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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No.* SR - 2019 - * 10

Amendment No. (req. for Amendments *)

Filing by Municipal Securities Rulemaking Board

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * [x] Amendment * [ ] Withdrawal [ ]

Section 19(b)(2) * [x] Section 19(b)(3)(A) * [ ] Section 19(b)(3)(B) * [ ]

Pilot [ ]

Extension of Time Period for Commission Action * [ ]

Date Expires *

Rule

19b-4(f)(1) 19b-4(f)(4)
19b-4(f)(2) 19b-4(f)(5)
19b-4(f)(3) 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010

Section 806(e)(1) * [ ] Section 806(e)(2) * [ ]

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934

Section 3C(b)(2) * [ ]

Exhibit 2 Sent As Paper Document

Exhibit 3 Sent As Paper Document

Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

Proposed Rule Change to Amend and Restate the MSRB's August 2, 2012 Interpretive Notice Concerning the Application of Rule G-17 to Underwriters of Municipal Securities

Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name * Lanny Last Name * Schwartz

Title * Chief Regulatory Officer

E-mail * lschwartz@msrb.org

Telephone * (202) 838-1500 Fax

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

Municipal Securities Rulemaking Board

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date 07/26/2019

By Ronald W. Smith
(Name *)

(Title *)
Corporate Secretary

rsmith@msrb.org, rsmith@msrb.org

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Required fields are shown with yellow backgrounds and asterisks.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information * Add Remove View	The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.
Exhibit 1 - Notice of Proposed Rule Change * Add Remove View	The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO] -xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)
Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies * Add Remove View	The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO] -xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)
Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications Add Remove View Exhibit Sent As Paper Document ☐	Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.
Exhibit 3 - Form, Report, or Questionnaire Add Remove View Exhibit Sent As Paper Document ☐	Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.
Exhibit 4 - Marked Copies Add Remove View	The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.
Exhibit 5 - Proposed Rule Text Add Remove View	The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.
Partial Amendment Add Remove View	If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act"),[1] and Rule 19b-4 thereunder,[2] the Municipal Securities Rulemaking Board ("MSRB" or "Board") is filing with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change (the "proposed rule change") to amend and restate the MSRB's August 2, 2012 interpretive notice concerning the application of MSRB Rule G-17 to underwriters of municipal securities (the "2012 Interpretive Notice").[3] The proposed rule change seeks to update the 2012 Interpretive Notice in light of its implementation in the market since its first adoption and current market practices.

Following the approval of the proposed rule change, the MSRB will publish a regulatory notice within 90 days of the publication of approval in the Federal Register (the 2012 Interpretive Notice, so amended by the proposed rule change, is referred to herein as the "Revised Interpretive Notice"), and such notice shall specify the compliance date for the amendments described in the proposed rule change, which in any case shall be not less than 90 days, nor more than one year, following the date of the notice establishing such compliance date. Until such compliance date, the current version of the 2012 Interpretive Notice would remain in effect with respect to underwriting relationships commenced prior to the compliance date, at which time underwriters would then be subject to the Revised Interpretive Notice for all of their underwriting relationships beginning on or after that date. The 2012 Interpretive Notice would be superseded by the Revised Interpretive Notice as of such compliance date. Similarly, and as further described herein, the MSRB's implementation guidance dated July 18, 2012 concerning the 2012 Interpretive Notice (the "Implementation Guidance")[4] and the regulatory guidance dated March 25, 2013 answering certain frequently asked questions regarding the 2012 Interpretive Notice (the "FAQs")[5] would be withdrawn as of such compliance date.

(a) The text of the amendments to the 2012 Interpretive Notice is attached in Exhibit 5. The text proposed to be added is underlined, and text proposed to be deleted is enclosed in brackets.

(b) Not applicable.

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] The 2012 Interpretive Notice was approved by the SEC on May 4, 2012 and became effective on August 2, 2012. 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). The 2012 Interpretive Notice is available here.

[4] See MSRB Notice 2012-38 (July 18, 2012).

[5] See MSRB Notice 2013-08 (Mar. 25, 2013).

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The Board approved the amendments to the 2012 Interpretive Notice at its April 23-25, 2019 meeting. Questions concerning this filing may be directed to Lanny A. Schwartz, Chief Regulatory Officer, or David C. Hodapp, Assistant General Counsel, at 202-838-1500.

3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

I. Background

Rule G-17 requires that, in the conduct of municipal securities activities, brokers, dealers and municipal securities dealers (collectively, "dealers") deal fairly with all persons, including municipal entity issuers, and not engage in any deceptive, dishonest or unfair practice. The 2012 Interpretive Notice describes certain fair dealing obligations dealers owe to issuers in the course of their underwriting relationships, and promotes fair dealing in the municipal securities market by, among other things, prescribing the delivery of written disclosures to issuers regarding the nature of their underwriting relationships, compensation and other conflicts, and the risks associated with certain recommended municipal security transactions in negotiated offerings. Beyond these matters, the 2012 Interpretive Notice also describes an underwriter's obligation to: have a reasonable basis for the representations it makes, and other material information it provides, to an issuer in order to ensure that such representations are accurate and not misleading; purchase securities from the issuer at a fair and reasonable price, 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 of pricing; honor the issuer's rules for retail order periods by, among other things, not accepting or placing orders that do not satisfy the issuer's definition of "retail;" and avoid certain lavish gifts and entertainment.[6]

II. Proposed Rule Change

In response to informal feedback from market participants regarding their experience with the 2012 Interpretive Notice and, particularly, the effectiveness of the disclosures and related requirements, the MSRB initiated a retrospective review of the 2012 Interpretive Notice and published a request for comment on June 5, 2018 (the "Concept Proposal").[7]
The Concept Proposal requested feedback on whether amendments to the 2012 Interpretive

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[6] As further described therein, the 2012 Interpretive Notice provides that, except where otherwise noted, the obligations described are only applicable to negotiated offerings and do not apply to selling group members.

[7] MSRB Notice 2018-10 (June 5, 2018) (i.e., the Concept Proposal).

Notice should be considered to help ensure that it continues to achieve its intended purpose and reflects the current state of the municipal securities market. The MSRB received five comment letters in response to the Concept Proposal, all of which supported the retrospective review and suggested modifications to the 2012 Interpretive Notice.[8] The feedback received formed the foundation for a subsequent request for comment published on November 16, 2018 (the "Request for Comment").[9] The MSRB received five comment letters in response to the Request for Comment.[10] Following review of the comments, the MSRB conducted additional outreach with various market participants. The feedback received and follow-up conversations formed the basis for the proposed rule change.

In general, the comment letters observed that the disclosures under the 2012 Interpretive Notice had become too voluminous in length and boilerplate in nature. Commenters generally stated that the length and nature of the disclosures both created a significant burden for dealers and also made it difficult for issuers to assess which conflicts, risks, and other matters were most significant. As more fully discussed below in the MSRB's summary of comments, commenters also addressed the following major topics – the redundancy of certain disclosures received by an issuer, particularly if an issuer frequently goes to market and/or a syndicate is formed in a particular offering; the benefits of separately identifying certain categories of disclosures; the standard applicable to determine whether an underwriter has made a recommendation to an issuer of a particular municipal securities financing; what potential material conflicts of interest must be disclosed by an underwriter; whether an underwriter must disclose the conflicts of other parties involved with the transaction; underwriter communications regarding the issuer's engagement of a municipal advisor; what an underwriter may rely upon to substantiate an issuer's receipt of a disclosure; and various other clarifications and revisions to the 2012 Interpretive Notice that would promote market efficiency and reduce the regulatory burden on underwriters, while not diminishing the protections afforded to municipal entity issuers.

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8 See Letters from: Mike Nicholas, Chief Executive Officer, Bond Dealers of America (BDA), dated August 6, 2018 ("BDA Letter I"); Emily S. Brock, Director, Federal Liaison Center, Government Finance Officers Association (GFOA), dated August 6, 2018 ("GFOA Letter I"); Susan Gaffney, Executive Director, National Association of Municipal Advisors (NAMA), dated August 6, 2018 ("NAMA Letter I"); Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (SIFMA), dated August 6, 2018 ("SIFMA Letter I"); and J. Ben Watkins III, Director, State of Florida, Division of Bond Finance of the State Board of Administration ("Florida Division of Bond Finance"), dated August 8, 2018 ("Florida Division of Bond Finance Letter").

9 See MSRB Notice 2018-29 (November 16, 2018) (i.e., the Request for Comment).

10 See Letters from: Mike Nicholas, Chief Executive Officer, BDA, dated January 15, 2019 ("BDA Letter II"); Emily S. Brock, Director, Federal Liaison Center, GFOA, dated January 15, 2019 ("GFOA Letter II"); Susan Gaffney, Executive Director, NAMA, dated January 15, 2019 ("NAMA Letter II"); Leslie M. Norwood, Managing Director and Associate General Counsel, SIFMA, dated January 15, 2019 ("SIFMA Letter II"); and City of San Diego (unsigned and undated) ("City of San Diego Letter").

The amendments in the proposed rule change are intended to update and streamline certain obligations specified in the 2012 Interpretive Notice and, thereby, benefit issuers and underwriters alike by reducing the burdens associated with those obligations, including the obligation of underwriters to make, and the burden on issuers to acknowledge and review, written disclosures that itemize risks and conflicts that are unlikely to materialize during the course of a transaction, not unique to a given transaction or a particular underwriter where a syndicate is formed, and/or otherwise duplicative.

A. Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into the Revised Interpretive Notice and Related Revisions

The proposed rule change would integrate the substantive concepts from the Implementation Guidance[11] and the FAQs[12] into the Revised Interpretive Notice and, thereby, would consolidate the Implementation Guidance, FAQs, and the Revised Interpretive Notice into a single publication. Except as described herein, the proposed rule change would incorporate the substantive content of the Implementation Guidance and FAQs without material revision. Along with the 2012 Interpretive Notice, assuming approval of the proposed rule change, the Implementation Guidance and FAQs would be withdrawn as of the compliance date of the Revised Interpretive Notice. The proposed technical revisions are necessary to conform or supplement the statements from the Implementation Guidance and FAQs into the Revised Interpretive Notice.[13] Unless otherwise expressly stated herein, the MSRB's conforming edits are only intended to promote consistency of language and otherwise are not intended to substantively alter the understanding and implementation of these existing fair dealing concepts.

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[11] Published on July 18, 2012, the Implementation Guidance was intended to assist dealers in revising their written supervisory procedures in accordance with their fair practice obligations under the 2012 Interpretive Notice.

[12] Published on March 25, 2013, the FAQs answered certain frequently asked questions regarding operational matters pertaining to the 2012 Interpretive Notice.

[13] The MSRB notes that the Implementation Guidance and FAQs were issued in distinct formats – i.e., in a list of bulleted statements and frequently asked questions, respectively – from the format of the 2012 Interpretive Notice and, consequently, in many instances cannot be simply copied-and-pasted into the proposed format of the Revised Interpretive Notice without conforming revisions. Similarly, the proposed rule change incorporates newly defined terms and other modified substantive concepts (e.g., assigning the fair dealing obligation to provide the standard disclosures and transaction-specific disclosures to syndicate managers, as further described herein), which require tailoring edits to appropriately integrate the existing concepts of the Implementation Guidance and FAQs into the Revised Interpretive Notice. Thus, the MSRB is proposing to make conforming technical revisions of a non-substantive, drafting nature when integrating the existing language of the Implementation Guidance and FAQs into the Revised Interpretive Notice (referred to hereinafter as, "conforming edits"). The MSRB has identified in the discussion below when it has proposed such conforming edits and also provided the proposed language of the Revised Interpretive Notice in relevant part for ease of comparison.

i. Incorporate Statements Regarding the Applicability of the Revised Interpretive Notice to the Continuous Offering of Municipal Fund Securities

As presently stated in the Implementation Guidance, no type of underwriting is wholly excluded from the application of the 2012 Interpretive Notice. The Implementation Guidance makes clear that the 2012 Interpretive Notice applies not only to primary offerings of new issues of municipal bonds and notes 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.[14] The proposed rule change would incorporate this language into the Revised Interpretive Notice as stated in the Implementation Guidance with one addition. More specifically, the proposed rule change would add a reference to Achieving a Better Life Experience (ABLE) programs[15] as another example of a continuous offering of municipal fund securities. In relevant part, the Revised Interpretive Notice would read, "[t]his 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."

ii. Incorporate Statements Regarding the Applicability of the Revised Interpretive Notice to a Primary Offering that is Placed with Investors by a Placement Agent

As presently stated in the Implementation Guidance, no type of underwriting is wholly excluded from the application of the 2012 Interpretive Notice, including certain private placement activities. In relevant part, the Implementation Guidance states:

> In a private placement where a dealer acting as placement agent takes on a true agency role with the issuer and does not take a principal position (including not taking a 'riskless principal' position) in the securities being placed, the disclosure relating to an 'arm's length' relationship would be inapplicable and may be omitted due to the agent-principal relationship between the dealer and issuer that normally gives rise to state law obligations – whether termed as a fiduciary or other obligation of trust. . . . As described [in the Implementation Guidance], in a private placement where a dealer acts as a true placement agent, the disclosure relating to fiduciary duty would be inapplicable and may be omitted due to the existence of similar state law obligations. . . . In many private placements, as well as in certain other types of new issue offerings, no official statement may be

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[14] As a general matter, a 529 savings plan is a tax-advantaged qualified tuition program established by a state, or an agency, or instrumentality of a state, designed to encourage families to save for a child's future education expenses.

[15] As a general matter, an ABLE program is a tax-advantaged savings account established by a state, or an agency, or instrumentality of a state, designed to allow eligible individuals and their families to save on a tax-deferred basis for qualified disability expenses.

> produced, so that to the extent that such an offering occurs without the production of an official statement, the dealer would not be required to disclose its role with regard to the review of an official statement.

In a footnote to this language, the Implementation Guidance further states:

> 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, a fiduciary relationship with the issuer. In such cases, it would also be appropriate for the underwriter to omit disclosures inapplicable as a result of such relationship. Dealers exercising an option to omit such disclosure should understand that they are effectively acknowledging the existence of a fiduciary responsibility on behalf of the issuer.

The proposed rule change would incorporate these concepts from the Implementation Guidance into the Revised Interpretive Notice with conforming edits and the omission of certain language. It also would incorporate a supplemental concept regarding how a dealer's activities as a placement agent may interact with the Commission's registration and record-keeping requirements for municipal advisors.[16]

In terms of the conforming edits, the proposed rule change would not word-for-word integrate the existing text that, ". . . in a private placement where a dealer acts as a true placement agent, the disclosure relating to a fiduciary duty would be inapplicable and may be omitted due to the existence of similar state law obligations." In light of the other amendments proposed herein, the proposed rule change would revise and supplement the existing text with the following conforming edits that, "it would also be appropriate for an underwriter to omit <u>those</u> disclosures inapplicable as a result of such relationship <u>and the existence of any analogous legal obligations under other law, such as certain fiduciary duties existing pursuant to applicable state law</u>" (emphasis added). The MSRB believes that the guidance provided by this revised and supplemented language is substantively equivalent to the concept articulated by the omitted statement.

Additionally, the proposed rule change would omit the final sentence from the footnote of the Implementation Guidance stating that, "[d]ealers exercising an option to omit such disclosure should understand that they are effectively acknowledging the existence of a fiduciary responsibility on behalf of the issuer." The MSRB believes that this statement is substantively redundant with the statements that precede it and, ultimately, may create more confusion than it would resolve, as its inclusion in the Revised Interpretive Notice might be interpreted to bind underwriters into a binary scenario of either: (1) including the relevant disclosure(s) and, thereby, communicating the lack of a fiduciary duty to an issuer client, or (2) omitting the relevant disclosure(s) and, thereby, "effectively acknowledging" the existence of a fiduciary duty to an issuer client. At bottom, an underwriter has a fair dealing obligation under Rule G-17 to not

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[16] <u>See</u> Registration of Municipal Advisors, Release No. 34-70462 (September 20, 2013), 78 FR 67467 (hereinafter, the "MA Rule Adopting Release") (November 12, 2013) (available at http://www.sec.gov/rules/final/2013/34-70462.pdf); <u>see</u> <u>also</u> note 18 <u>infra</u> and related text.

engage in any deceptive, dishonest, or unfair practice when interacting with a municipal entity client in the course of an underwriting relationship, which requires the underwriter to accurately, honestly, and fairly describe its services and the scope of its relationship with the municipal entity. This overarching fair dealing obligation requires an underwriter to include, omit, and/or supplement the relevant fiduciary disclosures as necessary to meet its fair dealing obligations in light of the particular facts and circumstances of a given transaction. Consequently, the exclusion of this statement from the proposed rule change is not intended to diminish this overarching fair dealing obligation, but, rather, eliminate a potentially confusing and redundant statement.

The Revised Interpretive Notice in relevant part would provide:

> In a private placement where a dealer acting as placement agent takes on a true agency role with the issuer and does not take a principal position (including not taking a 'riskless principal' position) in the securities being placed, the disclosure relating to an 'arm's length' relationship would be inapplicable and 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. . . . 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 cases, it would also be appropriate for an underwriter to omit those disclosures 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.

In addition, the proposed rule change would update the 2012 Interpretive Notice by incorporating supplemental language into the Revised Interpretive Notice intended to harmonize it with the Commission's adoption of its permanent rules regarding the registration and record-keeping requirements applicable to municipal advisors, and related exclusions and exceptions, which went into effect after the effective date of the 2012 Interpretive Notice.[17] The Revised Interpretive Notice would also incorporate language regarding the application of the exclusion from the definition of "municipal advisor" applicable to dealers acting as underwriters pursuant to Exchange Act Rule 15Ba1-1(d)(2)(i)[18] and the application of this underwriter exclusion to a dealer's placement agent activities. In relevant part, the Revised Interpretive Notice would state:

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17 See Final MA Adopting Release (citation and link at note 16 supra).

18 See Final MA Rule Adopting Release, 78 FR at 67515 – 67516 (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 Final MA Rule Adopting Release, 78 FR at 67513 – 67514 (discussing activities within and

> 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).

The MSRB believes that the guidance provided by this harmonizing language is in keeping with the existing references included in the 2012 Interpretive Notice and its guidance regarding the existence of other relevant or similar legal obligations that could have a bearing on an underwriter's fair dealing obligations under Rule G-17.

iii. Incorporate Statements Regarding Negotiated Offerings and Defining Negotiated and Competitive Offerings for Purposes of the Revised Interpretive Notice

By its terms, and as presently stated in the Implementation Guidance, the 2012 Interpretive Notice applies primarily to negotiated offerings of municipal securities, with many of its provisions not applicable to competitive offerings. The Implementation Guidance clarifies what constitutes a negotiated offering for purposes of the 2012 Interpretive Notice, stating that:

> 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 the 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 proposed rule change would incorporate this language into the Revised Interpretive Notice as stated in the Implementation Guidance. In relevant part, the Revised Interpretive Notice would read:

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outside the scope of serving as an underwriter of a particular issuance of municipal securities for purposes of the underwriter exclusion).

> 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.

iv. Incorporate Statements Regarding the Applicability of the Revised Interpretive Notice to Persons Other than Issuers of Municipal Securities and Update the Definition of Municipal Entities

The 2012 Interpretive Notice outlines the duties that a dealer owes to an issuer of municipal securities when the dealer underwrites a new issuance. As explained in the Implementation Guidance, the 2012 Interpretive Notice "does not set out the underwriter's fair dealing obligations to other parties involved with a municipal securities financing, including a conduit borrower." As discussed further below,[19] the MSRB sought feedback in the Concept Release and Request for Proposal regarding whether the 2012 Interpretive Notice should be amended to incorporate specifics regarding how an underwriter must fulfill its obligations to a conduit borrower. Ultimately, the MSRB decided not to incorporate such an amendment in the proposed rule change for the reasons discussed further herein, including that the issues presented by the relationship between underwriters and conduit borrowers are sufficiently distinct to merit their own full consideration in separate guidance. Accordingly, the proposed rule change would incorporate the language from the Implementation Guidance into the Revised Interpretive Notice with conforming edits, stating "[t]his notice does not set out the underwriter's fair-practice duties to other parties to a municipal securities financing (e.g., conduit borrowers)."

The proposed rule change would also update the definition of "municipal entity" as used in the 2012 Interpretive Notice. In relevant part, the Revised Interpretive Notice would read, ". . . 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

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[19] Relatedly, the comments received by the MSRB regarding the incorporation of this language are discussed further below in the MSRB's summary of comments. See related discussion under Summary of Comments Received in Response to the Concept Proposal– Disclosures to Conduit Borrowers and related notes 137 et. seq. infra.; see also Summary of Comments Received in Response to the Request for Comment – Disclosures to Conduit Borrowers and related note 228.

thereunder." This revision would harmonize the Revised Interpretive Notice with the Final MA Rules and MSRB Rule G-42.[20] The MSRB believes this revision to be non-substantive.

v. Incorporate Statements Regarding Underwriters' Discouragement of the Engagement of a Municipal Advisor

The Implementation Guidance further clarifies the scope of the prohibition included in the 2012 Interpretive Notice, affirming that an underwriter must not recommend that the issuer not retain a municipal advisor. The prior guidance states that "an underwriter may not discourage an issuer from using a municipal advisor or otherwise imply that the hiring of a municipal advisor would be redundant because the underwriter can provide the same services that a municipal advisor would." The proposed rule change would incorporate this language into the Revised Interpretive Notice as stated in the Implementation Guidance with conforming edits.[21] In relevant part, the Revised Interpretive Notice would provide:

> Underwriters also must not recommend 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.

The MSRB believes this revision to be a non-substantive incorporation of existing guidance. The comments the MSRB received in response to this change are discussed herein in the MSRB's summary of comments.[22]

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[20] See Rule G-42(f)(vi) ("'Municipal entity' shall, for purposes of [Rule G-42], have the same meaning as in Section 15B(e)(8) of the Act, 17 CFR 240.15Ba1-1(g) and other rules and regulations thereunder.").

[21] Relatedly, the comments received by the MSRB regarding the incorporation of this language are discussed further below in the MSRB's summary of comments. See related discussion under Summary of Comments Received in Response to the Concept Proposal – Underwriter Discouragement of Use of Municipal Advisor; Addition of a New Standard Disclosure Regarding the Engagement of Municipal Advisors and related notes 134 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor and related notes 201 et. seq. infra.

[22] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Underwriter Discouragement of Use of Municipal Advisor and under Summary of Comments Received in Response to the Request for Comment – Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor and related notes 201 et. seq. infra.

vi. Incorporate Statements Regarding Third-Party Payments

The Implementation Guidance clarifies the obligation of underwriters to disclose certain third-party payments, as well as other payments, values or credits received by an underwriter. More specifically, the 2012 Implementation Guidance states, "[t]he third-party payments to which the disclosure requirement under the [2012 Interpretive Notice] would apply are those that give rise to actual or potential conflicts of interest and typically would not apply to third-party arrangements for products and services of the type that are routinely entered into in the normal course of business, so long as any specific routine arrangement does not give rise to an actual or potential conflict of interest." The Implementation Guidance further states that, "[e]ven though . . . the [2012 Interpretive Notice] specifically requires disclosure of the existence of any incentives for the underwriter to recommend a complex municipal securities financing or any other conflicts of interest associated with such recommendation, the specific requirement with respect to complex financings does not obviate the requirement 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."

The proposed rule change would incorporate this language into the Revised Interpretive Notice as stated in the Implementation Guidance with the following exception and conforming edits. The proposed rule change omits the statements from the 2012 Implementation Guidance that the disclosure, " . . . typically would not apply to third-party arrangements for products and services of the type that are routinely entered into in the normal course of business, so long as any specific routine arrangement does not give rise to an actual or potential conflict of interest." The MSRB views this language to be redundant with the prior language regarding the applicability of the disclosure to only those third-party payments that give rise to actual material conflicts of interest or potential material conflicts of interest. Consequently, the MSRB views the omission of this text as non-substantive. Thus, with this omission and the conforming edits, the Revised Interpretive Notice would read in relevant part:

> 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. … 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.

vii. Incorporate Statements Regarding the Need for Each Underwriter in a Syndicate to Deliver Dealer-Specific Conflicts of Interest When Applicable

The FAQs clarify what disclosures may be effected by a syndicate manager on behalf of co-managing underwriters in the syndicate. As stated in the FAQs:

> In general, disclosures of dealer-specific conflicts of interest cannot be satisfied by disclosures made by the syndicate manager because such disclosures are, by their nature, not uniform, and must be prepared by each dealer. However, nothing

> in the [2012 Interpretive Notice] or [Implementation Guidance] would preclude a syndicate manager from delivering each of the dealer-specific conflicts to the issuer as part of a single package of disclosures. . . . The [2012 Interpretive Notice] does not require an underwriter to notify an issuer if it has determined that it does not have an actual or potential conflict of interest subject to disclosure. However, underwriters are reminded that the obligation to disclose actual or potential conflicts of interest includes conflicts arising after the time of engagement with the issuer, as [further noted in the FAQs].

Despite certain other amendments discussed herein that would require the syndicate manager to deliver the standard disclosures and transaction-specific disclosures where a syndicate is formed, these statements regarding the dealer-specific disclosures in the FAQs would remain true and accurate under the Revised Interpretive Notice. Accordingly, the proposed rule change would incorporate this language into the Revised Interpretive Notice as stated in the FAQs with conforming edits, including the technical clarification that such disclosures apply to "actual material conflicts of interest" and "potential material conflicts of interest" in order to make the statements consistent with related amendments in the proposed rule change.[23] In relevant part, the Revised Interpretive Notice would read:

> 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 [therein].

viii. Incorporate Statements Regarding the Timing for the Delivery of Certain Disclosures

The Implementation Guidance and FAQs clarify the timing for the delivery of the disclosures under the 2012 Interpretive Notice. More specifically, the Implementation Guidance states that, "[n]ot all transactions proceed along the same timeline or pathway and on rare occasions precise compliance with some of the timeframes set out in the [2012 Interpretive Notice] may not be feasible." It further states:

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[23] The MSRB notes that the proposed rule change would preserve existing language from the 2012 Interpretive Notice that the syndicate manager may deliver the dealer-specific disclosures of the other syndicate members in a single package, but the MSRB views this simply as a permissive function of delivery rather than an obligation to craft adequate disclosures on the part of other parties.

> The timeframes set out in the [2012 Interpretive Notice] should be viewed in light of the overarching goals of Rule G-17 and the purposes that required disclosures are intended to serve as described in the [2012 Interpretive Notice]. . . . That is, the issuer (i) has clarity throughout all substantive stages of a financing regarding the roles of its professionals, (ii) is aware of conflicts of interest promptly after they arise and well before it effectively becomes fully committed (either formally or due to having already expended substantial time and effort) to completing the transaction with the underwriter, and (iii) has the information required to be disclosed with sufficient time to take such information into consideration before making certain key decisions on the financing.

On this particular point, the Implementation Guidance concludes by stating that, ". . . the timeframes set out in the [2012 Interpretive Notice] are not intended to establish hair-trigger tripwires resulting in technical rule violations so long as underwriters act in substantial compliance with such timeframes and have met the key objectives for providing such disclosures under the [2012 Interpretive Notice]."

