with the issuance of municipal securities. For example, absent unusual circumstances or features, the typical fixed rate offering may be presumed to be well understood. Nevertheless, in the case of issuer personnel that the underwriter reasonably believes lack the requisite knowledge or experience to fully understand or assess the implications of a [with such] financing structures or products recommended by an underwriter, the underwriter making such recommendation must provide disclosures on the material aspects of such financing structure[s] or product that it recommends (*i.e.*, the "transaction-specific disclosures").[30]

[However, i]In some cases, issuer personnel responsible for the issuance of municipal securities would not be well positioned to fully understand or assess the implications of a recommended financing structure in its totality, because [the financing] it is structured in a unique, atypical, or otherwise complex manner or incorporates unique, atypical, or otherwise complex features or products (a "complex municipal securities financing").[6]31 Examples of complex municipal securities financings include, but are not limited to, variable rate demand obligations ("VRDOs"),[and] financings involving derivatives (such as swaps), and financings in which interest rates are benchmarked to an index (such as LIBOR, SIFMA, or SOFR).[32] [An underwriter in a negotiated offering that recommends a complex municipal securities financing to an issuer has an obligation under Rule G-17 to make more particularized disclosures than those that may be required in the case of routine financing structures.] When a recommendation

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[30] In the circumstance where a dealer proposing to act as an underwriter in a negotiated offering recommends a financing structure or product prior to the time at which an underwriting syndicate is formed, such dealer shall have the same obligations to make any applicable standard disclosures, as if it were a sole underwriter or syndicate manager for purposes of their obligations described under "Required Disclosure to the Issuer" (e.g., to make the standard disclosure concerning the arm's-length nature of the underwriter-issuer relationship at the earliest stages of the underwriter's relationship with the issuer with respect to an issue), including complying with corresponding requirements to maintain and preserve records.

[31][6] If a complex municipal securities financing consists of an otherwise routine financing structure that incorporates a unique, atypical, or complex element or product and the issuer personnel have knowledge or experience with respect to the routine elements of the financing, the disclosure of material risks and characteristics may be limited to those relating to such specific element and any material impact such element may have on other features that would normally be viewed as routine.

[32] Respectively, the London Inter-bank Offered Rate (*i.e.*, "LIBOR"), the SIFMA Municipal Swap Index (*i.e.*, "SIFMA"), and Secured Overnight Financing Rate ("SOFR"). The MSRB notes that its references to LIBOR, SIFMA, and SOFR are illustrative only and non-exclusive. Any financings involving a benchmark interest rate index may be complex, particularly if an issuer is unlikely to fully understand the components of that index, its material risks, or its possible interaction with other indexes.

regarding a complex municipal securities financing structure has been made by an underwriter in a negotiated offering,[33] the underwriter making the recommendation has an obligation under Rule G-17 to communicate more particularized transaction-specific disclosures than those that may be required in the case the recommendation of routine financing structures or products.[34] The underwriter making the recommendation must also disclose the material financial characteristics of the complex municipal securities financing, as well as the material financial risks of the financing that are known to the underwriter and reasonably foreseeable at the time of the disclosure.[35][7] It must also disclose any incentives for the [underwriter to recommend the]

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[33] For purposes of determining when an underwriter recommends a financing structure in a negotiated offering or recommends a complex municipal securities financing in a negotiated offering (a "Complex Municipal Securities Financing Recommendation"), the MSRB's guidance on the meaning of "recommendation" for dealers in MSRB Notice 2014-07: SEC Approves MSRB Rule G-47 on Time-of-Trade Disclosure Obligations, MSRB Rules D-15 and G-48 on Sophisticated Municipal Market Professionals, and Revisions to MSRB Rule G-19 on Suitability of Recommendations and Transactions (March 12, 2014) is applicable by analogy. For example, whether an underwriter has made a Complex Municipal Securities Financing Recommendation is not susceptible to a bright line definition but turns on the facts and circumstances of the particular situation. An important factor in determining whether a Complex Municipal Securities Financing Recommendation has been made is whether – given its content, context, and manner of presentation— a particular communication from an underwriter to an issuer regarding a financing structure or product reasonably would be viewed as a call to action or reasonably would influence an issuer to engage in a such a financing structure or product deemed a complex municipal securities financing structure. In general, the more individually tailored the underwriter's communication is to a specific issuer about a complex municipal securities financing structure, the greater the likelihood that the communication reasonably would be viewed as a Complex Municipal Securities Financing Recommendation.