The FAQs provide that certain disclosures be made at different points in a transaction. More specifically, the FAQs specify that:

- the underwriter's disclosure regarding the arm's length nature of the relationship must be disclosed "at the earliest stage of the relationship, generally at or before a response to a request for proposals or promotional materials are delivered to an issuer;"

- the other role disclosures and disclosures regarding the underwriter's compensation must be disclosed "[a]t or before the time the underwriter has been engaged to perform the underwriting services;"

- those dealer-specific conflicts of interest known at the time of the engagement must be disclosed "[a]t or before the time the dealer has been engaged to serve as underwriter" in the case of a sole underwriter or syndicate manager where a syndicate has been formed;

- a co-managing underwriter joining a syndicate must disclose any dealer-specific conflicts of interest known at that time concurrent with the formation of the syndicate or upon the co-managing underwriter joining an already-formed syndicate;

- those dealer-specific conflicts of interest discovered or arising after being engaged as an underwriter must be disclosed "as soon as practicable after [being] discovered and with sufficient time for the issuer to evaluate the conflict and its implications;"

- any conflicts arising in connection with a recommendation of a complex municipal securities financing must be disclosed "[b]efore the execution of a

commitment by the issuer (which may include a bond purchase agreement) relating to such recommendation, and with sufficient time to allow the issuer to evaluate the conflict and its implication;"

- the disclosures regarding the material aspects of a routine financing must be disclosed "[b]efore the execution of a commitment by the issuer (which may include a bond purchase agreement) relating to the financing, and with sufficient time to allow the issuer to evaluate the features of the financing;" and

- the disclosures regarding the material financial risks and characteristics of a complex financing must be disclosed "[b]efore the execution of a commitment by the issuer (which may include a bond purchase agreement) relating to the financing, and with sufficient time to allow the issuer to evaluate the features of the financing."

The proposed rule change would incorporate these timeline concepts from the Implementation Guidance and FAQs into the Revised Interpretive Notice with certain conforming edits (e.g., by utilizing the Revised Interpretive Notice's defined terms of "standard disclosure", "dealer-specific disclosures," and "transaction-specific disclosures").

The proposed rule change would also incorporate clarifying language regarding the intent of these timelines. More specifically, the intent that the timelines are defined to ensure that underwriters act promptly to deliver disclosures in light of all the relevant facts and circumstances, but are not "intended to establish strict, hair-trigger tripwires resulting in mere technical rule violations."[24] In relevant part, the Revised Interpretive Notice would read:

> 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

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[24] Relatedly, the comments received by the MSRB regarding the incorporation of this language are discussed further below in the MSRB's summary of comments. See related discussion under Summary of Comments Received in Response to the Concept Proposal – Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into a Single Interpretive Notice – Modification of Implementation Guidance's Language Regarding the "No Hair-Trigger" and related note 95 and Summary of Comments Received in Response to the Request for Comment – Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into a Single Interpretive Notice – Reincorporation of the "No Hair-Trigger" Language from the Implementation Guidance and related notes 157 et. seq. infra.

> 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.

ix. Incorporate Statements Regarding Whether Underwriters May Rely on Certain Representations of Issuer Officials

The FAQs clarify the circumstances under which an underwriter may rely on the representations of issuer officials, stating:

> Absent red flags, an underwriter may reasonably rely on a written representation from an issuer official in, among other things, the issuer's request for proposals that he or she has the ability to bind the issuer by contract with the underwriter. Moreover, the underwriter may reasonably rely on a written statement from such person that he or she is not a party to a disclosed conflict.

The proposed rule change would incorporate this language from the FAQs into the Revised Interpretive Notice with clarifying language regarding the relevance of facts discovered during the course of an underwriter's due diligence, including diligence related to the transaction generally or pursuant to an underwriter's own determination of whether it has any actual material conflicts of interest or potential material conflicts of interest. Specifically, the Revised Interpretive Notice supplements the existing statement from the FAQs with the following text:

> 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.

This statement is intended to clarify that if an underwriter becomes aware of a fact through the normal course of its diligence that would lead it to doubt a representation of an issuer official, such information may rise to the level of a red flag that would not allow the underwriter to reasonably rely on the written representation.

x. Incorporate Statements Regarding an Underwriter Having a Reasonable Basis for Its Representations and Other Material Information Provided to Issuers

The 2012 Interpretive Notice states that underwriters must "have a reasonable basis for representations and other material information provided to issuers" and clarifies that the obligation "extends to the reasonableness of assumptions underlying the material information being provided." The Implementation Guidance further contextualizes this reasonable basis standard, stating:

> The less certain an underwriter is of the validity of underlying assumptions, the more cautious it should be in using such assumptions and the more important it will be that the underwriter disclose to the issuer the degree and nature of any uncertainties arising from the potential for such assumptions not being valid. . . . If an underwriter is uncomfortable having an issuer rely on any statements made or information provided to such issuer, it should refrain from making the statement or providing the information, or should provide any appropriate disclosures or other information that would allow the issuer to adequately assess the reliability of the statement or information. . . . 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. . . . 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.

The proposed rule change would incorporate this language from the Implementation Guidance into the Revised Interpretive Notice with conforming edits and the following exception.[25] The proposed rule change omits the statements from the 2012 Implementation Guidance that:

> The less certain an underwriter is of the validity of underlying assumptions, the more cautious it should be in using such assumptions and the more important it will be that the underwriter disclose to the issuer the degree and nature of any uncertainties arising from the potential for such assumptions not being valid.

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[25] Relatedly, the comments received by the MSRB regarding the incorporation of this language are discussed further below in the MSRB's summary of comments. See related discussion under Summary of Comments Received in Response to the Concept Proposal – Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into a Single Interpretive Notice – General Comments Encouraging the Consolidation of the Implementation Guidance, and the FAQs and related notes 91 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into a Single Interpretive Notice – Inclusion of Language Regarding a Reasonable Basis for Underwriter Representations related note 155 infra.

The MSRB views this statement to be potentially confusing and likely redundant with the preceding statement regarding the need for an underwriter to have a reasonable basis for its assumptions underlying any material information being provided to an issuer. Accordingly, the MSRB views the omission of this text as non-substantive. In relevant part, the Revised Interpretive Notice would read as follows:

> 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.

xi. Incorporate Statements Regarding Whether a Particular Recommended Financing Structure or Product is Complex

The 2012 Implementation Guidance describes a complex municipal securities financing as "a new issue financing that is structured in a unique, atypical, or otherwise complex manner that issuer personnel responsible for the issuance of municipal securities would not be well positioned to fully understand or to assess the implications of a financing in its totality." The Implementation Guidance clarifies that, "[u]nderwriters must make reasonable judgments regarding 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." The 2012 Interpretive Notice then provides a non-exclusive, illustrative list of examples of new issue structures that constitute a complex municipal securities financing, inclusive of variable rate demand obligations (VRDOs); financings involving derivatives (such as swaps); and financings in which the interest rate is benchmarked to an index that is commonly used in the municipal marketplace (e.g., LIBOR or SIFMA), which may be complex to an issuer that does not understand the components of that index or its possible interaction with other indexes.

The proposed rule change would incorporate this language from the Implementation Guidance into the Revised Interpretive Notice with conforming edits and an update to the illustrative, non-exclusive list of interest rate benchmarks to include the Secured Overnight Financing Rate (SOFR).[26] The MSRB believes this edit is a necessary update to ensure that the

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[26] SOFR is published by the Federal Reserve Bank of New York and is based on a broad measure of the cost of borrowing cash overnight collateralized by U.S. Treasury securities in the repurchase agreement market. SOFR was chosen by the Alternative Reference Rates Committee ("ARRC") as the rate that represents best practice for use in certain new USD derivatives and other financial contracts, representing the ARRC's preferred alternative to USD LIBOR. See http://www.msrb.org/EducationCenter/Municipal-Market/About/Market/Market-Indicators.aspx.

Revised Interpretive Notice would reflect current market practices. In relevant part, the Revised Interpretive Notice would read as follows, "[e]xamples 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)." The Revised Interpretive Notice would also incorporate the following footnote to this language:

> 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.

xii. Incorporate Statements Regarding the Specificity of Disclosures

The 2012 Interpretive Notice provides that an underwriter of a negotiated issue that recommends a complex municipal securities transaction or product to an issuer has an obligation to disclose all financial material risks known to the underwriter and reasonably foreseeable at the time of the disclosure, financial characteristics, incentives, and conflicts of interest regarding the transaction or product. The Implementation Guidance clarified the scope of this obligation, stating:

> The disclosures concerning a complex municipal securities financing must address the specific elements of the financing, rather than being general in nature. . . . An underwriter cannot satisfy this requirement by providing an issuer a single document setting out general descriptions of the various complex municipal securities financing structures or products it may recommend from time to time to its 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. . . . An underwriter can create, in advance, individualized descriptions, with appropriate levels of detail, of the material financial characteristics and risks for each of the various complex municipal securities financing structures or products (including any typical variations) it may recommend from time to time to its various issuer clients, with such standardized descriptions serving as the base for more particularized disclosure for the specific complex financing the underwriter is recommending to a particular issuer. The 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.

The Implementation Guidance further states that "[p]age after page of complex legal jargon in small print would not satisfy this requirement" and that "[u]nderwriters should be able to leverage such materials for purposes of assisting issuers to more efficiently prepare disclosures to the public included in official statements in a manner that promotes more

consistent marketplace disclosure of a particular financing type from issue to issue, and also should be able to leverage the materials for internal training and risk management purposes." The Implementation Guidance also clarifies that "[n]ot all negotiated offerings involve a recommendation by the underwriter, such as where an underwriter merely executes a transaction already structured by the issuer or its financial advisor." The proposed rule change would incorporate this language from the Implementation Guidance into the Revised Interpretive Notice with conforming edits and the following exception.

In terms of the exception, the proposed rule change omits the statement regarding how such materials might assist issuers. Accordingly, in relevant part, the Revised Interpretive Notice would simply read, "[u]nderwriters should be able to leverage such materials for internal training and risk management purposes." The MSRB views this statement as unnecessary and so its deletion is non-substantive for purposes of the Revised Interpretive Notice.

xiii. Incorporate Statements Regarding Profit Sharing Arrangements

The 2012 Interpretive Notice states that, "[a]rrangements between the underwriter and an investor purchasing new issue securities from the underwriter 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." The Implementation Guidance further clarifies that:

> 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 without the existence of a formal written agreement. . . . An underwriter should carefully consider whether any such arrangement, regardless of whether it constitutes a violation of MSRB Rule G-25(c) precluding a dealer from directly or indirectly sharing in the profits or losses of a transaction in municipal securities with or for a customer, may evidence a potential failure of the underwriter's duty with regard to new issue pricing [as further described in the Implementation Guidance].

The proposed rule change would incorporate this concept into the Revised Interpretive Notice as stated in the Implementation Guidance, which reads, in relevant part, "[u]nderwriters 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."

B. Amending the Nature, Timing, and Manner of Disclosures

The proposed rule change would define certain categories of underwriter disclosures and assign the responsibility for the delivery of certain disclosures to the syndicate manager in circumstances where a syndicate is formed, as further described below.

i. Define Certain Categories of Underwriter Disclosures

The proposed rule change would define the following terms in order to delineate a dealer's various fair dealing obligations under the Revised Interpretive Notice: "standard disclosures" as collectively referring to the disclosures concerning the role of an underwriter[27] and an underwriter's compensation;[28] "dealer-specific disclosures" as collectively referring to the disclosures concerning an underwriter's actual material conflicts of interest and potential material conflicts of interest; and "transaction-specific disclosures" as collectively referring to the disclosures concerning the material aspects of financing structures that the underwriter recommends.

ii. Assign the Syndicate Manager the Exclusive Responsibility for the Standard Disclosures and Transaction-Specific Disclosures

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[27] Under the 2012 Interpretive Notice, these disclosures currently state: (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; (iii) unlike municipal advisors, underwriters do not have a fiduciary duty to the issuer under the federal securities laws and are, therefore, not required by federal law to act in the best interests of the issuer without regard to their own financial or other interests; (iv) 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 (v) 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. The proposed rule change incorporates one additional disclosure into the Revised Interpretive Notice, 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. See related discussion under Summary of Comments Received in Response to the Concept Proposal – Underwriter Discouragement of Use of Municipal Advisor; Addition of a New Standard Disclosure Regarding the Engagement of Municipal Advisors and related notes 134 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor and related notes 201 et. seq. infra.

[28] Under the 2012 Interpretive Notice, an underwriter must disclose to an issuer whether its underwriting compensation will be contingent on the closing of a transaction. It 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 underwriter to recommend a transaction that it is unnecessary or to recommend that the size of the transaction be larger than is necessary.

The 2012 Interpretive Notice states that a syndicate manager is permitted, but not required, to make the standard disclosures and the transaction-specific disclosures on behalf of the other underwriters in the syndicate. The amendments in the proposed rule change would obligate only the syndicate manager[29] of a syndicate – or sole underwriter, as the case may be – to make the standard disclosures and transaction-specific disclosures and eliminates any obligation of other co-managing underwriters in the syndicate to make the standard disclosures and transaction-specific disclosures. By eliminating the obligation of such other syndicate members to deliver the standard disclosures and transaction-specific disclosures upon the formation of the syndicate, the syndicate manager would no longer be delivering the disclosures "on behalf of" any other syndicate members, and such other syndicate members would be under no obligation to ensure the delivery of such disclosures on their behalf.[30] As further described in the MSRB's summary of comments,[31] the MSRB believes that this proposed change will result in issuers receiving fewer duplicative boilerplate disclosures, because a syndicate member will not be obligated to deliver its own disclosures.

In addition, the proposed rule change provides that any disclosures delivered by a syndicate manager prior to or concurrent with the formation of a syndicate would not need to be

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[29] For purposes of the proposed rule change, 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, the proposed rule change would clarify that the syndicate manager is obligated to make the standard disclosures and transaction-specific disclosures. In the event that there are joint-bookrunning senior managers, the proposed rule change would state that only one of the joint-bookrunning senior managers would be obligated under the Revised Interpretive 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 solely responsible for providing the standard disclosures and transaction-specific disclosures under the Revised Interpretive Notice. Notwithstanding the obligation of a syndicate manager to deliver the standard disclosures and transaction-specific disclosures under the Revised Interpretive Notice, nothing in the Revised Interpretive Notice would prohibit an underwriter from making a disclosure in order to, for example, comply with another regulatory or statutory obligation.

[30] In light of, and consistent with, these obligations placed on the syndicate manager, only the syndicate manager must maintain and preserve records of the applicable disclosures it delivers in accordance with MSRB rules.

[31] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Syndicate Manager Responsibility for the Standard Disclosures and Transaction-Specific Disclosures and notes 102 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Syndicate Manager Responsibility for the Standard Disclosures and Transaction-Specific Disclosures and notes 169 et. seq. infra.

identified as delivered in the capacity of the syndicate manager or otherwise redelivered "on behalf" of the syndicate. It would suffice for purposes of the proposed rule change that an underwriter – later syndicate manager – has delivered the standard disclosures and/or transaction-specific disclosures to the issuer regardless of whether a syndicate may form or has already been formed in the course of the transaction.[32]

Each member of the syndicate would remain responsible for ensuring the delivery of any dealer-specific disclosures if, but only if, such syndicate member had actual material conflicts of interest or potential material conflicts of interest that must be disclosed. The MSRB continues to believe that the obligation for each underwriter to deliver dealer-specific disclosures is warranted because such disclosures are, by their nature, not uniform, and must be tailored to each underwriter's unique circumstances.[33] As currently stated in the 2012 Interpretive Notice, if an underwriter does not have any actual material conflicts of interest or potential material conflicts of interest, the proposed rule change would not require the underwriter to deliver an affirmative written statement to the issuer regarding the absence of such dealer-specific conflicts, but the underwriter is permitted to do so.

iii. Require the Separate Identification of the Standard Disclosures

The 2012 Interpretive Notice currently permits the delivery of omnibus disclosure documents, in which the standard disclosures need not be separately identified from the transaction-specific disclosures and dealer-specific disclosures. The proposed rule change would require the separate identification and formatting of the standard disclosures (i.e., disclosures concerning the role of the underwriter and the underwriter's compensation) from the transaction-specific disclosure and the dealer-specific disclosures. For example, when providing the various disclosures in the same document, an underwriter would be required to clearly identify the standard disclosures and separate them from the other disclosures (e.g., by placing the standard disclosures in an appendix or attachment).

iv. Clarify the Meaning of "Recommendation" for Purposes of Disclosures Related to Complex Municipal Securities Financings

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[32] For the avoidance of any doubt, the proposed change would apply to all applicable timeframes for the development of a syndicate, including situations when an underwriter – later syndicate manager – has previously delivered the disclosures prior to the formation of the syndicate and also when a syndicate manager delivers the disclosures concurrent with or after the formation of the syndicate.

[33] As currently stated in the 2012 Interpretive Notice and Implementation Guidance, nothing in the Revised Interpretive Notice would preclude – or require – a syndicate manager from delivering each of the dealer-specific conflicts to the issuer as part of a single package of disclosures, if the syndicate manager and other co-managing underwriters of the syndicate so agreed.

The 2012 Interpretive Notice provides that an underwriter in a negotiated offering that recommends a complex municipal securities financing to an issuer must 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 (a "complex municipal securities financing disclosure"). Accordingly, as stated in the Implementation Guidance, the requirement to provide a complex municipal securities financing disclosure is triggered if – the new issue is sold in a negotiated offering; the new issue is a complex municipal securities financing; and such financing was recommended by the underwriter. These aspects of the 2012 Interpretive Notice would remain applicable under the Revised Interpretive Notice.

However, the 2012 Interpretive Notice does not define the term "recommendation" for purposes of this requirement. As further described in the MSRB's summary of comments,[34] the MSRB believes it is important to provide this clarification to facilitate dealer compliance with the proposed rule change. The proposed rule change would clarify that a communication by an underwriter is a "recommendation" that triggers the obligation to deliver a complex municipal securities financing disclosure if – given its content, context, and manner of presentation — the communication reasonably would be viewed as a call to action to engage in a complex municipal securities financing or reasonably would influence an issuer to engage in a particular complex municipal securities financing.[35] For the reasons described in the MSRB's summary of

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[34] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Clarification of the Meaning of "Recommendation" and related notes 131 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Guidance Regarding Meaning of "Recommendation" and related notes 219 et. seq. infra.

[35] In proposing this change the MSRB draws upon, by analogy, the analysis applicable to dealers making recommendations to customers under MSRB Rule G-19, on the suitability of recommendations and transactions. While Rule G-19 does not apply to the recommendations made by underwriters to issuers in connection with new issues of municipal securities for the reasons discussed below, the Revised Interpretive Notice draws, by analogy, on the analysis of when a dealer has made recommendation under Rule G-19. As discussed in existing MSRB guidance, this analysis under Rule G-19 is informed by the related suitability standard promulgated by the Financial Industry Regulatory Authority (FINRA). More specifically, when proposed amendments to Rule G-19 were approved in March 2014, the MSRB noted that "[g]iven the extensive interpretive guidance surrounding FINRA Rule 2111 [on suitability] and the impracticality and inefficiency of republishing each iteration of that guidance, substantively similar provisions of Rule G-19 will be interpreted in a manner consistent with FINRA's interpretations of Rule 2111." See Release No. 34-71665; 77 FR 14321 (March 7, 2014) (File No. SR-MSRB-2013-07) (Mar. 7, 2014) and MSRB Regulatory Notice 2014-07 (March 2014). FINRA's suitability guidance has long provided that the determination of whether a "recommendation" has been made is an objective rather subjective inquiry. See FINRA Notice to Members 01-23 (March 2001). In guidance relating to FINRA Rules 2090 and 2011, FINRA reiterated this prior guidance, stating that an important factor in this inquiry "is whether – given its content, context and manner of presentation – a particular communication from a firm or associated person to a customer reasonably would be viewed as a suggestion that the customer

comments below,[36] the MSRB considered, and ultimately determined not to, adopt the standard that has been developed for purposes of municipal advisor recommendations under Rule G-42, on the duties of non-solicitor municipal advisors.[37]

v. Establish a "Reasonably Likely" Standard for Disclosure of Potential Material 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. As described in the Implementation Guidance, the requirement to provide such disclosure 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 material. These aspects of the 2012 Interpretive Notice would remain applicable under the Revised Interpretive Notice. However, the proposed rule change provides 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. This revision would narrow 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 further described below in the MSRB's summary of comments, the MSRB believes this amendment will benefit issuers and underwriters alike by reducing the volume of disclosure that must to be provided to those conflicts that are most concrete and probable.[38] Underwriters

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take action or refrain from taking action regarding a security or investment strategy." See FINRA Regulatory Notice 11-02 (Know Your Customer and Suitability) (January 2011). Rule G-19 in this situation does not directly apply to a recommendation made by an underwriter to an issuer in transactions involving the sale by the issuer of a new issue of its securities, because, by its terms, Rule G-19 governs recommendations to "customers," and MSRB Rule D-9 provides that an issuer is not a "customer" within the meaning of that rule in the case of a sale by it of a new issue of its securities. See MSRB Rule D-9 (available here) and related interpretive guidance (available here).

[36] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Clarification of the Meaning of "Recommendation" and related notes 131 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Guidance Regarding Meaning of "Recommendation" and related notes 219 et. seq. infra.

[37] See FAQs Regarding MSRB Rule G-42 and Making Recommendations (June 2018) (hereinafter, the "G-42 FAQs").

[38] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Disclosure of Potential Material Conflicts of Interest and related notes 98 et. seq. infra., and see also Summary of Comments Received in Response to the Request for Comment – Amending the Nature,

will benefit from this change by no longer having to draft and deliver longer disclosures that identify and describe remote or hypothetical conflicts that are unlikely to materialize during the course of a given transaction. The MSRB believes that issuers will also benefit from this change because they will no longer have to review and analyze such longer-form disclosures, which will allow them to focus their time and other resources to the consideration of those material conflicts that are present, or reasonably likely to be present, during the course of the transaction, and, thereby, not expend time and resources discerning likely dealer conflicts from unlikely conflicts, or otherwise evaluating potential material conflicts that are not reasonably likely to materialize during the course of the transaction.

Additionally, the proposed rule change will not diminish an underwriter's fair dealing obligation to update, or otherwise supplement, its dealer-specific disclosures in circumstances when a previously undisclosed potential conflict of interest later ripens into an actual material conflict of interest. Thus, the MSRB believes that the proposed rule change does not compromise municipal entity protection, because municipal entity issuers would continue to receive timely information about all material conflicts of interest that ripen during the course of a transaction. More specifically, at or before the time an underwriter is engaged, issuers would continue to receive a dealer-specific disclosure describing any actual material conflicts of interest that are present at that time and any potential material conflicts of interest that, based on the reasonable judgement of the dealer at that time, are likely to mature into an actual material conflict of interest – assuming there are any such actual material conflicts of interest or potential material conflicts of interest.[39] Thereafter, an underwriter's fair dealing obligation would continue to require it to deliver an updated or supplemental dealer-specific disclosure for any actual material conflict of interest or potential material conflict of interest that has not been previously disclosed to the issuer and arising after the triggering of the initial dealer-specific disclosure.[40]

vi. Clarify that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties

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Timing, and Manner of Disclosures – Disclosure of Potential Material Conflicts of Interest and related notes 161 et. seq. infra.

[39] In the absence of any such actual material conflict of interest or potential material conflict of interest, an underwriter would not have a fair dealing obligation under the Revised Interpretive Notice to disclose the absence of such a conflict, but may choose to provide an affirmative written statement regarding the absence of such conflicts at its discretion (e.g., for the benefit of establishing a written record of such absence).

[40] For example, the 2012 Interpretive Notice states: ". . . 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.'" This concept would remain applicable under the Revised Interpretive Notice.

As outlined above, the 2012 Interpretive Notice requires underwriters to provide issuers with certain standard disclosures, dealer-specific disclosures, and transaction-specific disclosures, when and if applicable. By their respective definitions, the standard disclosures cover generic conflicts of interest that could apply to any underwriter in any underwriting; the dealer-specific disclosures are the actual material conflicts of interest and potential material conflicts of interest generally unique to a specific underwriter; and the transaction-specific disclosures relate to the specific financing structure recommended by an underwriter. None of the requirements in the 2012 Interpretive Notice prescribe that the underwriter must provide the issuer with written disclosures on the part of any other transaction participants, including issuer personnel, but does not expressly state this fact. In response to the concern of a commenter more fully described in the MSRB's summary of comments below,[41] the MSRB believes that this express clarification is warranted to avoid potential misinterpretation of the disclosure requirements of the proposed rule change. Accordingly, the proposed rule change would expressly state that underwriters 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.

vii. Clarify that Disclosures must be "Clear and Concise"

The 2012 Interpretive Notice currently requires disclosures to be "designed to make clear to such official the subject matter of such disclosures and their implications for the issuer." The proposed rule change would clarify that an underwriter's disclosures must be delivered in a "clear and concise" manner, which the MSRB believes is consistent with, and substantially equivalent to, the standard currently articulated in the 2012 Interpretive Notice. Nevertheless, in response to the concern of commenters more fully described in the MSRB's summary of comments below, the MSRB believes that this clarification is warranted to provide further guidance to all stakeholders regarding the accessibility and readability of an underwriter's disclosures.

viii. Update the Definition of Municipal Entity

The 2012 Interpretive Notice currently provides a definition of "municipal entity" that references Section 15B(e)(8) under the Exchange Act.[42] Notably, the 2012 Interpretive Notice

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[41] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties and related note 114, and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties and related notes 194 et. seq infra.

[42] The 2012 Interpretive Notice states: "The term 'municipal entity' is defined by Section 15B(e)(8) of the Securities Exchange Act of 1934 (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

does not reference the definition of municipal entity under Exchange Act Rule 15Ba1-1, because the 2012 Interpretive Notice was issued prior to the effectiveness of the Commission's permanent registration regime for "municipal advisors" pursuant to the amendments to Section 15B of the Exchange Act effectuated by Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act[43] (collectively, the "Final MA Rules"), including Exchange Act Rule 15Ba1-1.[44] Exchange Act Rule 15Ba1-1 defines a "municipal entity" to mean: "any State, political subdivision of a State, or municipal corporate instrumentality of a State or of a political subdivision of a State, including – (1) Any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (2) 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 (3) Any other issuer of municipal securities."[45] Relatedly, Rule G-42 includes this same reference to the definition of municipal entity as used in the Final MA Rules.

In light of the Commission's definition contained in the Final MA Rules and the MSRB's definition of "municipal entity" as used under Rule G-42, the proposed rule change would incorporate a specific reference to this rule definition, in addition to the general statutory definition, to avoid any confusion about the scope of the Revised Interpretive Notice and to promote harmonization with the Final MA Rules and Rule G-42. In relevant part, the Revised Interpretive Notice would read, " . . . 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."