[34] An underwriter must make reasonable judgments regarding whether it has recommended a financing structure or product to an issuer and whether a particular financing structure or product recommended by the underwriter to the issuer is complex, understanding that the fact that a structure or product has become relatively common in the market does not reduce its complexity. Not all negotiated offerings involve a recommendation by the underwriter(s), such as where a sole underwriter merely executes a transaction already structured by the issuer or its municipal advisor.

[35][7] For example, when a Complex Municipal Securities Financing Recommendation for a VRDO is made, the [an]underwriter [that] who recommends a VRDO should inform the issuer of the risk of interest rate fluctuations and material risks of any associated credit or liquidity facilities (*e.g.*, the risk that the issuer might not be able to replace the facility upon its expiration and might be required to repay the facility provider over a short period of time). As an additional example, if the underwriter recommends that the issuer swap the floating rate interest payments on the VRDOs to fixed rate payments under a

recommendation of the complex municipal securities financing and other associated material conflicts of interest.[36][8] Such disclosures must be made in a fair and balanced manner based on principles of fair dealing and good faith.

The level of transaction-specific disclosure required may vary according to the issuer's knowledge or experience with the proposed financing structure or similar structures, capability of evaluating the risks of the recommended financing structure or product, and financial ability to bear the risks of the recommended financing structure or product, in each case based on the reasonable belief of the underwriter.[37][9] Consequently, the level of transaction-specific disclosure to be provided to a particular issuer also can vary over time. In all events, the

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swap, the underwriter must disclose the material financial risks (including market, credit, operational, and liquidity risks) and material financial characteristics of the recommended swap (*e.g.*, the material economic terms of the swap, the material terms relating to the operation of the swap, and the material rights and obligations of the parties during the term of the swap), as well as the material financial risks associated with the VRDO. Such disclosure should be sufficient to allow the issuer to assess the magnitude of its potential exposure as a result of the complex municipal securities financing. [The underwriter]Such disclosures must also inform the issuer that there may be accounting, legal, and other risks associated with the swap and that the issuer should consult with other professionals concerning such risks. If the underwriter[']s] who has made a Complex Municipal Financing Securities Recommendation is affiliated with the swap dealer [is] proposed to be the executing swap dealer, the underwriter may satisfy its disclosure obligation with respect to the swap if such disclosure has been provided to the issuer by the affiliated swap dealer or the issuer's swap or other financial advisor that is independent of such underwriter and the swap dealer, as long as the underwriter has a reasonable basis for belief in the truthfulness and completeness of such disclosure. If the issuer decides to enter into a swap with another dealer, the underwriter is not required to make disclosures with regard to that swap product under this notice. The MSRB notes that a dealer[s] [that]who recommends a swap[s] or security-based swap[s] to a municipal [entities] entity may also be subject to rules of the Commodity Futures Trading Commission or those of the Securities and Exchange Commission ("SEC").

36[8] For example, a conflict of interest may exist when the underwriter who makes a Complex Municipal Securities Financing Recommendation to an issuer is also the provider, or an affiliate of the provider, of a swap used by an issuer to hedge a municipal securities offering or when an underwriter receives compensation from a swap provider for recommending the swap [provider to the issuer]. *See also* "Conflicts of Interest/Payments to or from Third Parties" herein.

37[9] Even a financing in which the interest rate is benchmarked to an index that is commonly used in the municipal marketplace (*e.g.*, [LIBOR or]SIFMA) may be complex to an issuer that does not understand the components of that index or its possible interaction with other indexes.

underwriter must disclose any incentives for the recommendation of [underwriter to recommend] the complex municipal securities financing and other associated conflicts of interest.

As previously mentioned, [T]the transaction-specific disclosures [described in this section of this notice] must be made in writing to an official of the issuer identified by the issuer as a primary contact for the issuer for the receipt of such disclosures, or, in the absence of such identification, an underwriter may make such disclosures in writing to an issuer official whom the underwriter reasonably believes has the authority to bind the issuer by contract with the underwriter(s), and that, to the knowledge of the underwriter delivering the disclosure, is not a party to a disclosed conflict: (i) in sufficient time before the execution of a contract with the underwriter to allow the official to evaluate the recommendation (including consultation with any of its counsel or advisors) and (ii) in a manner designed to make clear to such official the subject matter of such disclosures and their implications for the issuer.