C. Require an Additional Standard Disclosure Regarding the Engagement of Municipal Advisors

The 2012 Interpretive Notice currently requires an underwriter to make five discrete statements regarding the underwriter's role as part of the standard disclosures, including a disclosure that, "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

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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.'"

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

44 See Registration of Municipal Advisors, Release No. 34-70462 (September 20, 2013), 78 FR 67467 (hereinafter, the "MA Rule Adopting Release") (November 12, 2013) (available at http://www.sec.gov/rules/final/2013/34-70462.pdf).

45 See Exchange Act Rule 15Ba1-1(g).

best interest of the issuer without regard to its own or other interests."[46] The proposed rule change would incorporate a 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." As a standard disclosure, this additional disclosure would be subject to the same principles for its timing as the other similar standard disclosures (i.e., at or before the time the underwriter has been engaged to perform the underwriting services) and separate delivery as the other standard disclosures (i.e., separately identified when provided with the transaction-specific disclosures and/or dealer-specific disclosures). In response to the concern of commenters more fully described in the MSRB's summary of comments below,[47] 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.

D. Permit E-mail Read Receipt to Serve as Issuer Acknowledgement

The 2012 Interpretive Notice currently requires underwriters to attempt to receive written acknowledgement of receipt by the official of the issuer other than by evidence of automatic e-mail receipt. The proposed rule change would permit an e-mail read receipt to serve as the issuer's acknowledgement under the Revised Interpretive Notice.[48] The proposed rule change would define the term "e-mail read receipt" to mean "an automatic response generated by a recipient issuer official confirming that an e-mail has been opened." The proposed rule change would also clarify that, "[w]hile 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

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[46] See note 27 supra for the other four disclosures currently required under the 2012 Interpretive Notice.

[47] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Underwriter Discouragement of Use of Municipal Advisor; Addition of a New Standard Disclosure Regarding the Engagement of Municipal Advisors and related notes 134 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor and related notes 201 et. seq. infra.

[48] While an e-mail read receipt would serve as acknowledgement of disclosures delivered for purposes of an underwriter's fair dealing obligations under the Revised Interpretive Notice, the MSRB does not intend to create any implication or inference that an e-mail read receipt may serve as an acknowledgment for any other regulatory purposes.

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."

In response to the concern of commenters more fully described in the MSRB's summary of comments below,[49] the MSRB believes that this amendment will ease the burden of the acknowledgement requirement on underwriters and issuers alike, as both issuer and underwriter commentators indicated that an underwriter's fair dealing obligation to obtain a written acknowledgement, as currently defined under the 2012 Interpretive Notice, creates burdens without offsetting benefits.[50] The MSRB believes that underwriters would benefit from this change by being able to more efficiently obtain issuer acknowledgement of the disclosures electronically through the automated process of an e-mail system, while issuers that desire to provide such acknowledgement to an underwriter can similarly take advantage of the efficiency of the e-mail system to electronically reply to an underwriter's electronic request. At the same time, under the Revised Interpretive Notice, issuers would still have the choice not to provide acknowledgement to an underwriter in this manner by opting not to send an e-mail read receipt in response to the underwriter's e-mail communication.

Moreover, the MSRB believes that this proposed change will not compromise issuer protection, because, like any other form of acknowledgement under the Revised Interpretive Notice, the proposed rule change would require the e-mail read receipt to come from an issuer official that is not party to a conflict, based on the underwriter's knowledge, and either has been specifically identified by the issuer to receive such disclosure communications or, in the absence of such specific identification, is an issuer official who the underwriter reasonably believes has the authority to bind the issuer by contract with the underwriter. Similarly, the proposed rule change would provide that an underwriter may not rely on an e-mail read receipt as the issuer's written acknowledgement when such reliance is unreasonable under all of the facts and circumstances. Accordingly, the proposed change will not compromise issuer protection because an underwriter still must meet the overarching fair dealing obligation of Rule G-17 when relying on an e-mail read receipt, and, thus, an underwriter cannot reasonably rely on e-mail read receipts as written acknowledgement when the particular facts and circumstances indicate that doing so would be deceptive, dishonest, or unfair, as in the case where an 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.

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[49] See related discussion under Summary of Comments Received in Response to the Concept Proposal – E-mail Read Receipt as Issuer Acknowledgement and related notes 125 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – E-mail Read Receipt as Issuer Acknowledgement and related notes 213 et. seq. infra.

[50] See, e.g., SIFMA Letter I, at p. 17 ("SIFMA and its members strongly believe that the issuer's acknowledgement of receipt of disclosures do not provide any benefit, create significant burdens and should be eliminated").

(b) Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2) of the Act,[51] which provides that:

> The Board shall propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.

Section 15B(b)(2)(C) of the Act[52] provides that the MSRB's rules shall:

> . . . be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

The proposed rule change is consistent with Section 15B(b)(2)(C) of the Exchange Act[53] because it will protect issuers of municipal securities from fraudulent and manipulative acts and practices, remove impediments to and perfect the mechanism of a free and open market, and promote just and equitable principles of trade, and promote the protection of municipal entities, for the reasons set forth below.

A. Defining the Various Categories of Underwriter Disclosures and Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into the Revised Interpretive Notice

The proposed rule change would promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market through its amendment of the 2012 Interpretive Notice to define the various categories of underwriter disclosures and through the incorporation of the content of the Implementation Guidance and FAQs. These amendments promote equitable principles of trade and the removal of impediments

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[51] 15.U.S.C. 78o-4(b)(2).

[52] 15 U.S.C. 78o-4(b)(2)(C).

[53] 15.U.S.C. 78o-4(b)(2).

to and perfection of the mechanism of a free and open market by allowing underwriters to reference and review a single consolidated document with uniform terms under Rule G-17, which facilitates the efficient determination of any applicable fair dealing obligations and, thereby, allows for more efficient and less burdensome compliance. At the same time, this amendment does not compromise issuer protection, because these amendments to the 2012 Interpretive Notice are primarily of a technical nature that do not alter the substance of the information delivered to issuers of municipal securities.

B. Amending the Nature, Timing, and Manner of Disclosures

i. Assign the Syndicate Manager the Exclusive Responsibility for the Standard Disclosures and Transaction-Specific Disclosures

The proposed rule change would promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market by amending the 2012 Interpretive Notice to obligate only the syndicate manager – or the sole underwriter, as the case may be – to deliver the standard disclosures and transaction-specific disclosures, and eliminating the concept that the disclosures must be provided "on behalf of" any other members of the syndicate. This would remove impediments to and perfect the mechanism of a free and open market by eliminating certain redundant and generic disclosures currently delivered by underwriters to issuers that provide little, if any, novel informational benefits to issuers, but do create non-trivial compliance and record-keeping burdens on underwriters. The amendment will also promote the goal of protecting municipal entity issuers because issuers will be able to more efficiently evaluate the information contained in the disclosures they do receive, rather than having to differentiate generic and duplicative disclosures from disclosures that are more particularized to the facts and circumstances of the transaction.

ii. Require the Separate Identification of the Standard Disclosures

The proposed rule change would prevent fraudulent and manipulative acts and practices and promote the protection of municipal entity issuers by amending the 2012 Interpretive Notice to require the separate identification and formatting of the standard disclosures by underwriters. This would prevent fraudulent and manipulative acts and practices and promote the protection of municipal entity issuers because issuers will be able to more efficiently differentiate an underwriter's dealer-specific disclosures and transaction-specific disclosures from an underwriter's standard disclosures, and, thereby, more efficiently evaluate those disclosures that are unique to a given underwriting firm and transaction type from those that are more generic and common to all underwriting relationships.

iii. Clarify the Meaning of "Recommendation" for Purposes of Disclosures Related to Complex Municipal Securities Financings

The proposed rule change would promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market by amending the 2012 Interpretive Notice to define the analysis applicable to when an underwriter has made a recommendation triggering the obligation to deliver complex municipal securities financing

disclosures. The 2012 Interpretive Notice does not currently define what constitutes a "recommendation" for these purposes. The absence of a definition creates a burden for underwriters to appropriately interpret and operationalize the 2012 Interpretive Notice. Clarifying the applicable definition would eliminate any legal ambiguity under the Revised Interpretive Notice regarding the applicable standard for determining when a recommendation of a complex municipal securities financing has been made. For similar reasons, the proposed change will promote just and equitable principles of trade by clarifying the circumstances when underwriters must provide these particularized transaction-specific disclosures to issuers, which will reduce the compliance burden for all dealers who act as underwriters.

iv. Establish a "Reasonably Likely" Standard for Disclosure of Potential Material Conflicts of Interest

The proposed rule change would remove impediments to and perfect the mechanism of a free and open market by amending the 2012 Interpretive Notice to more narrowly define which potential material conflicts of interest must be disclosed by underwriters. The disclosures regarding remote and unlikely conflicts provide little, if any, actionable informational benefits to issuers, but do create non-trivial compliance and record-keeping burdens on underwriters. The proposed rule change would prevent fraudulent and manipulative acts and practices and also promote the protection of municipal entity issuers by facilitating issuers' ability to more efficiently evaluate and consider those potential material conflicts of interest that are most concrete and probable, rather than having to differentiate likely material conflicts of interest from a longer inventory of conflicts that includes remote material conflicts of interest that are hypothetical and unlikely to materialize during the course of the transaction.

As further described below in the MSRB's summary of comments, the MSRB believes this amendment will benefit market participants by reducing the volume of disclosure that must be provided to those conflicts that are most concrete and probable.[54] Moreover, the MSRB believes that the proposed rule change does not compromise municipal entity protection, and may in fact bolster issuer protection, by providing more focused and actionable information to issuers. The MSRB believes that issuers will benefit from this change because they will no longer have to review and analyze longer-form disclosures discussing potential material conflicts of interest that are not reasonably likely to materialize during the course of the transaction. Streamlining the disclosures in this way will allow issuers to focus their time and other resources to the consideration of those material conflicts that are currently present and/or reasonably likely to be present during the course of the transaction.

Additionally, the proposed rule change will not diminish an underwriter's fair dealing obligation to update, or otherwise supplement, its dealer-specific disclosures in circumstances when a previously undisclosed potential conflict of interest later ripens into an actual material

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[54] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures and related notes 96 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures and related notes 159 et. seq. infra.

conflict of interest.[55] An underwriter must provide disclosure to the issuer regarding the actual presence of a material conflict that arises during the course of the transaction in accordance with the following timelines:

- If an actual material conflict of interest is present at the time the underwriter is engaged, then the underwriter must disclose the conflict at or before the time the underwriter is so engaged.
- If a conflict of interest does not rise to the level of an actual material conflict of interest at the time of the underwriter's initial engagement, but is reasonably likely to mature into an actual material conflict of interest during the course of the transaction between the issuer and the underwriter, then the underwriter must disclose the conflict as a potential material conflict of interest at or before the time the underwriter is so engaged.
- If the material conflict of interest is not present at the time of the underwriter's initial engagement, and the underwriter reasonably determines at that time that a conflict of interest is not likely to mature into an actual material conflict of interest during the course of the transaction, then the underwriter would not have a fair dealing obligation under this notice to disclose the conflict upon its engagement. But, for example, if that same undisclosed conflict later ripened into an actual material conflict of interest during the course of the transaction, then the underwriter would continue to have a fair dealing obligation under the Revised Interpretive Notice to disclose the conflict as soon as practicable after it arises or upon its discovery by the dealer.

In this regard, the Revised Interpretive Notice would not diminish the amount of information provided to an issuer about the presence of any actual material conflicts of interest as compared to the 2012 Interpretive Notice. It may only change the timing by which certain of those conflicts of interest are first disclosed to an issuer. [56]

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[55] The FAQs presently state that dealer-specific conflicts of interest "discovered or arising after engagement" must be disclosed "[a]s soon as practicable after discovered and with sufficient time for the issuer to evaluate the conflict and its implication."

[56] As an illustration of this point, in the factual scenario discussed in the last bullet above, an underwriter may have identified the conflict as a potential material conflict of interest under the terms of the 2012 Interpretive Notice's broader disclosure standard, which requires an underwriter to disclose any potential material conflict of interest, not just those that are reasonably likely. Consequently, under the terms of the 2012 Interpretive Notice, the underwriter may have incorporated the conflict into its initial dealer-specific disclosure as a potential conflict and so delivered notice of the conflict to the issuer at or before the time of the underwriting engagement.

Under the proposed rule change, the same conflict would still be disclosed to the issuer, but the timing of its initial disclosure to the issuer could be delayed until no later than the conflict

To the degree that the Revised Interpretive Notice does result in a change in timing, the MSRB believes that the proposed rule change provides more actionable information to issuers regarding such conflicts, even if at a potentially later date, and, thereby, any detriment to issuers in regard to timing under the Revised Interpretive Notice generally would be positively offset in terms of issuers' increased informational certainty. While issuers may have less time to act in such scenarios, issuers would have the benefit of knowing that the conflicts being disclosed are more concrete and non-hypothetical.

Thus, the MSRB believes that the proposed rule change does not compromise municipal entity protection, and may in fact bolster issuer protection, by providing more actionable information to issuers, because issuers would continue to receive timely information about all material conflicts of interest that are present during the course of the transaction, and, more importantly, the revised standard eliminates some of the uncertainty regarding how an issuer should evaluate an underwriter's conflicts disclosure. Specifically, if the underwriter provides a material conflict disclosure to an issuer, then, under the Revised Interpretive Notice, the issuer is certain that the material conflict is actually present and/or reasonably likely to be present during the course of the transaction, rather than a mere hypothetical potential conflict. Thereby, issuers will benefit by not expending time and resources in distinguishing likely dealer conflicts from unlikely conflicts, or otherwise evaluating potential material conflicts of interest that are not reasonably likely to materialize during the course of the transaction.

v. Clarify that Underwriters Are Not Obligated to Provide Written Disclosures Regarding the Conflicts of Other Parties to the Transaction

The proposed rule change would remove impediments to and perfect the mechanism of a free and open market by amending the 2012 Interpretive Notice to clarify that underwriters are not obligated to provide written disclosures regarding the conflicts of issuer personnel or other parties to the transaction as part of the standard disclosures, dealer-specific disclosures, or the transaction-specific disclosures. The 2012 Interpretive Notice does not expressly state this fact, although the MSRB understands that the 2012 Interpretive Notice by its terms was not intended to create such a burden of written disclosure. Accordingly, the amendments providing this technical clarification in the Revised Interpretive Notice would reduce ambiguity regarding the nature of disclosures to be made under the 2012 Interpretive Notice and, thereby, reduce the burden on dealers that may be operating with such ambiguity.

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ripening into an actual material conflict of interest. In such a scenario, an issuer would receive notice of such a conflict at a potentially later date into the transaction under the Revised Interpretive Notice than under the 2012 Interpretive Notice, and, correspondingly, the amount of time an issuer would have to analyze and react to such a conflict would be abridged as a result. However, by knowing such conflicts are concrete and non-hypothetical, an issuer may not need as much time to act to analyze and resolve any such conflict. Moreover, the MSRB believes that differing timing outcomes exemplified by this scenario described in the last bullet above, in actuality, would occur relatively infrequently.

vi. Clarify that Disclosures Must Be Clear and Concise

The proposed rule change would remove impediments to and perfect the mechanism of a free and open market by amending the 2012 Interpretive Notice to clarify that disclosures must be made in a clear and concise manner. These amendments promote equitable principles of trade and the removal of impediments to and perfection of the mechanism of a free and open market by granting underwriters clarity regarding the standard by which the disclosures will be evaluated. The 2012 Interpretive Notice does not currently express this standard by its terms, although the MSRB understands that this standard is consistent with the 2012 Interpretive Notice. Accordingly, providing this technical clarification in the Revised Interpretive Notice would reduce ambiguity regarding the application of the 2012 Interpretive Notice and, thereby, reduce the burden on dealers that may be operating with such ambiguity.

C. Require an Additional Standard Disclosure Regarding the Engagement of Municipal Advisors

The proposed rule change would prevent fraudulent and manipulative acts and practices and promote the protection of municipal entity issuers by amending the 2012 Interpretive Notice to require underwriters to incorporate a 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." This proposed change would augment current disclosures by further emphasizing to an issuer the arm's-length, commercial nature of the underwriting relationship and expressly informing the issuer that it may obtain the advice of a municipal advisor, who serves as a fiduciary to the issuer, rather than relying solely upon the advice of an underwriter, who may have commercial interests that differ from the issuer's best interests.

D. Permit E-mail Read Receipt to Serve as Issuer Acknowledgement

Finally, the proposed rule change would remove impediments to and perfect the mechanism of a free and open market, and facilitate transactions in municipal securities, by amending the 2012 Interpretive Notice under Rule G-17 to permit an e-mail read receipt to serve as the issuer's acknowledgement of receipt of the applicable disclosures. For purposes of the Revised Interpretive Notice, the term "e-mail read receipt" would mean an automatic response generated by a recipient issuer official confirming that an e-mail has been opened. This amendment would remove impediments to and perfect the mechanism of a free and open market by improving the efficiency of the disclosure process by allowing underwriters to seek, and issuers to provide, acknowledgement electronically through the built-in, automatic process of an e-mail system. In those instances where a municipal entity is familiar with an underwriter's disclosures, because, for example, it frequently utilizes the underwriter in the sale of its municipal securities, the issuer can choose to affirm an e-mail read receipt to provide electronic acknowledgement of receipt of the underwriter's disclosures, rather than taking the additional time to recognize such receipt by, for example, returning a signature execution of a hard copy acknowledgement.[57] This potential for increased efficiency and added flexibility removes

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[57] The MSRB understands that personnel of certain frequent issuers may desire more flexible methods to provide acknowledgment of receipt. See, e.g., NAMA Letter I, at p. 2

impediments to and perfects the mechanism of a free and open market, and facilitates transactions in municipal securities, by flexibly permitting underwriters and issuers to utilize additional electronic methods to seek and provide, respectively, acknowledgements in a less-burdensome manner. [58]

Moreover, an e-mail read receipt enables an issuer to respond to an underwriter's request for an acknowledgement that more efficiently ensures the issuer is only providing an acknowledgement of receipt, rather than agreeing to legal terms beyond receipt confirmation. The MSRB understands that issuers can be hesitant to provide a signature acknowledgement to a hard-copy receipt of disclosures out of an abundance of caution that providing such a signature may be an execution of legal terms beyond the acknowledgement of receipt, and, relatedly, issuers oftentimes seek legal counsel before providing a signature acknowledgement in such circumstances to ensure that the execution of an underwriter disclosure does not legally bind them to any terms. Allowing for an e-mail read receipt to constitute acknowledgement may help alleviate issuer concerns in such circumstances and, thereby, save issuers from spending the time and resources to more fully evaluate whether a hard copy execution of an underwriter disclosure may legally commit an issuer to more than just a mere acknowledgement of having received a disclosure. Accordingly, the proposed rule change would eliminate the need for underwriters to repeatedly request a hard-copy, signature execution of an acknowledgement from an issuer in such circumstances where the issuer has determined not to provide such a hard-copy execution, but will provide an e-mail read receipt, and also would eliminate the need for issuers to respond to such repeated underwriter requests for hard-copy acknowledgements.[59] This potential reduction in issuer and underwriter burdens removes impediments to and perfects the mechanism of a free and open market, and facilitates transactions in municipal securities, by enabling the more efficient execution of municipal securities transactions.

At the same time, the MSRB believes that this proposed amendment would not compromise municipal entity issuer protection, because underwriters would be required under the Revised Interpretive Notice to attempt to receive written acknowledgement by an official identified as the issuer's primary contact for the receipt of such disclosures. Thus, under the Revised Interpretive Notice, if an underwriter wanted to rely on an e-mail read receipt as written acknowledgement, then the underwriter would have a fair dealing obligation to receive the e-mail read receipt from a specific official identified as the issuer's primary contact for the receipt of such disclosures. In the absence of such an issuer's designation of a primary contact, the

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("Issuers currently acknowledge receiving disclosures from underwriters. This practice should continue, and should allow for issuers to execute acknowledgment as they see fit.").

[58] Id.

[59] The FAQs provide that, "[i]f an authorized issuer official agrees to proceed with the underwriting after receipt of the disclosures but will not provide a written acknowledgment, an underwriter must document specifically why it was unable to obtain such written acknowledgment." The MSRB understands that some underwriters will repeatedly ask for an issuer's acknowledgement, despite having been told no such acknowledgement will be provided, in order to comply with this guidance.

underwriter would have a fair dealing obligation to receive an e-mail read receipt from an issuer official that the underwriter reasonably believes has authority to bind the issuer by contract with the underwriter. Moreover, the Revised Interpretive Notice would not permit an underwriter to rely on an e-mail read receipt as an issuer's 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.

The electronic delivery of the disclosures to such an official in either scenario (i.e., in a scenario in which an issuer has identified a specific primary contact, or in the alternative scenario in which no such identification has been made by an issuer, and, so, the underwriter must make a reasonable determination about an issuer official with the requisite authority) ensures that the issuer's decision of whether to provide acknowledgement by means of an e-mail read receipt is made by an official with the authority and ability to make such decisions on the issuer's behalf. Stated differently, not any e-mail read receipt will suffice under the Revised Interpretive Notice, as the proposed rule change would permit an e-mail read receipt only from certain issuer officials to satisfy an underwriter's fair dealing obligation.

In proposing this change to the acknowledgement requirement, the MSRB notes that Rule G-42, which was adopted subsequent to the 2012 Interpretive Notice, does not require an acknowledgement from an issuer or obligated person client of the client's receipt of the applicable conflict and disciplinary event disclosures under Rule G-42(b), nor in the case of disclosures required to be made by a municipal advisor who has given inadvertent advice under Supplementary Material. 07 to Rule G-42, so long as the municipal advisor has a reasonable belief that the documentation was in fact received by the client.[60] In view of the MSRB's experience with disclosures under Rule G-42, where no client acknowledgement is expressly required, the MSRB believes that it is appropriate, [61] and consistent with the protection of issuers, to adopt a revised acknowledgement standard as part of the Revised Interpretive Guidance.

Additionally, the MSRB believes that this proposed amendment would not compromise municipal entity issuer protection because recipients of such an automatic e-mail read receipt request would still have the option to not provide this form of acknowledgement. Thus, if an issuer official did not desire to provide such an e-mail read receipt, for whatever reason, then the underwriter would continue to have the obligation to seek acknowledgement by other means in order to document why it was unable to obtain such acknowledgement, as currently required under the 2012 Interpretive Notice.

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60 See Exchange Act Release No. 34-76753 (December 23, 2015), 80 FR 81614, at 81617 note 18 (December 30, 2015) ("While no acknowledgement from the client of its receipt of the documentation would be required, the MSRB notes that a municipal advisor must, as part of the duty of care it owes its client, reasonably believe that the documentation was received by its client.").

61 Id.

4. Self-Regulatory Organization's Statement on Burden on Competition

Section 15B(b)(2)(C) of the Exchange Act requires that MSRB rules not be designed to impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[62] The MSRB has considered the economic impact of the proposed rule change, including a comparison to reasonable alternative regulatory approaches.[63] The MSRB does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The MSRB's proposed amendments to the 2012 Interpretive Notice are intended to update and streamline certain obligations specified in the 2012 Interpretive Notice and, thereby, benefit issuers and underwriters alike by reducing the burdens associated with those obligations, including the obligation of underwriters to make, and the burden on issuers to acknowledge and review, written disclosures that are duplicative, itemize risks and conflicts that are unlikely to materialize during the course of a transaction, and/or are not unique to a particular transaction or underwriting engagement. The MSRB believes that the overall impact of the proposed rule change will improve market practices, better protect issuers, and reduce the burdens on market participants.

Based on the feedback of some market participants, the 2012 Interpretative Notice has created unintended consequences in the market. For example, certain market participants, including issuers and underwriters, have indicated their belief that the disclosure obligations specified in the 2012 Interpretive Notice have led to the delivery of voluminous disclosures with mostly boilerplate information. Similarly, market participants have indicated that the disclosure obligations specified in the 2012 Interpretive Notice place a significant burden on underwriters to draft and deliver disclosures that are dense and otherwise difficult or inefficient for issuers to utilize in making informed decisions about the issuance of municipal securities, and also inadvertently bury disclosures of important conflicts and risks. Commenters also stated that the duplicative nature of some disclosures unnecessarily increases the overall volume of disclosures and, equally important, increases the likelihood that an issuer will receive similar information in a non-uniform or redundant manner, which makes it more difficult for an issuer to evaluate the information included in the disclosures it receives.[64]

The MSRB believes the proposed rule change is necessary to update and streamline the burdens placed on market participants and to increase the efficiency of certain market practices, such as enhancing the ability of issuers to efficiently and properly evaluate the risks associated

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62 15 U.S.C. 78o-4(b)(2)(C).

63 Id.

64 See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures and related notes 96 et. seq. infra; see also Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures and related notes 159 et. seq. infra.

with a given transaction, and, thereby, improving the protection of issuers. The MSRB further believes that the proposed rule change will provide clarity to underwriters regarding the scope of their regulatory obligations to municipal entity issuers by expressly affirming and defining certain significant concepts in the Revised Interpretive Notice.

Identifying and Evaluating Reasonable Alternative Regulatory Approaches

The MSRB has assessed alternative approaches to amend the 2012 Interpretative Notice and has determined that the respective amendments in the proposed rule change are superior to these alternatives.

To clarify the nature, timing, and manner of disclosures of conflicts of interest, the MSRB considered strictly limiting the dealer-specific disclosures required under the Revised Interpretive Notice to only an underwriter's actual material conflicts of interest (rather than an underwriter's actual material conflicts of interest and potential material conflicts of interest, as prescribed in the proposed rule change).[65] Eliminating the requirement for an underwriter to make disclosures regarding its potential material conflicts of interest would reduce the overall regulatory burden on dealers, but also delay the timing of disclosures regarding material conflicts of interest that are known at the outset of the engagement as being likely to materialize during the course of the transaction until such time as the conflicts in fact arise and, thereby, compromise certain protections currently afforded to issuers under the 2012 Interpretive Notice.[66] Accordingly, the MSRB determined that such an alternative was inferior and did not incorporate this alternative regulatory approach into the Revised Interpretive Notice.

The MSRB also considered amending the 2012 Interpretative Notice to permit issuers to opt out of receiving certain disclosures required under the 2012 Interpretive Notice. The 2012 Interpretive Notice does not provide such an opt-out process and, as a result, underwriters are generally required to deliver the applicable disclosures to an issuer regardless of an issuer's preference in this regard. The MSRB declined to incorporate this alternative regulatory approach into the Revised Interpretive Notice, because it was concerned that it may increase the likelihood that an issuer who has opted-out of certain disclosures may not receive all the information necessary to evaluate a given underwriting relationship and/or transaction structure.[67] Based on

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[65] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Disclosure of Potential Material Conflicts of Interest and related notes 98 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Disclosure of Potential Material Conflicts of Interest and related notes 161 et. seq. infra.

[66] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Issuer Opt-Out and Summary of Comments Received in Response to the Request for Comment – Issuer Opt-Out.

[67] Id.

certain comments it received, the MSRB is persuaded that the risks associated with such an opt-out concept outweigh the potential benefits.[68]

The MSRB also considered amending the 2012 Interpretative Notice to incorporate the meaning of "recommendation" under Rule G-42, on duties of non-solicitor municipal advisors, which describes a two-prong analysis for determining whether advice is a recommendation for purposes of that rule (a "G-42 Recommendation"). The relevant guidance under Rule G-42 provides the following two-prong analysis for such a G-42 Recommendation:

> First, the [municipal advisor's] advice must exhibit a call to action to proceed with a municipal financial product or an issuance of municipal securities and second, the [municipal advisor's] advice must be specific as to what municipal financial product or issuance of municipal securities the municipal advisor is advising the [municipal entity client or obligated person client] to proceed with.[69]

However, as discussed in more detail below, the MSRB declined to incorporate this G-42 Recommendation standard into the Revised Interpretive Notice, because of the likelihood that issuers may receive less disclosures on the risks associated with complex municipal securities financings under this standard.[70]

The MSRB considered amending the 2012 Interpretative Notice to eliminate all requirements regarding an issuer's acknowledgement of receipt of the disclosures. However, the MSRB believes that such an alternative approach would eliminate an important issuer protection and increase overall risks in the market without significant offsetting benefits.[71] Instead, to reduce the burden on underwriters and issuers alike, the proposed rule change incorporates into the Revised Interpretive Notice the concept that an underwriter may substantiate its delivery of a required disclosure by an e-mail read receipt.[72]

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[68] Id.

[69] G-42 FAQs, at p. 2 (note 37 supra).

[70] See related discussion under Proposed Rule Change – Amending the Nature, Timing, and Manner of Disclosures – Clarification of the Meaning of "Recommendation"; see also Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Clarification of the Meaning of "Recommendation" and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Clarification of the Meaning of "Recommendation".

[71] See related discussion under Summary of Comments Received in Response to the Concept Proposal – E-mail Read Receipt as Issuer Acknowledgement and related notes 125 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – E-mail Read Receipt as Issuer Acknowledgement and related notes 213 et. seq. infra.

[72] Id.

The MSRB also considered amending the 2012 Interpretive Notice to only obligate the syndicate manager, rather than each underwriter in the syndicate, to make the dealer-specific disclosures. The 2012 Interpretive Notice currently requires each underwriter to deliver such disclosures. The MSRB declined to incorporate this alternative regulatory approach into the Revised Interpretive Notice, because the elimination of this requirement would mean that issuers would no longer receive the benefit of this disclosure from each underwriter in the syndicate and the omission of this unique and tailored information would eliminate an issuer protection without a significant offsetting benefit to the market.

Lastly, the MSRB considered amending the 2012 Interpretive Notice to create different disclosure tiers based on the particular characteristics of an issuer, such as the issuer's size, knowledge, issuance frequency, or experience of issuer personnel. At this time, the MSRB believes that there are significant drawbacks to such an approach that outweigh possible benefits, including the ongoing costs and difficulties of ensuring that a given issuer remained in an appropriate disclosure tier and whether such tiers could be adequately drawn in a definitive fashion that would reduce regulatory burdens without harming overall issuer protection. Accordingly, the MSRB declined to incorporate this alternative regulatory approach into the Revised Interpretive Notice.

Assessing the Benefits and Costs of the Proposed Rule Change

The MSRB's regulation of the municipal securities market is designed to protect investors, municipal entities, obligated persons, and the public interest by promoting a fair and efficient municipal securities market. The proposed rule change is intended, in part, to reduce burdens on underwriters without decreasing benefits to municipal entity issuers or otherwise diminishing municipal entity issuer protections. The MSRB's analysis below shows that the proposed amendments accomplish this objective. For the purpose of this analysis, the baseline is the current 2012 Interpretative Notice.

A. Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into the Revised Interpretive Notice

Since this is primarily a technical change from the 2012 Interpretative Notice, the MSRB does not believe there are any significant costs relevant to market participants. However, the MSRB believes that incorporating the Implementation Guidance and FAQs into the Revised Interpretive Notice will promote more efficient dealer compliance in that dealers will only have to reference a single regulatory notice in the future, rather than three separate notices.

B. Amending Nature, Timing, and Manner of Disclosures

i. Define Certain Categories of Underwriter Disclosures

The MSRB believes the added definitions of standard disclosures, transaction-specific disclosures, and dealer-specific disclosures in the proposed rule change would clarify the categories of disclosures and assist underwriters with their compliance with certain new standards in the Revised Interpretive Notice. The MSRB does not believe there is any associated

cost to underwriters as a result of these changes, as the changes are more in the nature of a technical amendment.

ii. Assign the Syndicate Manager the Exclusive Responsibility for the Standard Disclosures and Transaction-Specific Disclosures

At present, the 2012 Interpretative Notice allows, but does not require, a syndicate manager to make the standard disclosures and transaction-specific disclosures on behalf of the other syndicate members. The MSRB understands that in accordance with current market practices, the syndicate manager rarely, if ever, provides disclosures for the other syndicate members, and, so, issuers typically receive separate disclosures from other underwriters in the syndicate.

The Revised Interpretive Notice would require the syndicate manager (or the sole underwriter as the case may be) to provide the standard disclosures and transaction-specific disclosures, and eliminate the obligation for the other syndicate members to make these disclosures.[73] The MSRB believes this amendment will alleviate certain burdens associated with the duplication of disclosures where there is a syndicate. The MSRB further believes that this amendment will reduce the likelihood of issuers receiving duplicative standard disclosures and transaction-specific disclosures in potentially inconsistent manners. Ultimately, the MSRB believes such a requirement would simplify issuers' review of standard disclosures and transaction-specific disclosures and allow them to more closely analyze any dealer-specific disclosures that may be received. The MSRB also believes that this amendment will make the process procedurally easier for dealers participating in an underwriting syndicate, because they only have a fair dealing obligation under the Revised Interpretive Notice to deliver their dealer-specific disclosures, if any existed, and would have no obligation to deliver the standard disclosures or transaction-specific disclosures.

iii. Require the Separate Identification of the Standard Disclosures

The proposed rule change would create a new requirement for underwriters that, when providing the various disclosures in the same document, an underwriter would have to clearly identify the standard disclosures. The MSRB believes this amendment will help prevent the disclosures regarding underwriter conflicts and transaction risks from being disclosed within

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[73] See related discussion under Proposed Rule Change – Amending the Nature, Timing, and Manner of Disclosures – Assign the Syndicate Manager the Exclusive Responsibility for the Standard Disclosures and Transaction-Specific Disclosures; see also Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Syndicate Manager Responsibility for Standard Disclosures and Transaction-Specific Disclosures and related notes 102 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Syndicate Manager Responsibility for Standard Disclosures and Transaction-Specific Disclosures and related notes 169 et. seq. infra.

other more boilerplate information.[74] The MSRB believes that the benefits of this amended requirement will be to provide clarity to issuers; diminish certain information asymmetries between underwriters and issuers; [75] reduce the burden of disclosure for syndicate members; and make it easier for issuers to assess the conflicts of interest and risks associated with a given transaction. The costs to dealers for clearly identifying and separating the standard disclosures from the dealer-specific and transaction-specific disclosures should be minimal, and the MSRB believes that the benefits would outweigh the costs.[76]

iv. Clarify the Meaning of "Recommendation" for Purposes of Disclosures Related to Complex Municipal Securities Financings

The 2012 Interpretative Notice requires an underwriter to make transaction-specific disclosures to the issuer based on the transaction or financing structure it recommends and the level of knowledge and experience of the issuer with that type of transaction or financing structure. In relevant part, the 2012 Interpretive Notice states:

> The level of 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, and financial ability to bear the risks of the recommended financing, in each case based on the reasonable belief of the underwriter. In all events, the underwriter must disclose any incentives for the underwriter to recommend the complex municipal securities financing and other associated conflicts of interest.

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[74] See related discussion under Proposed Rule Change – Amending the Nature, Timing, and Manner of Disclosures – Require the Separate Identification of the Standard Disclosures; see also Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Require the Separate Identification of the Standard Disclosures and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Require the Separate Identification of the Standard Disclosures.

[75] In economics, information asymmetry refers to transactions where one party has more or better information than the other.

[76] See related discussion under Proposed Rule Change – Amending the Nature, Timing, and Manner of Disclosures – Require the Separate Identification of the Standard Disclosures; see also Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Require the Separate Identification of the Standard Disclosures and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Require the Separate Identification of the Standard Disclosures.

The proposed rule change would clarify what constitutes a recommendation by adopting a definition for "recommendation" from analogous dealer guidance from Rule G-19.[77] As discussed further below, the MSRB believes many underwriters are already familiar with the practical application of this language,[78] and, as a result, the MSRB believes there would be no major implicit or explicit costs associated with the clarification of recommendation, as the MSRB believes the volume of the disclosures generally would remain the same. However, underwriters should experience the benefit of more efficient regulatory compliance by having an expressly defined standard.

v. Establish a "Reasonably Likely" Standard for Disclosure of Potential Material Conflicts of Interest

The 2012 Interpretative Notice requires each underwriter to disclose any potential material conflict of interest. The proposed rule change would amend the 2012 Interpretive Notice to require an underwriter to disclose any potential material conflict of interest that is reasonably likely to mature into an actual material conflict of interest during the course of that specific transaction.[79] Potential material conflicts of interest that are not reasonably likely (or do not have such a significant probability) to mature into an actual material conflict of interest during the transaction between the issuer and the underwriter are not required to be disclosed to the issuer at

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[77] See related discussion under Proposed Rule Change – Amending the Nature, Timing, and Manner of Disclosures – Clarify the Meaning of Recommendation for Purposes of Disclosures Related to Complex Municipal Securities Financings; see also Summary of Comments Received in Response to the Concept Proposal – Clarification of the Meaning of "Recommendation" and related notes 131 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Guidance Regarding Meaning of "Recommendation" and related notes 219 et. seq. infra. As further discussed herein, the proposed rule change would clarify that a communication by an underwriter is a "recommendation" that triggers the obligation to deliver a complex municipal securities financing disclosure if – given its content, context, and manner of presentation — the communication reasonably would be viewed as a call to action to engage in a complex municipal securities financing or reasonably would influence an issuer to engage in a particular complex municipal securities financing.

[78] Id. In the absence of an express standard in the 2012 Interpretive Notice, it is likely that at least some underwriters are already applying a form of this standard in determining whether a "recommendation" has been made.

[79] See related discussion under Proposed Rule Change – Amending the Nature, Timing, and Manner of Disclosures – Establish a Reasonably Likely Standard for Disclosure of Potential Material Conflicts of Interest; see also Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Disclosure of Potential Material Conflicts of Interest and related notes 98 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Disclosure of Potential Material Conflicts of Interest and related notes 161 et. seq. infra.

the outset of the engagement. The MSRB believes that a given potential material conflict of interest may have various chances of ripening into an actual material conflict of interest and, at a general level, can reflect a low likelihood, moderate likelihood, or high likelihood of occurring at any given point in time. The proposed rule change should reduce the length and complexity of a dealer's initial dealer-specific disclosures, as the MSRB understands that underwriters presently are inclined to disclose a potential material conflict of interest to an issuer as part of its dealer-specific disclosures even when such conflict is not reasonably likely to mature into an actual material conflict of interest during the course of the transaction because there is some remote likelihood.

The MSRB acknowledges that one potential cost to issuers of this proposed change would be the lost opportunity to evaluate potential material conflicts of interest that, according to the reasonable judgement of the dealer, are not likely to mature into an actual material conflict of interest. Consequently, there is a chance that the proposed change would hinder the issuer's ability to conduct a full risk assessment, particularly around the decision of whether to engage a particular underwriter for a given transaction.[80]

Nevertheless, the MSRB believes the benefits of the proposed change outweigh its potential costs, as this change will both reduce the burden placed on underwriters and also reduce the volume of disclosures received by issuers, while continuing to ensure that issuers are notified in writing of relevant conflicts of interest, and, thereby, promoting the protection of issuers by facilitating the ability of issuers to more efficiently evaluate and consider those potential material conflicts of interest that are most concrete and probable. Issuers would not have to review potential material conflicts of interest that are not reasonably likely to ripen during the course of the transaction. When there are too many disclosures, it is possible that an issuer's ability to make a comprehensive and efficient assessment of the disclosures is diminished. With the proposed rule change, issuers should be able to discern which conflicts of interest present actual material risks or material risks that are reasonably likely to actually develop during the course of the transaction, therefore reducing asymmetric information between the underwriters and issuers. Relatedly, excluding potential material conflicts of interest that are unlikely to occur would create initial/upfront costs to underwriters since underwriters would have to amend their policies and procedures to specify what constitutes a "reasonably likely" potential material conflict of interest, though the MSRB believes that such costs would be minor and are justified by offsetting benefits.

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[80] For example, if a potential material conflict of interest is first omitted from the dealer-specific disclosures – because the dealer correctly deems the risk to be possible, but not reasonably likely – and the conflict of interest, in actuality, has a higher likelihood and, ultimately, ripens into an actual material conflict of interest during the course of the transaction, then the dealer would still be required to timely disclose the conflict of interest when it ripens into an actual material conflict. However, the failure to disclose this possible conflict of interest at the first delivery of the dealer-specific disclosures, as currently required under the 2012 Interpretative Notice, may result in an inadequate due diligence performed by the issuer on the underwriter due to the information asymmetry between the issuer and the underwriter. See Id.

vi. Clarify that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties

None of the requirements in the 2012 Interpretative Notice require the underwriter to provide the issuer with disclosures on the part of any other transaction participants, including issuer personnel. However, the MSRB received comments requesting clarification on this point,[81] and the proposed rule change would provide a clarification that underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction. This clarification should reduce the burden on firms that were mistakenly under the impression that underwriters are required to disclose the conflicts of other transaction participants, as well as provide clarity to regulatory authorities examining and enforcing MSRB rules. Assuming underwriters are already compliant with the 2012 Interpretative Notice, there are no implicit or explicit economic benefits or costs associated with the clarification in the proposed rule change. To the degree that regulators may be inappropriately interpreting and applying the 2012 Interpretative Notice in connection with examination and enforcement proceedings, regulators and underwriters will benefit from the clarification in that it should reduce the amount of time spent on such activity.[82]

vii. Clarify that Disclosures must be "Clear and Concise"

Assuming underwriters are already compliant with the requirements under the 2012 Interpretative Notice, the MSRB believes there are no implicit or explicit economic benefits or costs associated with not amending the statement from the 2012 Interpretive Notice that "disclosures must be made in a manner designed to make clear to such officials the subject matter of such disclosures and their implications to the issuer"[83] and amending the 2012

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[81] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties and related note 114 and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties and related notes 194 et. seq. infra.

[82] SIFMA expressed concern that "regulators conflate conflicts of interest." See SIFMA Letter I, at p. 7 note 15 ("We also note that, in some cases, it appears that regulators conflate conflicts of interest that might exist on the part of other parties to a financing, including in particular conflicts on the part of issuer personnel, with conflicts on the part of the underwriter, and therefore regulators appear to expect that the conflicts disclosure under the [2012 Interpretive Notice] should include these conflicts of other parties. SIFMA and its members request that the MSRB clarify that the [2012 Interpretive Notice] does not require the underwriter to disclose conflicts on the part of parties other than the underwriter.").

[83] See related discussion under Proposed Rule Change – Amending the Nature, Timing, and Manner of Disclosures – Clarify that Disclosures Must Be Clear and Concise; see also Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing,

Interpretive Notice to further clarify that, consistent with the existing language, disclosures must be drafted in a "clear and concise manner."[84]

C. Require an Additional Standard Disclosure Regarding the Engagement of Municipal Advisors

The 2012 Interpretative Notice prohibits an underwriter from recommending that an issuer not retain a municipal advisor. By supplementing this language with the requirement that underwriters affirmatively state in their standard disclosures 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," the proposed rule change would further promote an issuer's understanding of the distinct roles of an underwriter and a municipal advisor.[85] Moreover, the MSRB believes that coupling this amendment with the incorporation of the existing language from the Implementation Guidance will promote issuer protection in the market by further ensuring that issuers are able to more freely evaluate their potential engagements with municipal advisors without undue bias.[86]

The possible benefits of this proposed change are demonstrated by a study from 2006, showing that an issuer's use of a financial advisor in the municipal bond issuance process reduces underwriter gross spreads, provides statistically significant borrowing costs savings, and lower reoffering yields.[87] The results of the study are consistent with the interpretation that the

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and Manner of Disclosures – Clarity of Disclosures and related notes 117 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Clarity of Disclosures and related notes 196 et. seq. infra.

[84] As indicated by one commenter, this standard should minimize any re-drafting of existing disclosure templates. See SIFMA Letter II, at p. 6 (stating a clear and concise standard "is in line with the MSRB's disclosure principles as well as the goals of the retrospective review").

[85] See related discussion under Proposed Rule Change – Require an Additional Standard Disclosure Regarding the Engagement of Municipal Advisors; see also Summary of Comments Received in Response to the Concept Proposal – Underwriter Discouragement of Use of Municipal Advisor; Addition of a New Standard Disclosure Regarding the Engagement of Municipal Advisors and related notes 134 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor and related notes 201 et. seq. infra.

[86] Id.

[87] Vijayakumar Jayaraman and Kenneth N. Daniels, "The Role and Impact of Financial Advisors in the Market for Municipal Bonds," Journal of Financial Services Research, 2006. After investigating how using a financial advisor affects the interest costs of issuers,

monitoring and information asymmetry reduction roles of financial advisors potentially reduce the perceived risk for issuers. Another study from 2010 found lower interest costs with municipal issues using financial advisors, and the interest cost savings were significantly large especially for more opaque and complex issues.[88] Given that an underwriter does not have the same fiduciary responsibility of a municipal advisor, the MSRB believes that clarifying the distinct roles of underwriters and municipal advisors should continue to improve market practices and further ensure that an issuer's decision to engage a municipal advisor is made without undue interference, which may obscure the issuer's overall evaluation of the costs and benefits of municipal advisory services.

As to the potential costs of compliance, underwriters would have to affirmatively state in their standard disclosures that an issuer may choose to engage the services of a municipal advisor with a fiduciary obligation to represent the issuer's interests in the transaction. Therefore, underwriters would incur additional cost associated with revising their policies and procedures (a one-time upfront cost) and delivering the statement in their standard disclosures during a transaction. Beyond this update to their standard disclosures and any related updates to their policies and procedures, the MSRB does not believe there will be any further ongoing implementation costs to underwriters.

D. Permit E-mail Read Receipt to Serve as Issuer Acknowledgement

Currently, the 2012 Interpretative Notice requires underwriters to attempt to receive written acknowledgement of receipt of the disclosures by an official of the issuer. The proposed rule change would allow for an e-mail read receipt to serve as an acknowledgement.[89] The MSRB believes that the acknowledgement requirement continues to have value to ensure that issuers receive the disclosures. Allowing for an e-mail read receipt to constitute written acknowledgement should reduce burdens on underwriters (including syndicate managers, when there is a syndicate) and on issuers, in that underwriters and issuers will no longer be required to follow up with written acknowledgements when such receipt is utilized. Nevertheless, underwriters should expect minor initial upfront costs (which are optional) associated with the implementation of the use of e-mail read receipts, and related compliance, supervisory, training, and record-keeping procedures. However, the MSRB believes that the benefits associated with

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Vijayakumar and Daniels, find that a financial advisor significantly reduces municipal bond interest rates, reoffering yields, and underwriters' gross spreads.

[88] Allen, Arthur and Donna Dudney, "Does the Quality of Financial Advice Affect Prices?" The Financial Review 45, 2010.

[89] See related discussion under Proposed Rule Change – Permit E-mail Read Receipt to Serve as Issuer Acknowledgement; see also related discussion under Summary of Comments Received in Response to the Concept Proposal – E-mail Read Receipt as Issuer Acknowledgement and related notes 125 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – E-mail Read Receipt as Issuer Acknowledgement and related notes 213 et. seq. infra.

the reduced burden of spending time to obtain written acknowledgement would accrue over time and should exceed the initial costs.

Effect on Competition, Efficiency and Capital Formation

The MSRB believes that the proposed amendments to the 2012 Interpretative Notice as reflected in the Revised Interpretive Notice should improve the municipal securities market's operational efficiency by promoting consistency in underwriters' disclosures to issuers and promoting greater transparency. At present, the MSRB is unable to quantitatively evaluate the magnitude of the efficiency gains or the cost of compliance with the new requirements, but believes the benefits outweigh the costs. Additionally, the MSRB believes that the proposed rule change should also reduce confusion and risk to both underwriters and issuers; reduce information asymmetry between underwriters and issuers; and allow issuers to make more informed financing decisions. Therefore, the proposed amendments to the 2012 Interpretative Notice would improve capital formation. Finally, since the proposed rule change would be applicable to all underwriters, it would not have a negative impact on market competition.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The MSRB published the Concept Proposal on June 5, 2018 and published the Request for Comment on November 16, 2018. The Concept Proposal sought public comment on various aspects of the 2012 Interpretive Notice, including the benefits and burdens of the 2012 Interpretive Notice at a general level, and how the 2012 Interpretive Notice might be amended to ensure that it continues to achieve its intended purpose in light of current practices in the municipal securities market.

The Request for Comment incorporated the comments received on the Concept Proposal by providing specific amendments to the text of the 2012 Interpretive Notice. Additionally, through a series of questions, the MSRB sought more specific feedback from market participants in the Request for Comment regarding how the 2012 Interpretive Notice might be improved to remove unnecessary burdens on market participants, while at the same time ensuring that it continues to achieve its intended purpose.

The following discussion summarizes the comments received in response to the Concept Proposal and the Request for Comment and sets forth the MSRB's responses thereto. The discussion does not provide specific responses for every comment, as, for example, when the MSRB only received a high-level general comment on a topic area. Comments to the Concept Proposal are discussed first and comments to the Request for Comment are discussed in the immediately following section. The summary includes cross-references from the discussion of the Concept Proposal to the discussion of the Request for Comment, and vice versa, in order to identify the discussion of comments received on the same or similar topics for ease of review. For topics that were incorporated into the Concept Proposal, but subsequently not incorporated into the Request for Comment, the discussion below incorporates a footnote statement indicating that no further discussion of the topic is included in the summary of comments to the Request for

Comment, along with a brief summary discussion of any significant comments received to the Request for Comment.

I. Summary of Comments Received in Response to the Concept Proposal

The MSRB received five comment letters in response to the Concept Proposal.[90] Each of the commenters generally indicated their support of the retrospective review of the 2012 Interpretive Notice as outlined in the Concept Proposal and each had specific suggestions on how the 2012 Interpretive Notice could be improved, as discussed further below.

A. Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into a Single Interpretive Notice

i. General Comments Encouraging the Consolidation of the Implementation Guidance and the FAQs

SIFMA's response to the Concept Proposal stated that, if the MSRB were to amend the 2012 Interpretive Notice, ". . . it would be critical to incorporate or otherwise preserve the guidance included in the Implementation Guidance and FAQs, with any modifications appropriate in light of the changes to the [2012 Interpretive Notice]."[91] SIFMA further elaborated on this request, indicating that the Implementation Guidance provides a "deeper understanding" of the 2012 Interpretive Notice and that the FAQs provide important guidance in "response to questions raised by underwriters based on their experience with initial implementation" of the 2012 Interpretive Notice.[92] No other commenters on the Concept Proposal addressed this issue.[93] In response to SIFMA's comments, the MSRB proposed to incorporate the substance of the Implementation Guidance and FAQs into the Request for Comment, along with certain conforming edits and supplemental modifications to address other proposed amendments.[94]

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[90] See note 8 supra.

[91] SIFMA Letter I, at p. 4.

[92] Id., at pp. 3-4.

[93] It should be noted that the MSRB did not seek specific comment on this topic in the Concept Proposal.

[94] As further discussed herein, the MSRB ultimately chose to incorporate these amendments into the proposed rule change. This general concept of incorporating the substantive language of the Implementation Guidance and FAQs into the Revised Interpretive Notice is not discussed again under the Summary of Comments Received in Response to the Request for Comment, but the MSRB does provide a summary of comments received in response to the incorporation of particular concepts and language from the Implementation Guidance and FAQs (e.g., comments regarding whether the no-hair trigger language should be incorporated into the Revised Interpretive Notice).

ii. Modification of Implementation Guidance's Language Regarding the "No Hair-Trigger"

As stated above, the Implementation Guidance provides the following regarding the timing and delivery of disclosures under the 2012 Interpretive Notice:

> The timeframes set out in the Notice should be viewed in light of the overarching goals of Rule G-17 and the purposes that required disclosures are intended to serve as described in the [2012 Interpretive Notice]. That is, the issuer (i) has clarity throughout all substantive stages of a financing regarding the roles of its professionals, (ii) is aware of conflicts of interest promptly after they arise and well before it effectively becomes fully committed (either formally or due to having already expended substantial time and effort) to completing the transaction with the underwriter, and (iii) has the information required to be disclosed with sufficient time to take such information into consideration before making certain key decisions on the financing. Thus, the timeframes set out in the [2012 Interpretive Notice] are not intended to establish hair-trigger tripwires resulting in technical rule violations so long as underwriters act in substantial compliance with such timeframes and have met the key objectives for providing such disclosures under the [2012 Interpretive Notice].

SIFMA's comment letter on the Concept Proposal urged the MSRB to reconfirm this language, stating SIFMA's belief that the language is a critical acknowledgement of the market reality that transactions rarely proceed on uniform timelines. Like the incorporation of the other language from the Implementation Guidance and FAQs described above, the MSRB agrees that this language provides an important supplementary gloss to the language of the 2012 Interpretive Notice. However, the MSRB believed at the time that it drafted the Request for Comment that it was worthwhile to propose certain modifications to this language in order to solicit additional input regarding the practical effects of the language in the market and, in particular, its practical impact on dealer compliance. Accordingly, the MSRB incorporated modified language in the Request for Comment by omitting its final sentence (i.e., deleting the statement that, ". . . the timeframes set out in the [2012 Interpretive Notice] are not intended to establish hair-trigger tripwires resulting in technical rule violations so long as underwriters act in substantial compliance with such timeframes and have met the key objectives for providing such disclosures under the [2012 Interpretive Notice]."). In effect, the Request for Comment proposed withdrawing this particular language of the Implementation Guidance.[95]

B. Amending the Nature, Timing, and Manner of Disclosures

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[95] The proposed rule change reincorporates this language with certain revisions, as further discussed herein. See related discussion under Summary of Comments Received in Response to the Request for Comment – Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into a Single Interpretive Notice – Reincorporation of the "No Hair-Trigger" Language from the Implementation Guidance and related notes 157 et. seq. infra.