The disclosures concerning a complex municipal securities financing must address the specific elements of, and/or relevant products incorporated, into the recommended financing structure, rather than being general in nature.[38] An underwriter making a Complex Municipal Securities Financing Recommendation to an issuer cannot satisfy its fair dealing obligations by providing an issuer a single document setting out general descriptions of the various financing structures and/or products that may be recommended from time to time to various issuer clients that would effectively require issuer personnel to discover which disclosures apply to a particular recommendation and to the particular circumstances of that issuer. Underwriters can create, in anticipation of making such a recommendation, individualized descriptions, with appropriate levels of detail, of the material financial characteristics and risks for each of the various complex municipal securities financing structures and/or products (including any typical variations) they may recommend from time to time to its various issuer clients, with such standardized descriptions serving as the base for more particularized disclosures for the specific complex financing the underwriter recommends to particular issuers.[39] In making a recommendation, an underwriter could incorporate, to the extent applicable, any refinements to the base description needed to fully describe the material financial features and risks unique to that financing.[40]

If the underwriter who has made a recommendation does not reasonably believe that the official to whom the disclosures are addressed is capable of independently evaluating the disclosures, the underwriter must make additional efforts reasonably designed to inform the official or its employees or agent. The underwriter also must make an independent assessment that such disclosures are appropriately tailored to the issuer's level of sophistication.

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[38] See note 19 supra.

[39] Page after page of complex legal jargon in small print would not be consistent with an underwriter's fair dealing obligation under this notice.

[40] Underwriters should be able to leverage such materials for internal training and risk management purposes.

Underwriter Duties in Connection with Issuer Disclosure Documents

Underwriters often play an important role in assisting issuers in the preparation of disclosure documents, such as preliminary official statements and official statements.[41][10] These documents are critical to the municipal securities transaction, because[in that] investors rely on the representations contained in such documents in making their investment decisions. Moreover, investment professionals, such as municipal securities analysts and ratings services, rely on the representations in forming an opinion regarding the credit. A dealer's duty to have a reasonable basis for the representations it makes, and other material information it provides, to an issuer and to ensure that such representations and information are accurate and not misleading, as described above, extends to representations and information provided by the underwriter in connection with the preparation by the issuer of its disclosure documents (*e.g.*, cash flows).

Underwriter Compensation and New Issue Pricing

Excessive Compensation. An underwriter's compensation for a new issue (including both direct compensation paid by the issuer and other separate payments, values, or credits received by the underwriter from the issuer or any other party in connection with the underwriting), in certain cases and depending upon the specific facts and circumstances of the offering, may be so disproportionate to the nature of the underwriting and related services performed as to constitute an unfair practice with regard to the issuer that it is a violation of Rule G-17. Among the factors relevant to whether an underwriter's compensation is disproportionate to the nature of the underwriting and related services performed, are the credit quality of the issue, the size of the issue, market conditions, the length of time spent structuring the issue, and whether the

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41[10] Underwriters that assist issuers in preparing official statements must remain cognizant of their duties under federal securities laws. With respect to primary offerings of municipal securities, the SEC has noted, "By participating in an offering, an underwriter makes an implied recommendation about the securities." *See* [SEC]Exchange Act Release[Rel.] No. [34-]26100 (Sept. 22, 1988) (proposing Exchange Act Rule 15c2-12) at text following [note]fn. 70. The SEC has stated that "this recommendation itself implies that the underwriter has a reasonable basis for belief in the truthfulness and completeness of the key representations made in any disclosure documents used in the offerings." Furthermore, pursuant to Exchange Act Rule 15c2-12(b)(5), an underwriter may not purchase or sell municipal securities in most primary offerings unless the underwriter has reasonably determined that the issuer or an obligated person has entered into a written undertaking to provide certain types of secondary market disclosure and has a reasonable basis for relying on the accuracy of the issuer's ongoing disclosure representations. [SEC] Exchange Act Release[Rel.] No. [34-]34961 (Nov. 10, 1994) (adopting continuing disclosure provisions of Exchange Act Rule 15c2-12) at text following [note]fn. 52.

underwriter is paying the fee of the underwriter's counsel or any other relevant costs related to the financing.