Each of the five commenters on the Concept Proposal offered improvements to the nature, timing, and manner of disclosures required under the 2012 Interpretive Notice. At a more general level, several commenters shared the view that the municipal securities market would benefit from reducing the volume and "boilerplate" nature of the disclosures required under the 2012 Interpretive Notice, as there was a shared belief among these commenters that the level of disclosure required by the 2012 Interpretive Notice, in many respects, overly burdened underwriters and issuers alike without any offsetting benefits. [96]

i. Disclosures Concerning the Contingent Nature of Underwriting Compensation

The 2012 Interpretive Notice requires underwriters to disclose the contingent nature of their underwriting compensation. The Concept Proposal requested feedback on this topic. SIFMA commented that disclosures concerning the contingent nature of underwriting compensation should be eliminated, because contingent underwriting compensation effectively is a universal practice. In response, the MSRB incorporated a proposed amendment into the Request for Comment that would require the disclosure concerning the contingent nature of underwriting compensation to be incorporated into an underwriter's standard disclosures, in acknowledgement of the fact that contingent compensation is a nearly-universal practice, yet continues to present an inherent conflict of interest. The Request for Comment clarified, however, that if a dealer were to underwrite an issuer's offering with an alternative compensation structure, the dealer would need to both indicate in its transaction-specific disclosures that the information included in its standard disclosure on underwriter compensation does not apply and also explain the alternative compensation structure as part of its transaction-specific disclosures, to the extent that such alternative compensation structure also presents a conflict of interest.[97]

ii. Disclosure of Potential Material Conflicts of Interest

The 2012 Interpretive Notice requires an underwriter to disclose certain actual material conflicts of interest and potential material conflicts of interest (i.e., the dealer-specific disclosures), including certain conflicts regarding payments received from third parties, profit-

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[96] In this regard, GFOA commented that the disclosures currently required "are often boilerplate and cumbersome." GFOA Letter I, at p. 1. NAMA similarly commented that "disclosures are buried within lengthy documents that contain hypothetical potential conflicts and risks." NAMA Letter I, at p. 1. Similarly, SIFMA encouraged the MSRB to "be cognizant of the substantial compliance burden on underwriters and complaints expressed by some issuers regarding excessive documentation resulting from the [2012 Interpretive Notice]" and "more precisely define the content of and the process for providing the disclosures required by the [2012 Interpretive Notice]." SIFMA Letter I, at p. 5.

[97] Ultimately, the proposed rule change did not incorporate this amendment to the 2012 Interpretive Notice, as further discussed herein. See related discussion under Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Disclosures Concerning the Contingent Nature of Underwriting Compensation and related notes 159 et. seq. infra.

sharing arrangements with investors, credit default swap activities, and/or incentives related to the recommendation of a complex municipal securities financing. Several commenters to the Concept Proposal suggested that the dealer-specific disclosures, as currently required, cause underwriters to deliver overly voluminous disclosures, which do not differentiate the most concrete and probable material conflicts from those that are merely possible.

From the dealer perspective, SIFMA stated its belief that "issuers in many cases are receiving excessive amounts of disclosures of potential and often remote conflicts that are of little or no practical relevance to issuers or the particular issuances and would benefit from more focused disclosure on conflicts that actually matter to them."[98] BDA concurred, stating its belief that "one of the factors that contributes to the length and complexity of Rule G-17 Disclosures is that underwriters disclose all potential conflicts of interests instead of known, actual conflicts of interests."[99] Similarly, GFOA stated that "the documents are full of non-material potential disclosures where key material disclosures are not highlighted nor flagged, and in many cases buried in the information provided."[100]

Based on these comments, the MSRB proposed an amendment to the 2012 Interpretive Notice in the Request for Comment clarifying that a dealer would have a fair obligation to disclose a potential material conflict of interest if, but only if, it is "reasonably foreseeable" that such a conflict would mature into an actual material conflict of interest during the course of a specific transaction between the issuer and the underwriter. The MSRB believed that the revision would preserve the requirement that issuers continue to receive disclosures regarding potential material conflicts of interest, while narrowing the amount of potential material conflicts to eliminate the need for those disclosures that are highly remote and generally unlikely to ripen into actual material conflicts of interest.[101]

iii. Syndicate Manager Responsibility for the Standard Disclosures and Transaction-Specific Disclosures

Under the 2012 Interpretive Notice, a syndicate manager may make the standard disclosures and transaction-specific disclosures on behalf of other syndicate members. The Concept Proposal requested feedback on how often this option has been utilized and whether such option was effective. The MSRB received four specific comments in response. BDA

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[98] SIFMA Letter I, at p. 7.

[99] BDA Letter I, at p. 2.

[100] GFOA Letter I, at p. 1.

[101] Ultimately, the proposed rule change incorporates a version of this concept, but refined to a "reasonably likely" standard, rather than a "reasonably foreseeable" standard, as further discussed herein. See related discussion under Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Disclosure of Potential Material Conflicts of Interest and notes 161 et. seq. infra.

commented that large, frequent issuers receive so many disclosures because co-managers of a syndicate do not exercise their ability to collectively make the required disclosures in this manner and, further, recommended that the MSRB amend the 2012 Interpretive Notice to provide that "co-managers have no requirement to deliver any Rule G-17 disclosures except for the circumstance where the co-manager has a discrete conflict of interest that materially impacts its engagement with the issuer."[102] The Florida Division of Bond Finance also recognized the issue of duplication when there is a syndicate,[103] and NAMA stated its belief that syndicate members should not be allowed to provide boilerplate disclosures when they are provided by the syndicate manager.[104] Finally, SIFMA noted that dealers do not consistently utilize the option of having a syndicate manager make the standard and transaction-specific disclosures on behalf of other co-managing underwriters in the syndicate, and suggested that this may be the result because it is procedurally easier for a co-managing underwriter to provide these disclosures when delivering their dealer-specific disclosures, or because it may be more difficult or risky from a compliance perspective to rely on the syndicate manager.[105]

Given the stated positions of these commenters that disclosures provided by co-managing underwriters in a syndicate often are duplicative and, therefore, voluminous, the MSRB incorporated a proposed amendment into the Request for Comment requiring, rather than permitting, the standard disclosures and transaction-specific disclosures to be made by a syndicate manager on behalf of the syndicate. The MSRB believed that such a revision would promote market efficiency by reducing the amount of duplicative disclosures that underwriters in a syndicate must deliver and, consequently, the number of duplicative disclosures that an issuer must acknowledge and review.[106]

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[102] BDA Letter I, at pp. 2-3.

[103] Florida Division of Bond Finance Letter (stating "such disclosures are duplicative when multiple underwriters are involved in the same transaction").

[104] NAMA Letter I, at p. 2.

[105] SIFMA Letter I, at p. 14 ("One reason this may be the case is that each syndicate member is obligated to provide its own disclosure of actual or potential conflicts of interest, and it is often procedurally easier to combine role disclosures and conflicts disclosures into a single document. Another reason may be that a particular underwriter has determined not to rely on another firm's actions to meet the underwriter's own regulatory obligations, or only permits such reliance upon confirmation that the syndicate manager has provided the required disclosure and has found that providing its own disclosure may be administratively easier than obtaining confirmation of the syndicate manager's disclosure.").

[106] Ultimately, the proposed rule change incorporates a version of this concept, but with certain refinements, as further discussed herein. See related discussion under Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Syndicate Manager Responsibility for the Standard Disclosures and Transaction-Specific Disclosures and notes 169 et. seq. infra.

iv. Alternative to the Transaction-by-Transaction Delivery of the Disclosures Proposed in the Request for Comment

The 2012 Interpretive Notice currently requires underwriters to provide issuers all of the disclosures on a transaction-by-transaction basis. In response to the Concept Proposal, SIFMA suggested an alternative manner of providing the required disclosures to address the issues of volume and duplication, and to reduce the burdens on both dealers and issuers. Specifically, SIFMA proposed that, when an underwriter engages in one or more negotiated underwritings with a particular issuer, the underwriter would be able to fulfill its disclosure requirements with respect to an offering by reference to, or by reconfirming to the issuer, its disclosures provided in the previous 12 months (e.g., disclosures provided in connection with a prior offering during such period or provided on an annual basis in anticipation of serving as underwriter on offerings during the next 12 months).[107] Under this construct, SIFMA explained that the underwriter would be required to provide any new disclosures or changes to previously disclosed information when they arise. SIFMA recommended that this manner of providing disclosures would be a permissible alternative and that an underwriter could continue to provide its disclosures on a transaction-by-transaction basis. Relatedly, and as previously mentioned, GFOA indicated in its response to the Concept Proposal that providing non-material or boilerplate disclosures annually might improve the disclosure process.[108] NAMA's response to the Concept Proposal stated its belief that it would be difficult to make disclosures on an annual basis without the need for supplementary material throughout the year and, therefore, commented that the easiest manner of disclosure delivery is to leave the relevant portions of the 2012 Interpretive Notice unchanged.

The MSRB was persuaded by SIFMA's suggestion to allow for an alternative to a transaction-by-transaction approach to disclosure, but also thought that NAMA's concern about the need to allow for updates and other supplementary material merited incorporation into any such alternative approach. Accordingly, the MSRB incorporated proposed amendments to the 2012 Interpretive Notice in the Request for Comment that would have permitted standard disclosures to be furnished to an issuer one time and then subsequently referenced and reconfirmed in future offerings, unless the issuer requests that the standard disclosures be made on a transaction-by-transaction basis.[109]

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[107] SIFMA Letter I, at p. 10-11.

[108] GFOA Letter I, at p. 2.

[109] The Request for Comment further clarified that, if the original standard disclosure needed to be amended, the syndicate manager would be permitted to deliver such amended standard disclosures. Similarly, in cases where such syndicate members may, themselves, subsequently be syndicate managers or sole underwriters, the Request for Comment would have allowed them to reference and reconfirm prior disclosures made on their behalf. Ultimately, the proposed rule change does not incorporate a version of this concept for the reasons discussed herein. See related discussion under Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Alternative to the

v. Separate Identification of the Standard Disclosures

The Concept Proposal asked for general feedback on alternative approaches for the delivery of the disclosures required under the 2012 Interpretive Notice. Among other comments discussed herein, GFOA suggested that the MSRB emphasize the current obligation within the 2012 Interpretive Notice requiring underwriters to identify generic or boilerplate disclosures.[110] Similarly, NAMA stated that the MSRB should "ensure that underwriters provide material transaction risks and conflicts disclosures in a manner that is easily identifiable by the issuer (including various members of the issuing entity's internal finance team and governing body),"[111] and the Florida Division of Bond Finance stated that "the disclosures provided to issuers are boilerplate, and may inadvertently bury disclosures of specific conflicts and risks within pages of nonmaterial information and legalese."[112] Accordingly, the MSRB incorporated a requirement in the Request for Comment that would have required clear identification of each category of disclosures and separated them by placing the standard disclosures in an appendix or attachment. The MSRB suggested that such a change would allow issuers to discern and focus on the disclosures most important to them.[113]

vi. Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties

As previously stated, the 2012 Interpretive Notice requires underwriters to provide issuers with the standard, dealer-specific, and transaction-specific disclosures. In its response to the Concept Proposal, SIFMA commented that, in some cases, it appears that other regulators conflate conflicts of interest that might exist on the part of other parties to a financing, including, in particular, conflicts of issuer personnel,[114] and, therefore, those other regulators appear to

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Transaction-by-Transaction Delivery of the Disclosures as Proposed in the Request for Comment and related notes 183 et. seq. infra.

110 GFOA Letter I, at p. 2.

111 NAMA Letter I, at p. 2.

112 Florida Division of Bond Finance Letter.

113 Ultimately, the proposed rule change incorporates a version of this concept, as further discussed herein. See related discussion under Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Separate Identification of the Standard Disclosures and related notes 189 et. seq. infra.

114 See SIFMA Letter I, at p. 7 note 15 ("We also note that, in some cases, it appears that regulators conflate conflicts of interest that might exist on the part of other parties to a financing, including in particular conflicts on the part of issuer personnel, with conflicts on the part of the underwriter, and therefore regulators appear to expect that the conflicts disclosure under the [2012 Interpretive Notice] should include these conflicts of other parties. SIFMA and its

expect that the conflicts disclosure under the 2012 Interpretive Notice should include these conflicts of interest of other parties. SIFMA requested clarification on this point.[115] In response, the MSRB incorporated a proposed amendment in the Request for Comment that explicitly stated that "underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction."[116]

vii. Clarity of Disclosures

The 2012 Interpretive Notice requires that disclosures be made in a manner designed to make clear to an issuer official the subject matter of such disclosures and their implications for the issuer. In their comments to the Concept Proposal, GFOA encouraged the MSRB to require the disclosures be provided in a "plain English" manner,[117] and NAMA indicated that the disclosures should be presented in a straight-forward manner.[118] Believing that the standard for the manner of disclosures currently in the 2012 Interpretive Notice are consistent and substantially similar to GFOA's proposed "plain English" standard, the MSRB proposed amendments to the 2012 Interpretive Notice in the Request for Comment that explicitly clarified that the disclosures be drafted in plain English.[119]

viii. Disclosures Regarding Third-Party Marketing Arrangements

SIFMA's comment letter on the Concept Proposal encouraged the MSRB to eliminate the dealer-specific disclosures regarding third-party marketing arrangements, stating that "we do not believe that the conflicts disclosure requirement under the 2012 Guidance is the appropriate

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members request that the MSRB clarify that the [2012 Interpretive Notice] does not require the underwriter to disclose conflicts on the part of parties other than the underwriter.").

115 Id.

116 Ultimately, the proposed rule change incorporates a version of this concept, but with certain refinements, as further discussed herein. See related discussion under Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties and related notes 194 et. seq. infra.

117 GFOA Letter I, at p. 2.

118 NAMA Letter I, at p. 2 (stating, ". . . information should be presented in a straight forward manner, with other general disclosures presented separately from the statements and discussions of material transaction risks and conflicts disclosures (including [the] statement that the underwriter does not have a fiduciary duty to the issuer)").

119 See related discussion under Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Clarity of Disclosures and related notes 196 et. seq. infra.

mechanism for ensuring that issuers understand the participation of such third-parties."[120] SIFMA argued that these disclosure requirements should be eliminated because "the use of retail distribution agreements is not an activity involving suspicious payments to a third party and does not increase costs to issuers; rather, it simply passes on a discounted rate to a motivated dealer, which is commonly available to dealers after the bonds have become free to trade in any event, notwithstanding any agreement."[121]

The MSRB chose not to incorporate this amendment into the Request for Comment and did not incorporate any such amendment into the proposed rule change. While the MSRB agrees with SIFMA's point that third-party marketing agreements are not inherently "suspicious" activity, the MSRB believes that such agreements could create material conflicts of interest and that there may be circumstances in which an issuer would not or could not have certain dealers participate in the underwriting in such capacity. For example, an issuer may be subject to jurisdictional requirements that could dictate the participation or non-participation of certain dealers, or an issuer may have a preference to not involve certain dealers in their offering due to reputational concerns. The MSRB believes that it remains important for underwriters to disclose this information to issuers and, accordingly, did not propose any such changes in the Request for Comment and is not proposing any such change to this aspect of the 2012 Interpretive Notice in the proposed rule change.[122]

ix. Disclosures Regarding Credit Default Swaps

The 2012 Interpretive Notice specifically references an underwriter's engagement in certain credit default swap activities as a potential material conflict of interest that would require disclosure to the issuer. Similar to its request that the MSRB eliminate the disclosure requirements regarding third-party marketing arrangements, SIFMA also requested that the MSRB eliminate this specific reference to credit default swaps. SIFMA noted that dealer use of, and participation in, credit default swaps has significantly decreased since the financial crisis and the adoption of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and, as a result, in SIFMA's view, the reference is no longer as relevant.[123] The MSRB believes that, even if credit default swaps are less prevalent in the municipal securities market, the possibility for underwriters to issue or purchase credit default swaps for which the reference is the issuer remains. The MSRB believes that it remains important for underwriters to disclose this information to issuers and, accordingly, did not propose any such changes in the Request for

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[120] SIFMA Letter I, at p. 8.

[121] Id.

[122] This concept is not discussed again under the Summary of Comments Received in Response to the Request for Comment. The MSRB did not receive any further significant comments on this concept subsequent to the Request for Comment other than SIFMA's reiteration that these disclosures should be eliminated. SIFMA Letter II, at pp. 4-5, note 12.

[123] SIFMA Letter I, pp. 8-9.

Comment and is not proposing any such change to this aspect of the 2012 Interpretive Notice in the proposed rule change.[124]

C. E-mail Read Receipt as Issuer Acknowledgement

The 2012 Interpretive Notice requires underwriters to attempt to receive written acknowledgement of receipt of the disclosures by an official of the issuer (other than by automatic e-mail receipt). 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 may proceed with the engagement after documenting with specificity why it was unable to obtain such written acknowledgement during the course of the engagement.

In its response to the Concept Proposal, SIFMA commented that this requirement creates a significant burden for underwriters with no corresponding benefit to issuers.[125] SIFMA encouraged the MSRB to eliminate the acknowledgement requirement.[126] To address this issue, SIFMA recommended that receipt of an e-mail return receipt should be conclusive proof of delivery if other transaction documentation has also been provided to the same e-mail address.[127] GFOA did not comment on this issue of changing the form or type of acknowledgement, but did indicate that frequent issuers are burdened by the acknowledgement requirement in that they must “tackle and acknowledge the paperwork” many times.[128] NAMA stated its belief that the acknowledgement requirement should remain in place, but provide greater flexibility to allow “issuers to execute acknowledgements as they see fit.”[129]

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[124] Given that the MSRB did not incorporate this particular concept into the proposed rule change, this concept is not discussed again under the Summary of Comments Received in Response to the Request for Comment. The MSRB did not receive any further significant comments on this concept subsequent to the Request for Comment other than SIFMA’s reiteration that these disclosures should be eliminated. SIFMA Letter II, at pp. 4-5, note 12.

[125] SIFMA Letter I, at p. 13 (stating, “. . . we believe the requirement for the underwriter to attempt to receive an issuer acknowledgment and the efforts to document cases where the issuer does not provide such acknowledgment create a significant degree of non-productive work on the part of underwriter personnel and provide no value to the issuer, but often produce unwanted follow-up inquiries from the underwriter”).

[126] Id.

[127] Id.

[128] GFOA Letter I, at p. 2. Relatedly, GFOA’s comments to the Concept Proposal also stated that certain “boilerplate disclosures” could be provided on an annual basis for frequent issuers, indicating that a more flexible approach to the acknowledgement of at least boilerplate disclosures could alleviate burdens on such issuers. Id.

[129] NAMA Letter I, at p. 2.

Based on such comments, the MSRB proposed in the Request for Comment to retain the acknowledgement requirement, but allow for e-mail delivery of the disclosures to the official of the issuer identified as the primary contact for the issuer and provide that an automatic e-mail receipt confirming electronic delivery of the applicable disclosures may be a means to satisfy the acknowledgement requirement.[130]

D. Clarification of the Meaning of "Recommendation"

Under the 2012 Interpretive Notice, whether an underwriter must make the transaction-specific disclosures, as well as the type of transaction-specific disclosures it must deliver, depends on whether the underwriter recommends certain financing structures to the issuer. In its response to the Concept Proposal, SIFMA requested clarification as to whether the MSRB's guidance on the meaning of "recommendation" under Rule G-42, on duties of non-solicitor municipal advisors, describing a two-prong analysis for determining whether advice is a recommendation for purposes of that rule (i.e., a G-42 Recommendation) applies when determining whether an underwriter has recommended a complex municipal securities financing.[131] More specifically, the relevant guidance under Rule G-42 provides the following two-prong analysis for a G-42 Recommendation:

> First, the [municipal advisor's] advice must exhibit a call to action to proceed with a municipal financial product or an issuance of municipal securities and second, the [municipal advisor's] advice must be specific as to what municipal financial product or issuance of municipal securities the municipal advisor is advising the [municipal entity client or obligated person client] to proceed with.[132]

Persuaded by SIFMA's request for clarification on this point, the MSRB proposed an amendment to the 2012 Interpretive Notice in the Request for Comment clarifying that "[f]or purposes of determining when an underwriter recommends a financing structure, the MSRB's

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130 The proposed rule change incorporates a version of this concept, but with certain refinements that would distinguish e-mail read receipts – which would be permitted to serve as acknowledgement under the Revised Interpretive Notice – from e-mail delivery receipts – which would not be permitted to serve as acknowledgement under the Revised Interpretive Notice, but may be used to evidence the timing of such disclosures – all as further discussed herein. See related discussion under Summary of Comments Received in Response to the Request for Comment – E-mail Read Receipt as Issuer Acknowledgement and related notes 213 et. seq. infra.

131 SIFMA Letter I, at p. 9.

132 G-42 FAQs, at p. 2 (note 39 supra).

guidance on the meaning of 'recommendation' under Rule G-42, on duties of non-solicitor municipal advisors is applicable" and seeking further input on this issue.[133]

E. Underwriter Discouragement of Use of Municipal Advisor; Addition of a New Standard Disclosure Regarding the Engagement of Municipal Advisors

The 2012 Interpretive Notice currently states that "[t]he underwriter must not recommend that the issuer not retain a municipal advisor." In their responses to the Concept Proposal, both GFOA and NAMA commented that this language should be strengthened by requiring the underwriter to affirmatively state that the issuer may hire a municipal advisor and by stating that the underwriter take no action to discourage or deter the use of a municipal advisor. More specifically, GFOA's comment asked the MSRB to amend the 2012 Interpretive Notice to require underwriters to "affirmatively state" both that "issuers may choose to hire a municipal advisor to represent their interests in a transaction" and also that underwriters are "to take no actions to discourage issuers from engaging a municipal advisor."[134] Similarly, NAMA asked that the MSRB amend the 2012 Interpretive Notice to include a statement that: "[t]he underwriter may not make direct or indirect statements to the issuer that the issuer not hire a municipal advisor or otherwise make statements to deter the use of a municipal advisor or blur the distinction between the underwriting and municipal advisor functions and/or duties."[135]

The MSRB attempted to address NAMA's and GFOA's comments to the Concept Proposal by incorporating existing language from the Implementation Guidance, as described above, which states that "an underwriter may not discourage an issuer from using a municipal advisor or otherwise imply that the hiring of a municipal advisor would be redundant because the underwriter can provide the same services that a municipal advisor would." The MSRB believed that, as a practical matter, this would address the concerns of NAMA and GFOA.[136]

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[133] Ultimately, the proposed rule change does define the term "recommendation," but not in relation to the interpretive guidance issued under Rule G-42 as first proposed in the Concept Proposal, as further described herein. See Summary of Comments Received in Response to the Request for Comment – Guidance Regarding Meaning of "Recommendation" and related notes 219 et. seq. infra.

[134] GFOA Letter I, at p. 3.

[135] NAMA Letter I, at p. 3.

[136] Ultimately, the proposed rule change does incorporate these concepts, but also incorporates a new standard disclosure regarding an issuer's choice to engage a municipal advisor, as further discussed herein. See related discussion under Summary of Comments Received in Response to the Request for Comment – Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor and related notes 201 et. seq. infra.

F. Disclosures to Conduit Borrowers

As discussed above, the 2012 Interpretive Notice specifies underwriters' fair-dealing obligations to issuers, but does not apply specific requirements to underwriters dealing with conduit borrowers. At the same time, the Implementation Guidance expressly acknowledges that underwriters must deal fairly with all persons, including conduit borrowers, and that a dealer's fair-dealing obligations to a conduit borrower depends on the specifics of the dealer's relationship with the borrower and other facts and circumstances specific to the engagement.

The Concept Proposal requested feedback on whether the MSRB should extend the requirements enumerated in the 2012 Interpretive Notice to underwriters' fair dealing obligations with conduit borrowers. Providing this feedback, GFOA stated in its comment letter on the Concept Proposal its belief that the MSRB should make clear that the information in the disclosures would best be utilized if it was sent to the party making decisions about the issuance and liable for the debt, which it indicated is the conduit borrower in most cases.[137] SIFMA indicated in its response to the Concept Proposal that it is common, but not universal, for underwriters to provide a conduit borrower with a copy of the disclosures provided to the conduit issuer.[138] SIFMA, otherwise, did not comment on whether that common practice should be required under Rule G-17.

Although it may be common practice by some underwriters, the MSRB, at this time, does not believe the 2012 Guidance should be amended to extend the obligations contained therein to underwriters' dealings with conduit borrowers. The MSRB understands that the level of engagement between underwriters and conduit borrowers is not consistent across the market, such that, in some circumstances, the underwriter(s) works directly with the conduit borrower to build the deal team and structure a financing prior to enlisting a conduit issuer to facilitate the transaction, while, in others, the underwriter(s) are engaged by the conduit issuer and subsequently connected to a conduit borrower seeking financing. The MSRB declined to address these issues in the Request for Comment – and continues to decline to incorporate such obligations into the proposed rule change – because the issues presented by the relationship between underwriters and conduit borrowers are unique enough to merit their own full consideration apart from this retrospective review.[139] Accordingly, the MSRB may consider this issue of the fair dealing obligations underwriters owe to conduit borrowers at a later date.

G. Tiered Disclosure Requirements Based on Issuer Characteristics

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[137] GFOA Letter I, at p. 2.

[138] SIFMA Letter I, at p. 16.

[139] This concept is not discussed again under the Summary of Comments Received in Response to the Request for Comment. The MSRB did receive one comment from SIFMA on this concept in response to the Request for Comment, which stated SIFMA's belief that the Revised Interpretive Notice should not require disclosures to conduit borrowers. SIFMA Letter II, at pp. 5-6.

The 2012 Interpretive Notice applies to underwriters in their dealings with all issuers in the same manner. The Concept Proposal posed the question whether there should be different disclosure obligations for different classes of issuers. In response, the Florida Division of Bond Finance stated that a "one size fits all" approach is not effective and that issuers could benefit from underwriters tailoring such disclosures based on issuer size and sophistication.[140] Similarly, SIFMA noted in its response to the Concept Proposal that the size of the issuer may have some bearing on issuer sophistication, but that it is most appropriate to focus on the knowledge, expertise, and experience of the issuer personnel, as well as the issuer's engagement of the advice of an independent registered municipal advisor ("IRMA").[141] Relatedly, BDA commented that the disclosure obligations of the 2012 Interpretive Notice should not apply if an issuer has an IRMA with respect to the same aspects of an issuance of municipal securities.[142]

BDA's response to the Concept Proposal further stated that its belief that there should not be different obligations for different types of issuers for two reasons. First, because even the personnel of large issuers that frequently issue municipal securities "change regularly" and so continue to need the disclosures; and, second, because the uniform requirement allows for a "consistent, standard process for dealers."[143] In their responses to the Concept Proposal, NAMA indicated that it does not support the varying of underwriters' responsibilities for different issuers,[144] and GFOA stated its belief that the wide variety of issuers would make it nearly impossible to develop ways to modify the 2012 Guidance for some issuers but not others.[145]

The MSRB does not believe there is 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. In light of these considerations, the MSRB did not propose any classification

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[140] Florida Division of Bond Finance Letter.

[141] SIFMA Letter I, at p. 12 (In terms of factoring in the engagement of an IRMA, SIFMA stated that, ". . . if the issuer is relying on the advice of a municipal advisor that meets the independent registered municipal advisor exemption . . . and the underwriter invokes the IRMA exemption to the SEC's registration rule for municipal advisors," the underwriter should be able to factor this into its analysis regarding the appropriate level of disclosure.).