Fair Pricing. The duty of fair dealing under Rule G-17 includes an implied representation that the price an underwriter pays to an issuer is fair and reasonable, taking into consideration all relevant factors, including the best judgment of the underwriter as to the fair market value of the issue at the time it is priced.[42][11] In general, a dealer purchasing bonds in a competitive underwriting for which the issuer may reject any and all bids will be deemed to have satisfied its duty of fairness to the issuer with respect to the purchase price of the issue as long as the dealer's bid is a bona fide bid (as defined in MSRB Rule G-13)[43][12] that is based on the dealer's best judgment of the fair market value of the securities that are the subject of the bid. In a negotiated underwriting, the underwriter has a duty under Rule G-17 to negotiate in good faith with the issuer. This duty includes the obligation of the dealer to ensure the accuracy of representations made during the course of such negotiations, including representations regarding the price negotiated and the nature of investor demand for the securities (*e.g.*, the status of the order period and the order book). If, for example, the dealer represents to the issuer that it is providing the "best" market price available on the new issue, or that it will exert its best efforts to obtain the "most favorable" pricing, the dealer may violate Rule G-17 if its actions are inconsistent with such representations.[44][13]

Conflicts of Interest

Payments to or from Third Parties. In certain cases, compensation received by [the]an underwriter from third parties, such as the providers of derivatives and investments (including affiliates of [the]an underwriter), may color the underwriter's judgment and cause it to recommend products, structures, and pricing levels to an issuer when it would not have done so absent such payments. The MSRB views the failure of an underwriter to disclose to the issuer the existence of payments, values, or credits received by [the]an underwriter in connection with its underwriting of the new issue from parties other than the issuer, and payments made by the underwriter in connection with such new issue to parties other than the issuer (in either case

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[42][11] The MSRB has previously observed that whether an underwriter has dealt fairly with an issuer for purposes of Rule G-17 is dependent upon all of the facts and circumstances of an underwriting and is not dependent solely on the price of the issue. *See* MSRB Notice 2009-54 (Sept. 29, 2009) and the 1997 Interpretation (note 2 *supra*). *See also* "Retail Order Periods" herein.

[43][12] Rule G-13(b)(iii) provides: "For purposes of subparagraph (i), a quotation shall be deemed to represent a ["]'bona fide bid for, or offer of, municipal securities'["] if the broker, dealer or municipal securities dealer making the quotation is prepared to purchase or sell the security which is the subject of the quotation at the price stated in the quotation and under such conditions, if any, as are specified at the time the quotation is made."

[44][13] *See* 1997 Interpretation (note 2 *supra*).

including payments, values, or credits that relate directly or indirectly to collateral transactions integrally related to the issue being underwritten), to be a violation of [the]an underwriter's obligation to the issuer under Rule G-17.[45][14] For example, it would be a violation of Rule G-17 for an underwriter to compensate an undisclosed third party in order to secure municipal securities business. Similarly, it would be a violation of Rule G-17 for an underwriter to receive undisclosed compensation from a third party in exchange for recommending that third party's services or product to an issuer, including business related to municipal securities derivative transactions. This notice does not require that the amount of such third-party payments be disclosed. The underwriter must also disclose to the issuer whether it has entered into any third-party arrangements for the marketing of the issuer's securities.

Profit-Sharing with Investors. Arrangements between the underwriter and an investor purchasing new issue securities from the underwriter (including purchases that are contingent upon the delivery by the issuer to the underwriter of the securities) according to which profits realized from the resale by such investor of the securities are directly or indirectly split or otherwise shared with the underwriter also would, depending on the facts and circumstances (including in particular if such resale occurs reasonably close in time to the original sale by the underwriter to the investor), constitute a violation of the underwriter's fair dealing obligation under Rule G-17.[46] Such arrangements could also constitute a violation of Rule G-25(c), which precludes a dealer from sharing, directly or indirectly, in the profits or losses of a transaction in municipal securities with or for a customer. An underwriter should carefully consider whether any such arrangement, regardless of whether it constitutes a violation of Rule G-25(c), may evidence a potential failure of the underwriter's duty with regard to new issue pricing described above.

Credit Default Swaps. The issuance or purchase by a dealer of credit default swaps for which the reference is the issuer for which the dealer is serving as underwriter, or an obligation of that issuer, may pose a conflict of interest, including a dealer-specific conflict of interest, because trading in such municipal credit default swaps has the potential to affect the pricing of the underlying reference obligations, as well as the pricing of other obligations brought to market by that issuer. Rule G-17 requires, therefore, that a dealer disclose the fact that it engages in such activities to the issuers for which it serves as underwriter. Activities with regard to credit default swaps based on baskets or indexes of municipal issuers that include the issuer or its obligation(s) need not be disclosed, unless the issuer or its obligation(s) represents more than 2% of the total notional amount of the credit default swap or the underwriter otherwise caused the issuer or its obligation(s) to be included in the basket or index.

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45 *See also* "Required Disclosures to Issuers" herein.

46 Underwriters should be mindful that, depending on the facts and circumstances, such an arrangement may be inferred from a purposeful but not otherwise justified pattern of transactions or other course of action, even without the existence of a formal written agreement.

Retail Order Periods

Rule G-17 requires an underwriter that has agreed to underwrite a transaction with a retail order period to, in fact, honor such agreement.[47][15] A dealer that wishes to allocate securities in a manner that is inconsistent with an issuer's requirements must not do so without the issuer's consent. In addition, Rule G-17 requires an underwriter that has agreed to underwrite a transaction with a retail order period to take reasonable measures to ensure that retail clients are bona fide. An underwriter that knowingly accepts an order that has been framed as a retail order when it is not (*e.g.*, a number of small orders placed by an institutional investor that would otherwise not qualify as a retail customer) would violate Rule G-17 if its actions are inconsistent with the issuer's expectations regarding retail orders. In addition, a dealer that places an order that is framed as a qualifying retail order but in fact represents an order that does not meet the qualification requirements to be treated as a retail order (*e.g.*, an order by a retail dealer without "going away" orders[48][16] from retail customers, when such orders are not within the issuer's definition of "retail") violates its Rule G-17 duty of fair dealing. The MSRB will continue to review activities relating to retail order periods to ensure that they are conducted in a fair and orderly manner consistent with the intent of the issuer and the MSRB's investor protection mandate.

Dealer Payments to Issuer Personnel

Dealers are reminded of the application of MSRB Rule G-20, on gifts, gratuities, and non-cash compensation, and Rule G-17, in connection with certain payments made to, and expenses reimbursed for, issuer personnel during the municipal bond issuance process.[49][17] These rules are designed to avoid conflicts of interest and to promote fair practices in the municipal securities market.

Dealers should consider carefully whether payments they make in regard to expenses of issuer personnel in the course of the bond issuance process, including in particular, but not limited to,

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[47][15] *See* MSRB Interpretation on Priority of Orders for Securities in a Primary Offering under Rule G-17, MSRB interpretation of October 12, 2010, reprinted in MSRB Rule Book. The MSRB also reminds underwriters of previous MSRB guidance on the pricing of securities sold to retail investors. *See* Guidance on Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities, MSRB Notice 2009-42 (July 14, 2009).

[48][16] In general, a "going away" order is an order for new issue securities for which a customer is already conditionally committed. *See* [SEC]Exchange Act Release No. [34-]62715, File No. SR-MSRB-2009-17 (August 13, 2010).

[49][17] *See* MSRB Rule G-20 Interpretation — Dealer Payments in Connection With the Municipal Securities Issuance Process (January 29, 2007), reprinted in MSRB Rule Book.

payments for which dealers seek reimbursement from bond proceeds or issuers, comport with the requirements of Rule G-20. For example, a dealer acting as a financial advisor or underwriter may violate Rule G-20 by paying for excessive or lavish travel, meal, lodging and entertainment expenses in connection with an offering (such as may be incurred for rating agency trips, bond closing dinners, and other functions) that inure to the personal benefit of issuer personnel and that exceed the limits or otherwise violate the requirements of the rule.[50][18]

[August 2, 2012]{DATE TO BE SPECIFIED}

[50][18] *See* In the Matter of RBC Capital Markets Corporation, [SEC]Exchange Act Release[Rel.] No. [34-]59439 (Feb. 24, 2009) (settlement in connection with broker-dealer alleged to have violated MSRB Rules G-20 and G-17 for payment of lavish travel and entertainment expenses of city officials and their families associated with rating agency trips, which expenditures were subsequently reimbursed from bond proceeds as costs of issuance); In the Matter of Merchant Capital, L.L.C., [SEC]Exchange Act Release[Rel.] No. [34-]60043 (June 4, 2009) (settlement in connection with broker-dealer alleged to have violated MSRB rules for payment of travel and entertainment expenses of family and friends of senior officials of issuer and reimbursement of the expenses from issuers and from proceeds of bond offerings).