[142] BDA Letter I, at p. 2.

[143] BDA letter I, at p. 1.

[144] NAMA Letter I, at pp. 1-2.

[145] GFOA Letter I, at p. 2.

of, and varied disclosure requirements for, issuers in the Request for Comment, nor is it proposing to do so in the proposed rule change.[146]

On the more specific topic of SIFMA's and BDA's comments regarding the IRMA exemption, the MSRB believes that the issuer's retention of an IRMA and the underwriter's corresponding invocation of the IRMA exemption should not relieve the underwriter from the obligations to provide disclosures. The MSRB believes that many of the disclosures are so fundamental that they should not be optional and that issuers should always have the benefit of receiving them. For example, even if an IRMA assists an issuer in understanding the role and responsibilities of the underwriter, the MSRB believes that an underwriter should still be required to make the representations regarding its role in the transaction. For transaction-specific disclosures, the MSRB does not believe that an issuer's retention of an IRMA should obviate the need to provide transaction-specific disclosure – particularly, disclosures regarding complex municipal securities financings – because the transaction-specific disclosures would continue to serve the crucial purpose of highlighting important risks for an issuer to discuss with its municipal advisor. However, in response to SIFMA's and BDA's comments, the Request for Comment incorporated the concepts that the level of transaction-specific disclosures can vary over time and, among other factors, an underwriter may consider the issuer's retention of an IRMA when assessing the issuer's level of knowledge and experience with a given type of transaction.[147]

H. Issuer Opt-Out

Under the 2012 Interpretive Notice, all issuers receive the disclosures required to be provided by underwriters and they may not opt out. In response to a specific inquiry in the Concept Proposal, GFOA opposed the concept of an issuer opt-out, while SIFMA argued that issuers should have the choice to not receive the standard disclosures in a written election based on their knowledge, expertise, experience, and financial ability, upon which underwriters should be permitted to conclusively rely. The MSRB believes that it is important for issuers to receive or have access to the disclosures for all of their negotiated transactions and that it has addressed many of commenters concerns regarding the need for an issuer opt-out through other proposed amendments to the 2012 Interpretive Notice. Accordingly, the MSRB did not incorporate such an opt-out concept into the Request for Comment, nor is it proposing to do so in the proposed rule change.[148]

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[146] This concept is not discussed again under the Summary of Comments Received in Response to the Request for Comment. The MSRB did receive a comment on this concept in response to the Request for Comment. SIFMA reiterated that tiered disclosure requirements may be beneficial issuers and underwriters. SIFMA Letter II, at p. 9.

[147] See related discussion under Summary of Comments Received in Response to the Request for Comment – Tiered Disclosure Requirements Based on Issuer Characteristics and related note 229 infra.

[148] See related discussion under Summary of Comments Received in Response to the Request for Comment – Issuer Opt-Out and related note 231 infra.

I. Evaluating Issuer Sophistication and the Delivery of the Transaction-Specific Disclosures

The 2012 Interpretive Notice provides that, absent unusual circumstances or features, the typical fixed rate offering may be presumed to be well understood by issuer personnel, which may obviate the need for an underwriter to provide a disclosure on the material aspects of a fixed rate financing when the underwriter recommends such a structure in connection with a negotiated offering. Conversely, the 2012 Interpretive Notice allows for a variance in the level of disclosure required for complex municipal securities financings based on the reasonable belief of the underwriter regarding: the issuer's knowledge or experience with the proposed financing structure or similar structures; the issuer's capability of evaluating the risks of the recommended financing; and the issuer's financial ability to bear the risks of the recommended financing.

SIFMA's comment letter on the Concept Proposal stated its belief that all transaction-specific disclosures, for negotiated offerings of fixed rate and complex municipal securities financings, should be triggered by the same standard, which would create the possibility that an underwriter need not provide disclosures about the material aspects of a complex municipal securities financing if it reasonably believes that the issuer has sufficient knowledge or experience with the proposed financing structure. The MSRB acknowledges that the rationale espoused by SIFMA is conceptually consistent with the 2012 Interpretive Notice and that it is possible for certain issuers to develop a level of knowledge and experience with certain complex municipal securities financings that would diminish the need for the disclosures related to the structure of such financings. However, the MSRB believes that the inherent nature of such unique and atypical financings requires a higher standard for the protection of issuers. Specifically, the MSRB believes that the risk of an underwriter inaccurately determining that such transaction-specific disclosures are not necessary is too great. The possible harms of an issuer's inability to understand the structure of a complex municipal securities financing and corresponding risks are very difficult to remedy after the transaction. Accordingly, the MSRB did not incorporate such a concept into the Request for Comment, nor is it proposing to do so in the proposed rule change.[149]

J. EMMA as a Tool for Disclosures

The 2012 Interpretive Notice requires underwriters to deliver in writing the required disclosures. In response to a question in the Concept Proposal on whether EMMA could or should be used as a tool to improve the utility of disclosures and the process for providing them to issuers, there was agreement among the commenters that responded to this question that EMMA was not an appropriate vehicle for the disclosures. Specifically, GFOA indicated in its response to the Concept Proposal that the use of EMMA could cause underwriters to provide even more boilerplate disclosures and that underwriters may be concerned about investor use of

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149 See related discussion under Summary of Comments Received in Response to the Request for Comment – Tiered Disclosure Requirements Based on Issuer Characteristics and related note 229 infra.

the information.[150] In their responses to the Concept Proposal, SIFMA stated that using EMMA would not be appropriate in light of the information disclosed,[151] and NAMA stated that it would undermine the purpose of the 2012 Interpretive Notice by requiring issuers to have to seek out the disclosures instead of receiving them directly.[152] Accordingly, the MSRB did not incorporate such a concept into the Request for Comment, nor is it proposing to do so in the proposed rule change.[153]

II. Summary of Comments Received in Response to the Request for Comment

The MSRB received five comment letters in response to the Request for Comment.[154] Each of the commenters generally indicated their support of the retrospective review of the 2012 Interpretive Notice as outlined in the Request for Comment and each had specific suggestions on how the proposed amendments to the 2012 Interpretive Notice incorporated into the Request for Comment could be improved, as discussed further below.

A. Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into a Single Interpretive Notice

In response to the Request for Comment, the MSRB received comments from GFOA, NAMA, BDA and SIFMA on the MSRB's proposal of amending the 2012 Interpretive Notice to consolidate the Implementation Guidance and the FAQs into a single publication. Commenters were generally supportive of the inclusion of the Implementation and the FAQs, but had specific suggestions in supplementing, revising, and/or deleting the proposed amendments, which are discussed below.

i. Inclusion of Language Regarding Underwriters' Fair Dealing Obligations to Other Parties in a Municipal Securities Financing

As previously discussed, the Request for Comment incorporated existing language from the Implementation Guidance that:

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150 GFOA Letter I, at p. 3.

151 SIFMA Letter I, at pp. 8, 19-20.

152 NAMA Letter I, at p. 2.

153 This concept is not discussed again under the Summary of Comments Received in Response to the Request for Comment. The MSRB did receive a specific comment on this concept from NAMA, which was supportive of not using EMMA as a means to satisfy the G-17 requirement. NAMA Letter II, at p. 2.

154 See note 10 supra.

> The fair practice duties outlined in this notice are those duties that a dealer owes to a municipal entity when the dealer underwrites its 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.

BDA's response to the Request for Comment stated its belief that this this inclusion is "unnecessary" and will make compliance with the proposed rule change "burdensome."[155] The MSRB believes that the proposed change merely reiterates Rule G-17's general principle of fair dealing in relation to a dealer's municipal securities activities and so is a useful and necessary reminder to dealers of their obligations to other parties participating in a given municipal securities transaction. Moreover, given that this language is taken from the existing Implementation Guidance, the MSRB believes that it should not create a new compliance burden for underwriters, as it should be incorporated into existing policies, procedures, and training. Accordingly, the MSRB incorporated this language into the proposed rule change with a slight modification to clarify that a dealer's fair dealing obligation under Rule G-17 extends only as far as its municipal securities activities. In relevant part, the Revised Interpretive Notice would read:

> 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.

ii. Inclusion of Language Regarding a Reasonable Basis for Underwriter Representations

The Request for Comment incorporated existing language from the Implementation Guidance stating:

> 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. The less certain an underwriter is of the validity of underlying assumptions, the more cautious it should be in using such assumptions and the more important it will be that the underwriter disclose to the issuer the degree and nature of any uncertainties arising from the potential for such assumptions not being valid. 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

[155] BDA Letter II, at p. 1.

> 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.

BDA objected to the inclusion of this language in its response to the Request for Comment as redundant, in that the language is "already covered in the existing language" of the 2012 Interpretive Notice.[156] The MSRB understands BDA's comment to suggest that, because the 2012 Interpretive Notice already addresses the requirement for an underwriter to have a reasonable basis for its representations, the Implementation Guidance language is a superfluous addition. The MSRB believes that this language from the Implementation Guidance generally provides an important illustrative gloss on Rule G-17's general principle of fair dealing in relation to a dealer's specific obligations regarding certain representations and the assumptions upon which such representations are based. Moreover, given that this language is taken from the existing Implementation Guidance, the MSRB believes that it should not create a new compliance burden for underwriters, as it should be incorporated into existing policies, procedures, and training.

Accordingly, the MSRB incorporated this language into the proposed rule change as generally proposed in the Request for Comment with one minor exception. The MSRB omitted the statement that, "[t]he less certain an underwriter is of the validity of underlying assumptions, the more cautious it should be in using such assumptions and the more important it will be that the underwriter disclose to the issuer the degree and nature of any uncertainties arising from the potential for such assumptions not being valid." The MSRB agrees with BDA that this language is redundant and potentially confusing. In relevant part, the Revised Interpretive Notice would read as follows:

> 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.

iii. Reincorporation of the "No Hair-Trigger" Language from the Implementation Guidance

As described above, the Request for Comment did not incorporate the existing language from the Implementation Guidance providing that, ". . . the timeframes set out in the [2012 Interpretive Notice] are not intended to establish hair-trigger tripwires resulting in technical rule

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156 BDA Letter II, at p. 2.

violations so long as underwriters act in substantial compliance with such timeframes and have met the key objectives for providing such disclosures under the [2012 Interpretive Notice]." SIFMA "strongly objected" to the omission of this language, stating that the "language has been an important reassurance to our members who have acted in substantial compliance with prescribed timeframes despite transactions that have proceeded along unforeseen timelines and pathways."[157] SIFMA argued that this statement in the Implementation Guidance has benefited dealers and regulators alike, by preserving valuable time and resources, and, more importantly, that it should be retained "as-is" unless the MSRB "can point to prevalent abuses."[158] The other commenters to the Request for Comment did not address the omission of this language. The MSRB is persuaded by SIFMA's concerns and believes there is a benefit to preserving aspects of the existing language from the Implementation Guidance, as it should be incorporated into existing policies, procedures, and training.

Accordingly, the proposed rule change would incorporate this concept from the Implementation Guidance into the Revised Interpretive Notice with certain clarifying and conforming edits to the language in order to promote consistency with the other amendments and to emphasize the facts and circumstances nature of the scope of an underwriter's fair dealing obligation under the Revised Interpretive Notice. In relevant part, the Revised Interpretive Notice would read as follows:

> 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

157 SIFMA Letter II, at p. 5.

158 Id.

fair-dealing obligations under Rule G-17, absent other mitigating facts and circumstances.

B. Amending the Nature, Timing, and Manner of Disclosures

Each of the five commenters on the Request for Comment offered improvements to the nature, timing, and manner of disclosures required under the 2012 Interpretive Notice. At a more general level, commenters continued to share the view that the municipal securities market would benefit from reducing the volume and "boilerplate" nature of the disclosures required under the 2012 Interpretive Notice as generally proposed in the Request for Comment.

i. Disclosures Concerning the Contingent Nature of Underwriting Compensation

As described above, the Request for Comment proposed an amendment to the 2012 Interpretive Notice that would require underwriters to deliver disclosures concerning the contingent nature of their underwriting compensation in their standard disclosures.[159] To the degree that an underwriter's compensation on a particular transaction deviates from the structure described in the standard disclosures, under the language of the Request for Comment, the dealer would need to indicate in its transaction-specific disclosures that the information included in the standard disclosure on underwriter compensation does not apply and explain the alternative compensation structure as part of the transaction-specific disclosures, to the extent that such alternative compensation structure also presents a conflict of interest.

In its response to the Request for Comment, SIFMA indicated its belief that the proposed changes in the Request for Comment are contrary to the goals of the retrospective review, because "it would invariably result in more standardized and generic disclosures that may district from more specific ones."[160] SIFMA stated its preference to retain the current method of providing the disclosures. The MSRB did not receive any other comments on this proposed change and is persuaded by SIFMA's concerns. The MSRB believes that retaining the existing requirements regarding the disclosures of underwriter's compensation would be consistent with the goals of the retrospective review and not harm current municipal entity issuer protections. Accordingly, the proposed rule change does not adopt the Request for Comment's approach to the disclosure of underwriter compensation and proposes to retain the existing requirements and structure under the 2012 Interpretive Notice.

ii. Disclosure of Potential Material Conflicts of Interest

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[159] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Disclosures Concerning the Contingent Nature of Underwriting Compensation and related notes 97 et. seq. supra.

[160] Id., at p. 8.

As previously described, the Request for Comment proposed certain revisions to the 2012 Interpretive Notice clarifying that a potential material conflict of interest must be disclosed if, but only if, it is "reasonably foreseeable" that it will mature into an actual material conflict of interest during the course of that specific transaction between the issuer and the underwriter.[161] The MSRB received several comments to the Request for Comment on this proposed change. GFOA and the City of San Diego supported the revision, while SIFMA continued to advocate for the elimination of this category of disclosure altogether. More specifically, GFOA stated that this "reasonably foreseeable" standard should be used, because continuing to require the disclosure of all potential material conflicts of interest "could diminish the meaningful inclusions that issuers need to know."[162] The City of San Diego indicated that the reasonably foreseeable standard provided a reasonable "limit" to what constitutes a potential material conflict of interest and indicated that the MSRB should not set a standard with "a greater likelihood."[163]

On the other hand, SIFMA reiterated its concern that the disclosure requirement, ". . . be limited to actual, and not merely potential, material conflicts of interest, or in the very least, a highly likely standard."[164] SIFMA stated that continuing to require the disclosure of potential material conflicts of interest would be "unnecessary, distracting, and does not advance the goal of the retrospective review" and suggested that the proposed reasonably foreseeable standard "would be exceedingly difficult to implement and monitor from a compliance standpoint."[165] SIFMA's response to the Request for Comment further explained that, because any potential material conflict of interest that ripens into an actual conflict prior to the execution of the bond purchase agreement must be disclosed under the 2012 Interpretive Notice, the advance disclosure of such potential material conflicts of interest are unnecessary and distracting. Moreover, SIFMA stated that the consequence of misjudging whether and when a potential conflict of interest becomes material is too great, and, consequently, the reasonably foreseeable standard proposed in the Request for Comment would not reduce the volume of disclosures provided to issuers, as underwriters "would be inclined," out of an abundance of caution or otherwise, to deliver the same level of disclosure as they currently deliver under the 2012 Interpretive Notice. [166] SIFMA encouraged the MSRB to either eliminate the category of potential material conflicts altogether

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[161] See related discussion under Summary of Comments Received in Response to the Concept Release – Amending the Nature, Timing, and Manner of Disclosures – Disclosure of Potential Material Conflicts of Interest and related notes 98 et. seq. infra.

[162] GFOA Letter II, at p. 2.

[163] City of San Diego Letter.

[164] SIFMA Letter II, at p. 4.

[165] Id., pp. 4-5.

[166] Id.

or, in the alternative, adopt a "highly likely" standard for those potential material conflicts of interest that must be disclosed.[167]

As indicated in the Request for Comment, 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.[168] 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 believes 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.

At the same time, the MSRB understands from issuers and dealers that the disclosures required under the 2012 Interpretive Notice can result in a long list of generic boilerplate disclosures with little actionable information, and which may distract an issuer's attention from conflicts of interest that are more concrete and specific to the transaction's participants, facts and circumstances. In this regard, the MSRB is persuaded by SIFMA's concerns that the Request for Comment's proposed "reasonably foreseeable" standard could be difficult to implement from a compliance perspective and so may not serve the goal of reducing boilerplate disclosure regarding potential material conflicts of interest and facilitating the more focused disclosure of the most likely and immediate conflicts.

Accordingly, the proposed rule change incorporates a "reasonably likely" standard to define what potential material conflicts of interest must be disclosed in advance of ripening into

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167 Id.

168 For example, the MSRB notes the requirements to disclose conflicts of interest – including potential material conflicts of interest – under the 2012 Interpretive Notice may serve as an important tool for the issuer and underwriter to discuss and address other disclosure obligations that may arise in the course of a primary offering of municipal securities. See, e.g., Exchange Act Release No. 34-33741, "Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others" (Mar. 9, 1994) (the "SEC's 1994 Interpretive Release"), 59 FR 12748, at p. 12751 (March 17, 1994) (stating that ". . . revelations about practices in the municipal securities offering process have highlighted the potential materiality of information concerning financial and business relationships, arrangements or practices, including political contributions, that could influence municipal securities offerings. . . . For example, such information could indicate the existence of actual or potential conflicts of interest, breach of duty, or less than arm's length transactions. Similarly, these matters may reflect upon the qualifications, level of diligence, and disinterestedness of financial advisors, underwriters, experts and other participants in an offering. Failure to disclose material information concerning such relationships, arrangements or practices may render misleading statements made in connection with the process, including statements in the official statement about the use of proceeds, underwriter's compensation and other expenses of the offering.").

an actual material conflict of interest during the course of a transaction. The MSRB believes that a reasonably likely standard appropriately balances competing policy interests, including by ensuring that issuers continue to benefit from the disclosure of potential material conflicts of interest, while at the same time attempting to reduce the volume of disclosures received by issuers and focusing the content of the disclosures to those conflicts that are more concrete and probable.

iii. Syndicate Manager Responsibility for the Standard Disclosures and Transaction-Specific Disclosures

As described above, the Request for Comment proposed an amendment to the 2012 Interpretive Notice that would require, rather than permit, the standard disclosures and transaction-specific disclosures to be made by a syndicate manager "on behalf of" the other syndicate members.[169] The MSRB received specific comments from the City of San Diego, SIFMA, and BDA on this proposed change. As discussed below, the City of Sand Diego questioned the proposed change and encouraged the MSRB to retain a version of the existing requirements under the 2012 Interpretive Notice,[170] while BDA and SIFMA supported the proposed change, but encouraged the MSRB to adopt clarifying amendments to the concept. The following provides a separate discussion regarding the MSRB's rationale for: assigning to the syndicate manager's the sole obligation to deliver the standard disclosures and transaction-specific disclosures where a syndicate is formed; continuing to require co-managing underwriters in the syndicate to disclose in writing any applicable dealer-specific conflicts of interest; and the elimination of the Request for Comment's "on behalf of" concept related to the syndicate manager's obligation to deliver the standard disclosures and transaction-specific disclosures.

1. Amending the 2012 Interpretive Notice to Require the Syndicate Manager to Make the Standard Disclosures and Transaction-Specific Disclosures

The City of San Diego objected to the inclusion of the proposed change and encouraged the MSRB to adopt a standard that would ensure each syndicate member is "responsible for delivering the standard and transaction specific disclosures" and "required to obtain acknowledgement of receipt from the issuer."[171] The City of San Diego reasoned that the burden placed on issuers of receiving multiple disclosures is manageable, even for frequent issuers.

As outlined above, the MSRB remains persuaded by the comments to the Concept Proposal from BDA, NAMA, and the Florida Division of Bond Finance that requiring, rather

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[169] <u>See</u> related discussion under <u>Summary of Comments Received in Response to the Concept Proposal– Amending the Nature, Timing, and Manner of Disclosures</u> – <u>Syndicate Manager Responsibility for the Standard Disclosures and Transaction-Specific Disclosures</u> and notes 102 <u>et. seq. supra</u>.

[170] City of San Diego Letter, at p 1.

[171] <u>Id</u>.

than merely allowing, the syndicate manager to deliver the standard disclosures and transaction-specific disclosures is an efficient way to reduce the duplication of disclosures received by issuers where a syndicate is formed. The MSRB understands that in many instances syndicate members may be reluctant to rely on the syndicate manager's delivery of the disclosures, as currently permitted by the 2012 Interpretive Guidance, because confirming delivery of its disclosures provides greater regulatory certainty that it has met its fair dealing obligations to the issuer. Additionally, the MSRB continues to be persuaded by GFOA's comment on the Concept Proposal that "issuers who may be frequently in the market have to tackle and acknowledge the paperwork many times."[172] Accordingly, the proposed rule change incorporates the concept of only obligating the syndicate manager to provide the standard disclosures and transaction-specific disclosures where a syndicate is formed.

2. Declining to Amend the 2012 Interpretive Notice to Require Only the Syndicate Manager to Provide the Dealer-Specific Disclosures

In contrast to the City of San Diego's view on this topic, BDA's comment on the Request for Comment encouraged the MSRB to go even further in reducing an underwriter's disclosure obligations by only requiring the syndicate manager to have an obligation to deliver the dealer-specific disclosures, and eliminating the obligation that co-managers must deliver their individual dealer-specific disclosures. BDA cautioned the MSRB that continuing to require dealers who serve as co-managers to provide the dealer-specific conflicts of interest result in "roughly the same number of disclosures to issuers as currently is the case."[173] BDA reasoned that, "[a]s a practical matter, conflicts of interest tend to be specific to dealers in that each dealer has specific arrangements that create the conflict," yet the disclosures of only the syndicate manager's dealer-specific conflicts of interest are sufficient, because "the role of co-manager does not entail the kind of active discussions with an issuer to merit disclosure by all co-managers of their specific conflicts."[174]

The MSRB understands BDA's concern that continuing to require co-managing underwriters to deliver their dealer-specific disclosures may not advance the goal of seeking to reduce the volume of disclosures to issuers.[175] The MSRB, however, continues to be persuaded by comments to the Concept Proposal and the Request for Comment that non-boilerplate

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172 GFOA Letter I, at p. 1.

173 BDA Letter II, at p. 3.

174 Id.

175 The MSRB also notes that pursuant to the existing requirements under the 2012 Interpretive Notice and the FAQs, a co-managing underwriter would not have an obligation to deliver an affirmative statement in writing to the issuer indicating that no such dealer-specific conflicts exist, although a co-managing underwriter is not prohibited from doing so. The MSRB believes that one benefit of not requiring a co-managing underwriter to deliver such a disclosure is that issuers should be able to focus on the dealer-specific disclosures it does receive.

disclosures regarding specific material conflicts of interest must be received by an issuer from each underwriter in the syndicate. While the general uniformity of the standard disclosures and the transaction-specific disclosures lend themselves to a single delivery in most circumstances, the MSRB believes that the relative uniqueness of the dealer-specific disclosures require a delivery obligation on the part of each co-managing underwriter. A co-managing underwriter's failure to deliver such disclosures could result in an issuer being unable to fully evaluate such co-managing underwriter's engagement in the syndicate and to make any appropriate disclosures to investors about the municipal securities offering. Accordingly, the MSRB declines to incorporate BDA's suggestion into the proposed rule change that only the syndicate manager is obligated to deliver the dealer-specific disclosures. Relatedly, the proposed rule change would not amend the guidance that, while each co-managing underwriter in the syndicate must disclose any applicable dealer-specific conflicts of interest, a co-managing underwriter has no obligation to affirmatively disclose in writing the absence of such conflicts.[176]

3. Clarifying that an Underwriter that Becomes a Syndicate Manager is Not Required to Make the Standard Disclosures and Transaction-Specific Disclosures on Behalf of Co-Managing Underwriters

SIFMA's response to the Request for Comment "welcome[d] this proposal to reduce oftentimes duplicative disclosures to issuers," but also requested certain refinements to it.[177] Specifically, SIFMA was concerned that the proposed change would require the syndicate manager to "affirmatively state" that the standard disclosures are provided "on behalf of the other syndicate members."[178] SIFMA suggested that this would be problematic in instances when an underwriter may need to provide the disclosures in order to meet the deadlines proposed in the 2012 Interpretive Notice, but co-managing underwriters have not yet been appointed and/or the underwriter is uncertain whether such a syndicate will be formed. SIFMA encouraged the MSRB to reconsider this "on behalf of" language to ensure that an underwriter is not required to suggest the appointment of co-managing underwriters in such instances or, presumably, to otherwise provide disclosures on behalf of a non-existent or still-forming syndicate.

Similarly, BDA encouraged the MSRB to clarify the timing of a syndicate manager's delivery of disclosures, requesting specifics regarding the scenario in which an "underwriter may deliver the standard disclosures and transaction-specific disclosures well before a syndicate is

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176 For the avoidance of doubt, the proposed rule change would preserve the ability of an underwriter to deliver an affirmative statement providing that the underwriter does not have an actual material conflict of interest or potential material conflicts of interest subject to disclosure. Moreover, the proposed rule change incorporates the reminder in the Implementation Guidance that underwriters are obligated to disclose such conflicts of interest arising after the time of engagement with the issuer.

177 SIFMA Letter II, at pp. 8-9.

178 Id.

formed."[179] BDA stated that the amendments should "clarify that standard disclosures and transaction-specific disclosures delivered by a syndicate manager can be delivered before a syndicate is formed and that the syndicate manager is not required to deliver new disclosures after a syndicate is formed or new syndicate members are added."[180]

The MSRB is persuaded by the scenarios that SIFMA and BDA describe and believes that requiring a syndicate manager to make the standard disclosures and the transaction-specific disclosures "on behalf of" the other members of the syndicate may unnecessarily be understood as requiring underwriters to deliver disclosures on behalf of non-existent syndicate members or otherwise defeat the purpose of the retrospective review by requiring an underwriter to re-deliver disclosures that had been provided, but delivered without such "on behalf of" language, in order to fulfill the dealer's fair dealing obligations to the issuer.[181] Accordingly, the proposed rule change would strike the "on behalf of" language as generally proposed in the Request for Comment and would expressly clarify that, in those instances in which an underwriter has provided the standard disclosures and/or transaction-specific disclosures prior to the formation of the syndicate, it would suffice that the disclosures have been delivered and no affirmative statement that such disclosures are made "on behalf of" any future co-managing underwriter would be necessary.[182]

iv. Alternative to the Transaction-by-Transaction Delivery of the Disclosures as Proposed in the Request for Comment

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[179] BDA Letter II, at p. 3.

[180] Id.

[181] Here, the MSRB contemplates scenarios in which an underwriting syndicate unexpectedly forms subsequent to the delivery of the standard disclosures and/or transaction-specific disclosures and desires to clarify that underwriters are not obliged to re-deliver such disclosures "on behalf of" the syndicate in order to meet their fair dealing obligations. The proposed rule change is intended to clarify that a syndicate manager is not required to re-deliver any disclosures previously provided to an issuer upon the subsequent or concurrent formation of a syndicate. Notwithstanding this obligation, and for the avoidance of doubt, to the extent that the content of those disclosures may need to be supplemented or amended to account for a change in circumstances, an underwriter is still permitted to deliver such a supplement or amendment. As stated in the FAQs, "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."

[182] The proposed rule change is intended to similarly permit a syndicate manager to provide the standard disclosures and/or transaction-specific disclosures concurrent with or after the formation of the syndicate without the reference to the "on behalf of" language.

As further described above, the MSRB incorporated proposed amendments to the 2012 Interpretive Notice in the Request for Comment that permitted underwriters to provide standard disclosures to an issuer one time and then subsequently refer to and reconfirm those disclosures.[183] The MSRB received specific comments from GFOA, NAMA, the City of San Diego, and SIFMA regarding this proposal and each comment was generally critical of the MSRB's proposed approach. GFOA's comment on the Request for Comment stated that the MSRB's proposal is "problematic" and encouraged the MSRB to adopt an approach "mandat[ing] that disclosures are provided to issuers for each transaction, to ensure that the issuers are aware of the fair dealing requirement for each issuance of securities."[184] Similarly, NAMA opposed any amendments that would eliminate the requirement for underwriters to provide disclosures for each transaction or otherwise allowed underwriters to reference back to previously provided disclosures. The City of San Diego agreed, stating that "[i]t is most straight forward to require disclosures on a transaction by transaction basis."[185] SIFMA appreciated the MSRB's attempt to respond to its request to provide an alternative manner of disclosure, but expressed concern that the MSRB's proposal "complicates matters even further."[186] SIFMA concluded that the MSRB's alternative proposal would be "operationally burdensome" and "do little to reduce the volume and nature of the paperwork."[187] SIFMA reiterated its original suggestion for an annual disclosure process "with bring-downs as necessary during the succeeding year."[188]

Given the lack of support from commenters regarding the MSRB's proposal, the MSRB did not incorporate the concept into the proposed rule change and declines to incorporate a different concept into the proposed rule change regarding an alternative to the transaction-by-transaction delivery of the disclosures, such as SIFMA's suggestion of annual disclosure process with bring-downs. The MSRB is persuaded by the comments from GFOA, NAMA, and City of San Diego that a transaction-by-transaction approach to disclosure better ensures that issuers and their personnel are apprised of an underwriter's fair dealing obligations for each offering.

v. Separate Identification of the Standard Disclosures

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[183] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Alternative to the Transaction-by-Transaction Delivery of the Disclosures and related note 107 et. seq. supra.

[184] GFOA Letter II, at pp. 1-2.

[185] City of San Diego Letter, at p. 1.

[186] SIFMA Letter II, at p. 7.

[187] Id., at p. 8.

[188] Id.

The MSRB incorporated a requirement in the Request for Comment that underwriters clearly identify each category of disclosure and generally separate them by placing the standard disclosures in an appendix or attachment.[189] The MSRB suggested that such a change would allow issuers to discern and focus on the disclosures most important to them. The MSRB received several specific comments on this proposed change. GFOA's response to the Request for Comment supported the separation of disclosures, stating: "[w]hen determining clarity and communication of disclosures, standard disclosures should be discussed separately from specific transaction and underwriter disclosures."[190] NAMA similarly supported the separation of the standard disclosures from the transaction-specific disclosures as a way to highlight key items to its issuer clients.[191] SIFMA suggested that the "separation of actual and non-standard disclosures is a reasonable proposal."[192] Accordingly, the proposed rule change incorporates the separation of the standard disclosures from the transaction-specific disclosures and dealer-specific disclosures.[193]

vi. Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties

The Request for Comment incorporated a proposed amendment to the 2012 Interpretive Notice in order to expressly emphasize that underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction.[194] The MSRB received one specific comment on this topic. More specifically, SIFMA's response to the

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[189] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Separate Identification of the Standard Disclosures and related notes 110 et. seq. infra.

[190] GFOA Letter II, at p. 1.

[191] NAMA Letter II, at p. 2.

[192] SIFMA Letter II, at pp. 3-4.

[193] As discussed above, the MSRB reiterates, but is not amending at this time, the existing language from the 2012 Interpretive Notice that disclosures must be "designed to make clear" to issuer officials "the subject matter of such disclosures and their implications for the issuer." Thus, an underwriter's fair dealing obligation requires it to identify and separate transaction-specific disclosures from dealer-specific disclosures to the extent possible without putting form over substance, as in the case of failing to fully discuss a conflict in a disclosure because it may not fit squarely into one category of disclosure versus another.

[194] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties and related note 114.

Request for Comment "welcome[d]" the MSRB's proposed clarification.[195] The MSRB believes that this clarification is warranted to avoid any misinterpretation of the disclosure requirements of the proposed rule change. Accordingly, the proposed rule change would incorporate this language as generally proposed in the Request for Comment with supplemental language specifically clarifying that the an underwriter has no obligation to make any written disclosures described therein on the part of issuer personnel or any other parties to the transaction, as the standard disclosures, transaction-specific disclosures, and dealer-specific disclosures are limited to underwriter conflicts.

vii. Clarity of Disclosures

The MSRB proposed amendments to the 2012 Interpretive Notice in the Request for Comment that explicitly clarified that the disclosures be drafted in "plain English."[196] The MSRB received several comments on this topic in response to the Request for Comment. The City of San Diego, GFOA and NAMA each supported the requirement that the disclosures be drafted in plain English, while SIFMA objected to the incorporation of this particular standard.

Of those in support of the standard, notably, the City of San Diego encouraged the MSRB to require underwriters to state whether their descriptions of certain complex municipal securities financing structures can be explained in plain English and, if not, to explicitly state that fact within the disclosure to alert an issuer that it may need to ask more questions.[197] In contrast, SIFMA objected to the inclusion of a plain English standard, stating its belief that the standard would be "susceptible to different interpretations" and the formal adoption of such a standard would defeat the purposes of the retrospective review by causing underwriters to "completely redo all manner of their G-17 disclosures."[198] As an alternative, SIFMA suggested that the MSRB adopt a "clear and concise" standard.[199]

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[195] SIFMA further asked the MSRB to provide examples of how the 2012 Interpretive Notice does not apply to other parties. Specifically, SIFMA requested "examples of conflicts of other parties that would not need to be disclosed." SIFMA Letter II, at p. 4. The MSRB is open to SIFMA's request for examples, but believes that it is premature to provide such examples prior to the approval of the amended language in the proposed rule change. Given the facts and circumstances nature of such examples, the MSRB believes that it can better respond to SIFMA's request, assuming approval of the proposed change, through an FAQ or other compliance resource at a later date, if there is a continuing need for such examples.

[196] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Clarity of Disclosures and related notes 117 et. seq. infra.

[197] City of San Diego Letter, at p. 2.

[198] SIFMA Letter II, at p. 6.

[199] Id.

As discussed above, the MSRB's intent of incorporating the "plain English" standard into the Request for Comment was merely to formalize a substantially equivalent standard to the one presently required under the 2012 Interpretive Notice. The MSRB did not intend to create a substantively different standard that would require underwriters to redraft their existing disclosure language. Consequently, the MSRB is persuaded by SIFMA's concerns that the adoption of a "plain English" standard may defeat the purposes of the retrospective review, because it would require underwriters to redraft existing disclosures to meet, in SIFMA's view, a new and elusive standard. For similar reasons, the MSRB is declining to incorporate the City of San Diego's suggestion, at this time, that would require underwriters to explicitly state if a disclosure could not be provided in plain English. Rather, the MSRB is persuaded by SIFMA's alternative proposal that the MSRB adopt a "clear and concise" standard. The MSRB believes that this addition is warranted to provide further clarification on the accessibility and readability of the disclosures required under the proposed rule change. Moreover, the MSRB believes that such a "clear and concise" standard is appropriate, because it has been adopted in other contexts related to the issuance of municipal securities, and, as a result, should be relatively familiar to issuers and underwriters alike.[200] Accordingly, the MSRB proposed rule change incorporates a clear and concise standard and omits any specific reference to plain English.

C. Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor

As discussed above, the Request for Comment incorporated existing language from the Implementation Guidance stating that "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."[201] BDA and SIFMA objected to the inclusion of this language, while GFOA and NAMA encouraged the MSRB to adopt even stronger requirements in this regard.

BDA objected to the inclusion of the language from the Implementation Guidance as redundant. Specifically, BDA stated that this language from the Implementation Guidance is "entirely covered" by the 2012 Interpretive Notice's statement that underwriters not "recommend issuers not retain a municipal advisor."[202] SIFMA also thought that the proposed language was

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200 For example, the SEC has stated that, "[l]ike other disclosure documents, official statements need to be clear and concise to avoid misleading investors through confusion and obfuscation." See the SEC's 1994 Interpretive Release, at p. 12753.

201 See related discussion under Summary of Comments Received in Response to the Concept Proposal – Underwriter Discouragement of Use of Municipal Advisor; Addition of a New Standard Disclosure Regarding the Engagement of Municipal Advisors and related notes 134 et. seq. supra.

202 BDA Letter II, at p. 2 ("The BDA believes that the additional sentence is entirely covered by the existing sentence that precedes the new sentence. Any underwriter who discourages an

not necessary, and further stated that it would have unintended consequences by limiting "otherwise permissible advice, such as describing what services can and cannot be provided, between underwriters and their [issuer] clients for fear of implying that a [municipal advisor] may be redundant."[203] SIFMA further stated its belief that the language may create a "bias" against underwriter-only transactions that "could confuse issuers and discourage an issuer's flexibility to control the cost and scope of its financings in cases where it chooses not to use a [municipal advisor]."[204] SIFMA requested the MSRB eliminate the proposed language; clarify that neither municipal advisors, nor underwriters may misrepresent the services and duties that the other is permitted to provide; and prohibit municipal advisors from misrepresenting that there is a regulatory requirement for an issuer to hire a municipal advisor.[205]

Conversely, in their responses to the Request for Comment, GFOA and NAMA each indicated that the proposed language was helpful, but encouraged the MSRB to go beyond just incorporating the language of the Implementation Guidance by adopting new, stronger prohibitions regarding underwriters deterring the engagement of municipal advisors. GFOA restated its request that the MSRB include a requirement that "underwriters affirmatively state that issuers may choose to hire a municipal advisor to represent their interests in a transaction."[206] NAMA stated that its members are "aware of instances where both underwriters and bond counsel directly deter the use of a municipal advisor or bond counsel dictates who the municipal advisor should be."[207]

The MSRB is persuaded by the comments from GFOA and NAMA about deal participants improperly dissuading issuers from considering the engagement of a municipal advisor and unfairly influencing issuers to engage one particular municipal advisor over another. However, the MSRB also believes there is merit to BDA and SIFMA's concerns, particularly regarding how further prohibitions may unintendedly chill otherwise valid underwriter advice and, thus, deprive issuers of the full benefit of an underwriters' expertise and experience in the market.

Given that the language prohibiting underwriters from discouraging the engagement of a municipal advisor or implying a redundancy of services provided by a municipal advisor is taken from the existing Implementation Guidance, the MSRB believes that underwriters should already

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issuer from retaining a municipal advisor for any reasons would be making already a prohibited recommendation to do so.").

[203] SIFMA Letter II, at p. 6.

[204] Id.

[205] Id.

[206] GFOA Letter II, at p. 2.

[207] NAMA Letter II, at p. 3.

be familiar with the practical application of this language. The MSRB further believes that the language should already have been incorporated into existing policies, procedures and training and, as a result, should not significantly increase the regulatory burden on underwriters. Equally important, the MSRB does not believe that the statements are redundant, as BDA contends, because they add an important gloss on the general fair dealing obligation of underwriters. As the additional language makes clear, a recommendation not to engage a municipal advisor can come in many express or implied forms, including, but not limited to, express communications discouraging the use of a municipal advisor or by strong implication of the redundancy of a given municipal advisor's services.

The MSRB believes there is potential merit to SIFMA's concerns that the proposed language may chill certain underwriter communications with issuers regarding municipal advisors and/or create a bias against underwriter only transactions that could lead to increased issuer borrowing costs. Nevertheless, the MSRB finds GFOA's comments to the Concept Proposal and Request for Proposal to be most persuasive on this topic, particularly in light of the MSRB's statutory mandate to protect municipal entities.[208] In this way, municipal entity issuers, as represented by GFOA, desire the prohibitions on such underwriter communications to be strengthened, rather than relaxed. Moreover, while GFOA's comments did not directly address SIFMA's concerns regarding the possible negative effects that this proposed change may have on issuer decision-making, the MSRB generally understands GFOA's view to be that, at this time, the risks that an issuer misunderstands the distinctions between a municipal advisor's role and an underwriter's role, and/or that an issuer is unduly persuaded by an underwriter against the engagement of a municipal advisor, generally outweighs the risks that an underwriter will be compelled, out of an abundance of caution or otherwise, to abstain from certain conversations with an issuer during the course of a negotiated offering, or that an issuer may uninformedly decline an underwriter-only transaction to the detriment of its borrowing costs by engaging a municipal advisor.

In terms of SIFMA's other comments, the MSRB agrees that "neither [municipal advisors] nor underwriters may misrepresent the services and duties that the other is permitted to provide," and that municipal advisors cannot make a misrepresentation regarding "a regulatory requirement for an issuer to hire a [municipal advisor]."[209] However, the MSRB does not believe that the proposed rule change is the appropriate vehicle to address potential misrepresentations by municipal advisors, as the proposed rule change is limitedly focused on underwriters' fair dealing obligations to issuers, not the duties of loyalty and care that municipal advisors owe to

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[208] In terms of municipal entity protection, the MSRB is further persuaded by academic evidence finding that issuers obtain real economic benefits from using municipal advisors. <u>See</u> note 87 <u>supra</u> and related discussion in the <u>Self-Regulatory Organization's Statement on Burden on Competition</u>.

[209] SIFMA Comment Letter II, at p. 7.

their municipal entity clients.[210] Accordingly, the MSRB declines to incorporate SIFMA's suggestions on these particular matters into the proposed rule change.[211]

For these reasons, the MSRB is incorporating into the Revised Interpretive Notice language from the Implementation Guidance that "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," as generally proposed in the Request for Comment. Beyond this, the proposed rule change would incorporate GFOA's and NAMA's requests to further bolster the disclosures regarding an issuer's choice to engage a municipal advisor by incorporating a new disclosure into an underwriter's standard disclosures. Specifically, the proposed rule change would require an underwriter to inform an issuer that "the issuer may choose to engage the services of a municipal advisor to represent its interests in the transaction" in a similar format and at the same time as the underwriter delivers certain other disclosures currently required under the 2012 Interpretive Notice.[212]

D. E-mail Read Receipt as Issuer Acknowledgement

The Request for Comment proposed a change to the acknowledgement requirement of the 2012 Interpretive Notice that would allow for an automatic e-mail return receipt to satisfy the acknowledgement requirement, as more fully described above.[213] The MSRB received several

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[210] See Rule G-42. More specific to SIFMA's concern that a municipal advisor may misrepresent a regulatory requirement for an issuer to hire a municipal advisor, the MSRB notes that an issuer may be subject to state or local jurisdictional statutes, regulations, or other policies that may dictate such a requirement (i.e., if and when a municipal entity may or must engage a municipal advisor). To the degree that there is an actual jurisdictional requirement for a municipal entity to engage a municipal advisor, consistent with its duties of care and loyalty, a municipal advisor may accurately communicate such jurisdictional requirements to a municipal entity issuer.

[211] As a threshold matter, however, the MSRB notes that Rule G-42, on the duties of non-solicitor municipal advisors, requires a municipal advisor to conduct its municipal advisory activities with a municipal entity client in accord with a duty of care and a duty of loyalty. Absent potential exculpating facts and circumstances, knowingly misrepresenting the services of an underwriter or the regulatory requirements applicable to a municipal entity client would be a violation of a municipal advisor's duty of care and/or duty of loyalty.

[212] Like the existing, similar disclosures regarding the underwriter's role, the proposed rule change would require the underwriter to deliver this new disclosure at or before the time the underwriter has been engaged to perform underwriting services.

[213] See related discussion under Summary of Comments Received in Response to the Concept Proposal – E-mail Read Receipt as Issuer Acknowledgement and related notes 125 et. seq. supra.

supportive comments specific to this proposed change. NAMA and SIFMA each expressed their support of the proposed change. Specifically, NAMA stated that it was ". . . pleased that the [Request for Comment] . . . would continue to mandate a form of acknowledgement from issuers that the disclosures are received, even through an e-mail return receipt."[214] SIFMA similarly expressed its support for the incorporation into the Request for Comment of the concept that an automatic e-mail return receipt could "evidence receipt of the underwriter disclosures."[215] The City of San Diego was similarly supportive, stating that "a read receipt should be permitted so long as the underwriter has delivered the disclosure to the issuer designated primary contact."[216] Notably, GFOA did not directly address this particular issue in its response to the Request for Comment, but did reiterate its preference that "[t]ransaction specific and material underwriter conflicts of interest should be provided for each issuance of securities."[217]

Based on these comments, the MSRB believes the acknowledgement requirement continues to have value to ensure that issuers receive the disclosures. However, the MSRB does not believe underwriters should have to repeatedly seek a particularized form of acknowledgement, which an issuer may not provide. Accordingly, the proposed rule change would incorporate this change as generally proposed in the Request for Comment with additional emphasis and clarifications on three important aspects of the proposed change to the acknowledgement requirement.

First, the proposed rule change would provide greater clarity regarding what type of automatic e-mail receipt can meet an underwriter's fair dealing obligation to obtain written acknowledgement of an issuer's receipt of the applicable disclosures. Specifically, the proposed rule change would make clear that an automatic e-mail read receipt must be obtained, rather than a mere automatic e-mail delivery receipt, in order to meet the proposed rule change's acknowledgement obligations. The proposed rule change would define the term "e-mail read receipt" to mean an automatic response generated by a recipient issuer official confirming that an e-mail has been opened. An e-mail delivery receipt that simply shows that a disclosure was successfully delivered fails to demonstrate whether the recipient actually received the disclosure in a working e-mail inbox folder or if, for example, the disclosure was in fact delivered to a spam or junk file folder. An e-mail delivery receipt that does not confirm that a recipient has in fact opened the e-mail communication would not satisfy an underwriter's fair dealing obligation to obtain acknowledgement regarding the receipt of disclosures under the Revised Interpretive Notice.[218]

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214 NAMA Letter II, at p. 2.

215 SIFMA Letter II, at p. 2

216 City of San Diego Letter, at p. 2.

217 GFOA Letter II, at p. 2.

218 Although, the proposed rule change would make clear that such an e-mail delivery receipt can still be used to evidence the timing regarding an underwriter's attempt to timely deliver a disclosure.

Second, the proposed rule change would clarify that while an e-mail read receipt may generally be an acceptable form of an issuer's written acknowledgement under the Revised Interpretive Notice, an underwriter, would not be able to rely on 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. If an underwriter is on notice that, for example, an issuer official has not in fact received and/or opened an e-mail with the applicable disclosures, despite having received an affirmative e-mail read receipt confirmation, then the underwriter would not have met its fair dealing obligation under the Revised Interpretive Notice to obtain written acknowledgement from the issuer. This language in the proposed rule change is intended to ensure that disclosures are in fact delivered to an issuer, and, thereby, issuer protection is not compromised.

Finally, the proposed rule change would emphasize that an underwriter's fair dealing obligation to obtain an issuer's written acknowledgement can be satisfied by an e-mail read receipt, but only if such e-mail read receipt is from an appropriate issuer official. The Revised Interpretive Notice would state the underwriter has a fair dealing obligation to obtain such an e-mail read receipt from the official of the issuer identified as the primary contact for receipt of such disclosures. In the absence of such identification, the underwriter would have a fair dealing obligation to receive an e-mail read receipt from an issuer official that the underwriter reasonably believes has authority to bind the issuer by contract with the underwriter. Only e-mail read receipts from such officials would meet an underwriter's fair dealing obligation under the Revised Interpretive Notice. Thus, the Revised Interpretive Notice would require underwriters to pay particular attention to the recipient providing an e-mail read receipt. The additional emphasis in the proposed rule change is intended to ensure that disclosures are in fact delivered to the appropriate issuer personnel, and, thereby, issuer protection is not compromised by the return of an e-mail read receipt from inappropriate issuer personnel.

E. Guidance Regarding Meaning of "Recommendation"

The Request for Comment proposed an amendment to the 2012 Interpretive Notice and requested comment on whether the use of the recommendation analysis applicable to a G-42 Recommendation should be applicable to the determination of whether an underwriter is recommending a complex municipal securities financing.[219] As currently provided in MSRB guidance, a G-42 Recommendation depends on the following "two-prong" analysis:

> First, the [municipal advisor's] advice must exhibit a call to action to proceed with a municipal financial product or an issuance of municipal securities and second, the [municipal advisor's] advice must be specific as to what municipal

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[219] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Clarification of the Meaning of "Recommendation" and related notes 131 et. seq. supra.

financial product or issuance of municipal securities the municipal advisor is advising the [municipal entity client or obligated person client] to proceed with.[220]

The MSRB received several comments on this topic. SIFMA's response to the Request for Comment stated its appreciation for the proposed change,[221] while GFOA's and NAMA's responses cautioned the MSRB on the adoption of such a standard. More specifically, GFOA questioned whether this standard is "the most appropriate" and stated its belief that the proposed standard in the Request for Comment "could prevent some issuers from receiving the right information they need to determine what financing structures are best for their government."[222] NAMA's response to the Request for Comment stated that the G-42 Recommendation analysis "is not the right standard" for this context.[223] NAMA cautioned that, "[a]pplying the G-42 [R]ecommendation[] standard to underwriter G-17 disclosures creates a false regulatory parity that is not appropriate given the MSRB's mission to protect issuers and the very different roles and duties that municipal advisors and underwriters have to issuers."

The MSRB understands GFOA's and NAMA's comments to be grounded in a concern that municipal advisors have a baseline fiduciary duty to protect the interests of municipal entity issuers, whereby any municipal advisor communication constituting advice to or on behalf of a municipal entity issuer must be in the best interests of the municipal entity client without regard to the financial or other interests of the municipal advisor. In contrast, underwriters have a more limited fair dealing obligation. Building upon this distinction, the MSRB's two-pronged analysis under Rule G-42 is primarily intended to clarify when a municipal advisor has additional suitability and record-keeping obligations when making a particular type of recommendation (i.e., a G-42 Recommendation)[224] to a municipal client and is not the analysis for more generally determining when a communication constitutes "advice" because it "involves a

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[220] See G-42 FAQs (note 37 supra).

[221] SIFMA Letter II, at p. 2 (stating, "[w]e appreciate that the MSRB has proposed adopting some of the suggestions we made in our comment letter to the MSRB's [Concept Proposal], including . . . clarifying the applicability of MSRB Rule G-42's two-prong analysis to a recommendation for complex municipal financings. . .").

[222] GFOA Letter II, at p. 2.

[223] NAMA Letter II, at p. 2.

[224] See the G-42 FAQs, at p. 2 (providing that, ". . . in order for a communication by a municipal advisor to be a G-42 Recommendation, it must, as a threshold matter, be advice and that advice must meet both prongs of a two-prong analysis. First, the advice must exhibit a call to action to proceed with a municipal financial product or an issuance of municipal securities and second, the advice must be specific as to what municipal financial product or issuance of municipal securities the municipal advisor is advising the MA Client to proceed with.").

recommendation."[225] In consequence, GFOA's and NAMA's comments indicate their shared concern that, compared to the current disclosure obligations under the 2012 Interpretive Notice, issuers may receive less disclosure under the G-42 Recommendation standard and, thereby, have less information available to evaluate complex transactions.[226]

The MSRB is persuaded by GFOA's and NAMA's concerns that issuers may receive less disclosure under the G-42 Recommendation standard than issuers currently receive under the 2012 Interpretive Notice and, therefore, the MSRB has not incorporated the G-42 Recommendation standard in the proposed rule change. At the same time, the MSRB is still persuaded by SIFMA's comment on the Concept Proposal that the MSRB should clarify the standard that determines whether an underwriter has made a "recommendation" of a municipal securities financing to an issuer in a negotiated offering.

Accordingly, the proposed rule change expressly clarifies that the analysis to determine if an underwriter has made a "recommendation" triggering the complex municipal securities financing disclosures is whether – given its content, context, and manner of presentation – a particular communication from an underwriter to an issuer reasonably would be viewed as a call to action or reasonably would influence an issuer to engage in a complex municipal securities financing. This analysis to determine whether a recommendation has been made is not dissimilar to the analysis for municipal advisors,[227] and borrows an objective rather than subjective inquiry analysis applicable to dealers in the context of MSRB Rule G-19, on suitability of

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[225] The definition of the advice standard pursuant to Exchange Act Rule 15Ba1–1(d)(1)(ii), as adopted, "does not exclude information that involves a recommendation." Registration of Municipal Advisors, Release No. 34-70462 (Sept. 20, 2013), 78 FR 67467, at 67480 (Nov. 12, 2013). Additionally, the Commission stated that, ". . . for purposes of the municipal advisor definition, the Commission believes that the determination of whether a recommendation has been made is an objective rather than a subjective inquiry. An important factor in this inquiry is whether, considering its content, context and manner of presentation, the information communicated to the municipal entity or obligated person reasonably would be viewed as a suggestion that the municipal entity or obligated person take action or refrain from taking action regarding municipal financial products or the issuance of municipal securities." Id.

[226] As one illustration of the possible distinctions in outcomes, if an underwriter presents a range of possible financing structures, but does not advise the issuer to proceed with any one specific structure, it may be ambiguous whether the underwriter met the second prong of the G-42 Recommendation analysis (i.e., whether the underwriter was specific enough as to what particular financing structure the issuer should proceed with). Under the Revised Interpretive Notice, if such a presentation reasonably would be viewed as a suggestion that the issuer take action regarding a financing structure or reasonably would influence the issuer to engage in a financing structure, then the underwriter would be deemed to have a made a recommendation regarding that financing structure and, thereby, triggered the applicable disclosure requirements.

[227] See note 35 supra and related discussion.

recommendations and transactions, and, in this way, the MSRB believes it should be familiar to dealers.

F. Disclosures to Conduit Borrowers

As discussed above, the MSRB declined to incorporate an amendment into the Request for Comment that would explicitly extend the requirements of the 2012 Interpretive Notice to the fair dealing obligations underwriters owe to conduit borrowers. The MSRB received a single specific comment from SIFMA on this topic, which supported the MSRB's approach in the Request for Comment. The proposed rule change does not include any changes in this regard.[228]

G. Tiered Disclosure Requirements Based on Issuer Characteristics

As discussed above, the MSRB declined to incorporate an amendment into the Request for Comment that would classify issuers into differing disclosure requirements based on various issuer characteristics, nor otherwise tailor the disclosure requirements applicable to specific categories of issuers.[229] However, in response to requests from SIFMA and BDA regarding assessing the level of knowledge and experience of the issuer in order to determine the appropriate level of disclosure regarding a recommended financing structure, the Request for Comment incorporated the concept that, among other factors, an underwriter may consider the issuer's retention of an IRMA when assessing the issuer's level of knowledge. The Request for Comment provided:

> Among other factors, a sole underwriter or syndicate manager (when there is an underwriting syndicate) may consider the issuer's retention of an IRMA, who can help the issuer evaluate underwriter recommendations and identify potential conflicts of interest, when assessing the issuer's level of knowledge and experience with the recommended financing structure, which may support a determination by the sole underwriter or syndicate manager that a more limited disclosure would satisfy the obligation for that transaction.

To further illustrate this point regarding the various factors involved in determining the appropriate level of disclosure, the Request for Comment also integrated existing language from the Implementation Guidance suggesting that the level of transaction-specific disclosures can vary over time, particularly if an issuer's personnel become more or less experienced with a given structure. In this regard, the Request for Comment provided:

> The level of transaction-specific disclosure to be provided to a particular issuer also can vary over time. To the extent that an issuer gains experience with a complex financing

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228 See discussion supra under Self-Regulatory Organization's Statement on Burden on Competition – Identifying and Evaluating Reasonable Alternative Regulatory Approaches.

229 See related discussion under Summary of Comments Received in Response to the Concept Proposal – Tiered Disclosure Requirements Based on Issuer Characteristics and related note 140 supra.

> structure or product over the course of multiple new issues utilizing that structure or product, the level of transaction-specific disclosure required to be provided to the issuer with respect to such complex financing structure or product would likely be reduced over time. If an issuer that previously employed a seasoned professional in connection with its complex financings who has been replaced by personnel with little experience, knowledge or training serving in the relevant responsible position or in undertaking such complex financings, the level of transaction-specific disclosure required to be provided to the issuer with respect to such complex financing structure or product would likely increase.

BDA objected to the inclusion of this language regarding the replacement of issuer personnel leading to increased disclosure, stating that, "[i]n the abstract, there is no way to determine whether the level should increase or not because it will depend on many factors."[230] The MSRB agrees with BDA's objection that the level of disclosure required in any given situation depends on numerous factors specific to that set of facts and circumstances and so the example provided from the Implementation Guidance may lead to confusion. For similar reasons, the MSRB also believes that the Request for Comment's language regarding an issuer's IRMA may similarly lead to confusion.

Accordingly, the proposed rule change does not incorporate this language from the Implementation Guidance regarding the replacement of issuer personnel and, for similar reasons, does not incorporate the language from the Request for Comment regarding an issuer's engagement of an IRMA, as the concepts may lead to more, rather than less, confusion regarding the underwriter's obligation to reasonably determine the level of transaction-specific disclosures required. However, the proposed rule change does incorporate existing language from the Implementation Guidance regarding the variability of such disclosures, providing:

> The level of 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, and financial ability to bear the risks of the recommended financing, in each case based on the reasonable belief of the underwriter. In this way, the level of disclosure to be provided to a particular issuer also can vary over time.

H. Issuer Opt-Out

As discussed above, the MSRB did not incorporate an issuer opt-out concept into the Request for Comment that would give issuer's the option of declining to receive certain disclosures from underwriters.[231] GFOA's and NAMA's response to the Request for Comment supported the omission of this concept. Accordingly, the proposed rule change does not incorporate such an opt-out concept.

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230 BDA Letter II, at p. 2.

231 See related discussion under Summary of Comments Received in Response to the Concept Proposal – Issuer Opt-Out and related note 148 supra.

The MSRB considered the above-noted comments in formulating the proposed rule change herein.

6. Extension of Time Period for Commission Action

The MSRB does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.[232]

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2) or Section 19(b)(7)(D)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notice Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervisions Act

Not applicable.

11. Exhibits

Exhibit 1	Completed Notice of Proposed Rule Change for Publication in the Federal Register
Exhibit 2a	MSRB Notice 2018-10 (June 5, 2018)
Exhibit 2b	List of Comment Letters Received in Response to MSRB Notice 2018-10
Exhibit 2c	Comments Received in Response to MSRB Notice 2018-10
Exhibit 2d	MSRB Notice 2018-29 (November 16, 2018)
Exhibit 2e	List of Comment Letters Received in Response to MSRB Notice 2018-29
Exhibit 2f	Comments Received in Response to MSRB Notice 2018-29
Exhibit 5	Text of Proposed Rule Change

[232] 15.U.S.C. 78o-4(b)(2).

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-___________; File No. SR-MSRB-2019-10)

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change to Amend and Restate the MSRB's August 2, 2012 Interpretive Notice Concerning the Application of Rule G-17 to Underwriters of Municipal Securities

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on the Municipal Securities Rulemaking Board ("MSRB") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB filed with the Commission a proposed rule change (the "proposed rule change") to amend and restate the MSRB's August 2, 2012 interpretive notice concerning the application of MSRB Rule G-17 to underwriters of municipal securities (the "2012 Interpretive Notice").[3] The proposed rule change seeks to update the 2012 Interpretive Notice in light of its implementation in the market since its first adoption and current market practices.

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 The 2012 Interpretive Notice was approved by the SEC on May 4, 2012 and became effective on August 2, 2012. 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). The 2012 Interpretive Notice is available here.

Following the approval of the proposed rule change, the MSRB will publish a regulatory notice within 90 days of the publication of approval in the Federal Register (the 2012 Interpretive Notice, so amended by the proposed rule change, is referred to herein as the "Revised Interpretive Notice"), and such notice shall specify the compliance date for the amendments described in the proposed rule change, which in any case shall be not less than 90 days, nor more than one year, following the date of the notice establishing such compliance date. Until such compliance date, the current version of the 2012 Interpretive Notice would remain in effect with respect to underwriting relationships commenced prior to the compliance date, at which time underwriters would then be subject to the Revised Interpretive Notice for all of their underwriting relationships beginning on or after that date. The 2012 Interpretive Notice would be superseded by the Revised Interpretive Notice as of such compliance date. Similarly, and as further described herein, the MSRB's implementation guidance dated July 18, 2012 concerning the 2012 Interpretive Notice (the "Implementation Guidance")[4] and the regulatory guidance dated March 25, 2013 answering certain frequently asked questions regarding the 2012 Interpretive Notice (the "FAQs")[5] would be withdrawn as of such compliance date.

The text of the proposed rule change is available on the MSRB's website at www.msrb.org/Rules-and-Interpretations/SEC-Filings/2019-Filings.aspx, at the MSRB's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the MSRB included statements concerning the purpose

[4] See MSRB Notice 2012-38 (July 18, 2012).

[5] See MSRB Notice 2013-08 (Mar. 25, 2013).

of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The MSRB has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

I. Background

Rule G-17 requires that, in the conduct of municipal securities activities, brokers, dealers and municipal securities dealers (collectively, "dealers") deal fairly with all persons, including municipal entity issuers, and not engage in any deceptive, dishonest or unfair practice. The 2012 Interpretive Notice describes certain fair dealing obligations dealers owe to issuers in the course of their underwriting relationships, and promotes fair dealing in the municipal securities market by, among other things, prescribing the delivery of written disclosures to issuers regarding the nature of their underwriting relationships, compensation and other conflicts, and the risks associated with certain recommended municipal security transactions in negotiated offerings. Beyond these matters, the 2012 Interpretive Notice also describes an underwriter's obligation to: have a reasonable basis for the representations it makes, and other material information it provides, to an issuer in order to ensure that such representations are accurate and not misleading; purchase securities from the issuer at a fair and reasonable price, 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 of pricing; honor the issuer's rules for retail order periods

by, among other things, not accepting or placing orders that do not satisfy the issuer's definition of "retail;" and avoid certain lavish gifts and entertainment.[6]

II. Proposed Rule Change

In response to informal feedback from market participants regarding their experience with the 2012 Interpretive Notice and, particularly, the effectiveness of the disclosures and related requirements, the MSRB initiated a retrospective review of the 2012 Interpretive Notice and published a request for comment on June 5, 2018 (the "Concept Proposal").[7]

The Concept Proposal requested feedback on whether amendments to the 2012 Interpretive Notice should be considered to help ensure that it continues to achieve its intended purpose and reflects the current state of the municipal securities market. The MSRB received five comment letters in response to the Concept Proposal, all of which supported the retrospective review and suggested modifications to the 2012 Interpretive Notice.[8] The feedback received formed the foundation for a subsequent request for comment published on November 16, 2018 (the "Request for Comment").[9] The MSRB received five comment letters in response to the Request for

[6] As further described therein, the 2012 Interpretive Notice provides that, except where otherwise noted, the obligations described are only applicable to negotiated offerings and do not apply to selling group members.

[7] MSRB Notice 2018-10 (June 5, 2018) (i.e., the Concept Proposal).

[8] See Letters from: Mike Nicholas, Chief Executive Officer, Bond Dealers of America (BDA), dated August 6, 2018 ("BDA Letter I"); Emily S. Brock, Director, Federal Liaison Center, Government Finance Officers Association (GFOA), dated August 6, 2018 ("GFOA Letter I"); Susan Gaffney, Executive Director, National Association of Municipal Advisors (NAMA), dated August 6, 2018 ("NAMA Letter I"); Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (SIFMA), dated August 6, 2018 ("SIFMA Letter I"); and J. Ben Watkins III, Director, State of Florida, Division of Bond Finance of the State Board of Administration ("Florida Division of Bond Finance"), dated August 8, 2018 ("Florida Division of Bond Finance Letter").

[9] See MSRB Notice 2018-29 (November 16, 2018) (i.e., the Request for Comment).

Comment.[10] Following review of the comments, the MSRB conducted additional outreach with various market participants. The feedback received and follow-up conversations formed the basis for the proposed rule change.

In general, the comment letters observed that the disclosures under the 2012 Interpretive Notice had become too voluminous in length and boilerplate in nature. Commenters generally stated that the length and nature of the disclosures both created a significant burden for dealers and also made it difficult for issuers to assess which conflicts, risks, and other matters were most significant. As more fully discussed below in the MSRB's summary of comments, commenters also addressed the following major topics – the redundancy of certain disclosures received by an issuer, particularly if an issuer frequently goes to market and/or a syndicate is formed in a particular offering; the benefits of separately identifying certain categories of disclosures; the standard applicable to determine whether an underwriter has made a recommendation to an issuer of a particular municipal securities financing; what potential material conflicts of interest must be disclosed by an underwriter; whether an underwriter must disclose the conflicts of other parties involved with the transaction; underwriter communications regarding the issuer's engagement of a municipal advisor; what an underwriter may rely upon to substantiate an issuer's receipt of a disclosure; and various other clarifications and revisions to the 2012 Interpretive Notice that would promote market efficiency and reduce the regulatory burden on underwriters, while not diminishing the protections afforded to municipal entity issuers.

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[10] See Letters from: Mike Nicholas, Chief Executive Officer, BDA, dated January 15, 2019 ("BDA Letter II"); Emily S. Brock, Director, Federal Liaison Center, GFOA, dated January 15, 2019 ("GFOA Letter II"); Susan Gaffney, Executive Director, NAMA, dated January 15, 2019 ("NAMA Letter II"); Leslie M. Norwood, Managing Director and Associate General Counsel, SIFMA, dated January 15, 2019 ("SIFMA Letter II"); and City of San Diego (unsigned and undated) ("City of San Diego Letter").

The amendments in the proposed rule change are intended to update and streamline certain obligations specified in the 2012 Interpretive Notice and, thereby, benefit issuers and underwriters alike by reducing the burdens associated with those obligations, including the obligation of underwriters to make, and the burden on issuers to acknowledge and review, written disclosures that itemize risks and conflicts that are unlikely to materialize during the course of a transaction, not unique to a given transaction or a particular underwriter where a syndicate is formed, and/or otherwise duplicative.

A. Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into the Revised Interpretive Notice and Related Revisions

The proposed rule change would integrate the substantive concepts from the Implementation Guidance[11] and the FAQs[12] into the Revised Interpretive Notice and, thereby, would consolidate the Implementation Guidance, FAQs, and the Revised Interpretive Notice into a single publication. Except as described herein, the proposed rule change would incorporate the substantive content of the Implementation Guidance and FAQs without material revision. Along with the 2012 Interpretive Notice, assuming approval of the proposed rule change, the Implementation Guidance and FAQs would be withdrawn as of the compliance date of the Revised Interpretive Notice. The proposed technical revisions are necessary to conform or supplement the statements from the Implementation Guidance and FAQs into the Revised

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[11] Published on July 18, 2012, the Implementation Guidance was intended to assist dealers in revising their written supervisory procedures in accordance with their fair practice obligations under the 2012 Interpretive Notice.

[12] Published on March 25, 2013, the FAQs answered certain frequently asked questions regarding operational matters pertaining to the 2012 Interpretive Notice.

Interpretive Notice.[13] Unless otherwise expressly stated herein, the MSRB's conforming edits are only intended to promote consistency of language and otherwise are not intended to substantively alter the understanding and implementation of these existing fair dealing concepts.

i. Incorporate Statements Regarding the Applicability of the Revised Interpretive Notice to the Continuous Offering of Municipal Fund Securities

As presently stated in the Implementation Guidance, no type of underwriting is wholly excluded from the application of the 2012 Interpretive Notice. The Implementation Guidance makes clear that the 2012 Interpretive Notice applies not only to primary offerings of new issues of municipal bonds and notes 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.[14] The proposed rule change would incorporate this language into the Revised Interpretive Notice as stated in the Implementation Guidance with one addition. More specifically, the proposed rule change would

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[13] The MSRB notes that the Implementation Guidance and FAQs were issued in distinct formats – i.e., in a list of bulleted statements and frequently asked questions, respectively – from the format of the 2012 Interpretive Notice and, consequently, in many instances cannot be simply copied-and-pasted into the proposed format of the Revised Interpretive Notice without conforming revisions. Similarly, the proposed rule change incorporates newly defined terms and other modified substantive concepts (e.g., assigning the fair dealing obligation to provide the standard disclosures and transaction-specific disclosures to syndicate managers, as further described herein), which require tailoring edits to appropriately integrate the existing concepts of the Implementation Guidance and FAQs into the Revised Interpretive Notice. Thus, the MSRB is proposing to make conforming technical revisions of a non-substantive, drafting nature when integrating the existing language of the Implementation Guidance and FAQs into the Revised Interpretive Notice (referred to hereinafter as, "conforming edits"). The MSRB has identified in the discussion below when it has proposed such conforming edits and also provided the proposed language of the Revised Interpretive Notice in relevant part for ease of comparison.

[14] As a general matter, a 529 savings plan is a tax-advantaged qualified tuition program established by a state, or an agency, or instrumentality of a state, designed to encourage families to save for a child's future education expenses.

add a reference to Achieving a Better Life Experience (ABLE) programs[15] as another example of a continuous offering of municipal fund securities. In relevant part, the Revised Interpretive Notice would read, "[t]his 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."

ii. Incorporate Statements Regarding the Applicability of the Revised Interpretive Notice to a Primary Offering that is Placed with Investors by a Placement Agent

As presently stated in the Implementation Guidance, no type of underwriting is wholly excluded from the application of the 2012 Interpretive Notice, including certain private placement activities. In relevant part, the Implementation Guidance states:

> In a private placement where a dealer acting as placement agent takes on a true agency role with the issuer and does not take a principal position (including not taking a 'riskless principal' position) in the securities being placed, the disclosure relating to an 'arm's length' relationship would be inapplicable and may be omitted due to the agent-principal relationship between the dealer and issuer that normally gives rise to state law obligations – whether termed as a fiduciary or other obligation of trust. . . . As described [in the Implementation Guidance], in a private placement where a dealer acts as a true placement agent, the disclosure relating to fiduciary duty would be inapplicable and may be omitted due to the existence of similar state law obligations. . . . 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, the dealer would not be required to disclose its role with regard to the review of an official statement.

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[15] As a general matter, an ABLE program is a tax-advantaged savings account established by a state, or an agency, or instrumentality of a state, designed to allow eligible individuals and their families to save on a tax-deferred basis for qualified disability expenses.

In a footnote to this language, the Implementation Guidance further states:

> 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, a fiduciary relationship with the issuer. In such cases, it would also be appropriate for the underwriter to omit disclosures inapplicable as a result of such relationship. Dealers exercising an option to omit such disclosure should understand that they are effectively acknowledging the existence of a fiduciary responsibility on behalf of the issuer.

The proposed rule change would incorporate these concepts from the Implementation Guidance into the Revised Interpretive Notice with conforming edits and the omission of certain language. It also would incorporate a supplemental concept regarding how a dealer's activities as a placement agent may interact with the Commission's registration and record-keeping requirements for municipal advisors.[16]

In terms of the conforming edits, the proposed rule change would not word-for-word integrate the existing text that, ". . . in a private placement where a dealer acts as a true placement agent, the disclosure relating to a fiduciary duty would be inapplicable and may be omitted due to the existence of similar state law obligations." In light of the other amendments proposed herein, the proposed rule change would revise and supplement the existing text with the following conforming edits that, "it would also be appropriate for an underwriter to omit those disclosures 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" (emphasis added). The MSRB believes that the guidance provided by this revised and supplemented language is substantively equivalent to the concept articulated by the omitted statement.

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[16] See Registration of Municipal Advisors, Release No. 34-70462 (September 20, 2013), 78 FR 67467 (hereinafter, the "MA Rule Adopting Release") (November 12, 2013) (available at http://www.sec.gov/rules/final/2013/34-70462.pdf); see also note 18 infra and related text.

Additionally, the proposed rule change would omit the final sentence from the footnote of the Implementation Guidance stating that, "[d]ealers exercising an option to omit such disclosure should understand that they are effectively acknowledging the existence of a fiduciary responsibility on behalf of the issuer." The MSRB believes that this statement is substantively redundant with the statements that precede it and, ultimately, may create more confusion than it would resolve, as its inclusion in the Revised Interpretive Notice might be interpreted to bind underwriters into a binary scenario of either: (1) including the relevant disclosure(s) and, thereby, communicating the lack of a fiduciary duty to an issuer client, or (2) omitting the relevant disclosure(s) and, thereby, "effectively acknowledging" the existence of a fiduciary duty to an issuer client. At bottom, an underwriter has a fair dealing obligation under Rule G-17 to not engage in any deceptive, dishonest, or unfair practice when interacting with a municipal entity client in the course of an underwriting relationship, which requires the underwriter to accurately, honestly, and fairly describe its services and the scope of its relationship with the municipal entity. This overarching fair dealing obligation requires an underwriter to include, omit, and/or supplement the relevant fiduciary disclosures as necessary to meet its fair dealing obligations in light of the particular facts and circumstances of a given transaction. Consequently, the exclusion of this statement from the proposed rule change is not intended to diminish this overarching fair dealing obligation, but, rather, eliminate a potentially confusing and redundant statement.

The Revised Interpretive Notice in relevant part would provide:

> In a private placement where a dealer acting as placement agent takes on a true agency role with the issuer and does not take a principal position (including not taking a 'riskless principal' position) in the securities being placed, the disclosure relating to an 'arm's length' relationship would be inapplicable and 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. . . . 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 cases, it would also be appropriate for an underwriter to omit those disclosures 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.

In addition, the proposed rule change would update the 2012 Interpretive Notice by incorporating supplemental language into the Revised Interpretive Notice intended to harmonize it with the Commission's adoption of its permanent rules regarding the registration and record-keeping requirements applicable to municipal advisors, and related exclusions and exceptions, which went into effect after the effective date of the 2012 Interpretive Notice.[17] The Revised Interpretive Notice would also incorporate language regarding the application of the exclusion from the definition of "municipal advisor" applicable to dealers acting as underwriters pursuant to Exchange Act Rule 15Ba1-1(d)(2)(i)[18] and the application of this underwriter exclusion to a dealer's placement agent activities. In relevant part, the Revised Interpretive Notice would state:

> 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).

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17 See Final MA Adopting Release (citation and link at note 16 supra).

18 See Final MA Rule Adopting Release, 78 FR at 67515 – 67516 (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 Final 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).

The MSRB believes that the guidance provided by this harmonizing language is in keeping with the existing references included in the 2012 Interpretive Notice and its guidance regarding the existence of other relevant or similar legal obligations that could have a bearing on an underwriter's fair dealing obligations under Rule G-17.

iii. Incorporate Statements Regarding Negotiated Offerings and Defining Negotiated and Competitive Offerings for Purposes of the Revised Interpretive Notice

By its terms, and as presently stated in the Implementation Guidance, the 2012 Interpretive Notice applies primarily to negotiated offerings of municipal securities, with many of its provisions not applicable to competitive offerings. The Implementation Guidance clarifies what constitutes a negotiated offering for purposes of the 2012 Interpretive Notice, stating that:

> 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 the 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 proposed rule change would incorporate this language into the Revised Interpretive Notice as stated in the Implementation Guidance. In relevant part, the Revised Interpretive Notice would read:

> 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.

iv. Incorporate Statements Regarding the Applicability of the Revised Interpretive Notice to Persons Other than Issuers of Municipal Securities and Update the Definition of Municipal Entities

The 2012 Interpretive Notice outlines the duties that a dealer owes to an issuer of municipal securities when the dealer underwrites a new issuance. As explained in the Implementation Guidance, the 2012 Interpretive Notice "does not set out the underwriter's fair dealing obligations to other parties involved with a municipal securities financing, including a conduit borrower." As discussed further below,[19] the MSRB sought feedback in the Concept Release and Request for Proposal regarding whether the 2012 Interpretive Notice should be amended to incorporate specifics regarding how an underwriter must fulfill its obligations to a conduit borrower. Ultimately, the MSRB decided not to incorporate such an amendment in the proposed rule change for the reasons discussed further herein, including that the issues presented by the relationship between underwriters and conduit borrowers are sufficiently distinct to merit their own full consideration in separate guidance. Accordingly, the proposed rule change would incorporate the language from the Implementation Guidance into the Revised Interpretive Notice

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[19] Relatedly, the comments received by the MSRB regarding the incorporation of this language are discussed further below in the MSRB's summary of comments. See related discussion under Summary of Comments Received in Response to the Concept Proposal– Disclosures to Conduit Borrowers and related notes 137 et. seq. infra.; see also Summary of Comments Received in Response to the Request for Comment – Disclosures to Conduit Borrowers and related note 228.

with conforming edits, stating "[t]his notice does not set out the underwriter's fair-practice duties to other parties to a municipal securities financing (e.g., conduit borrowers)."

The proposed rule change would also update the definition of "municipal entity" as used in the 2012 Interpretive Notice. In relevant part, the Revised Interpretive Notice would read, ". . . 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." This revision would harmonize the Revised Interpretive Notice with the Final MA Rules and MSRB Rule G-42.[20] The MSRB believes this revision to be non-substantive.

v. Incorporate Statements Regarding Underwriters' Discouragement of the Engagement of a Municipal Advisor

The Implementation Guidance further clarifies the scope of the prohibition included in the 2012 Interpretive Notice, affirming that an underwriter must not recommend that the issuer not retain a municipal advisor. The prior guidance states that "an underwriter may not discourage an issuer from using a municipal advisor or otherwise imply that the hiring of a municipal advisor would be redundant because the underwriter can provide the same services that a municipal advisor would." The proposed rule change would incorporate this language into the Revised Interpretive Notice as stated in the Implementation Guidance with conforming edits.[21] In relevant part, the Revised Interpretive Notice would provide:

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[20] See Rule G-42(f)(vi) ("'Municipal entity' shall, for purposes of [Rule G-42], have the same meaning as in Section 15B(e)(8) of the Act, 17 CFR 240.15Ba1-1(g) and other rules and regulations thereunder.").

[21] Relatedly, the comments received by the MSRB regarding the incorporation of this language are discussed further below in the MSRB's summary of comments. See related discussion under Summary of Comments Received in Response to the Concept Proposal – Underwriter Discouragement of Use of Municipal Advisor; Addition of a New Standard Disclosure Regarding the Engagement of Municipal Advisors and related notes 134 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment –

> Underwriters also must not recommend 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.

The MSRB believes this revision to be a non-substantive incorporation of existing guidance. The comments the MSRB received in response to this change are discussed herein in the MSRB's summary of comments.[22]

vi. Incorporate Statements Regarding Third-Party Payments

The Implementation Guidance clarifies the obligation of underwriters to disclose certain third-party payments, as well as other payments, values or credits received by an underwriter. More specifically, the 2012 Implementation Guidance states, "[t]he third-party payments to which the disclosure requirement under the [2012 Interpretive Notice] would apply are those that give rise to actual or potential conflicts of interest and typically would not apply to third-party arrangements for products and services of the type that are routinely entered into in the normal course of business, so long as any specific routine arrangement does not give rise to an actual or potential conflict of interest." The Implementation Guidance further states that, "[e]ven though . . . the [2012 Interpretive Notice] specifically requires disclosure of the existence of any incentives for the underwriter to recommend a complex municipal securities financing or any other

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Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor and related notes 201 et. seq. infra.

[22] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Underwriter Discouragement of Use of Municipal Advisor and under Summary of Comments Received in Response to the Request for Comment – Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor and related notes 201 et. seq. infra.

conflicts of interest associated with such recommendation, the specific requirement with respect to complex financings does not obviate the requirement 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."

The proposed rule change would incorporate this language into the Revised Interpretive Notice as stated in the Implementation Guidance with the following exception and conforming edits. The proposed rule change omits the statements from the 2012 Implementation Guidance that the disclosure, " . . . typically would not apply to third-party arrangements for products and services of the type that are routinely entered into in the normal course of business, so long as any specific routine arrangement does not give rise to an actual or potential conflict of interest." The MSRB views this language to be redundant with the prior language regarding the applicability of the disclosure to only those third-party payments that give rise to actual material conflicts of interest or potential material conflicts of interest. Consequently, the MSRB views the omission of this text as non-substantive. Thus, with this omission and the conforming edits, the Revised Interpretive Notice would read in relevant part:

> 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. … 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.

vii. Incorporate Statements Regarding the Need for Each Underwriter in a Syndicate to Deliver Dealer-Specific Conflicts of Interest When Applicable

The FAQs clarify what disclosures may be effected by a syndicate manager on behalf of co-managing underwriters in the syndicate. As stated in the FAQs:

> In general, disclosures of dealer-specific conflicts of interest cannot be satisfied by disclosures made by the syndicate manager because such disclosures are, by their nature, not uniform, and must be prepared by each dealer. However, nothing in the [2012 Interpretive Notice] or [Implementation Guidance] would preclude a syndicate manager from delivering each of the dealer-specific conflicts to the issuer as part of a single package of disclosures. . . . The [2012 Interpretive Notice] does not require an underwriter to notify an issuer if it has determined that it does not have an actual or potential conflict of interest subject to disclosure. However, underwriters are reminded that the obligation to disclose actual or potential conflicts of interest includes conflicts arising after the time of engagement with the issuer, as [further noted in the FAQs].

Despite certain other amendments discussed herein that would require the syndicate manager to deliver the standard disclosures and transaction-specific disclosures where a syndicate is formed, these statements regarding the dealer-specific disclosures in the FAQs would remain true and accurate under the Revised Interpretive Notice. Accordingly, the proposed rule change would incorporate this language into the Revised Interpretive Notice as stated in the FAQs with conforming edits, including the technical clarification that such disclosures apply to "actual material conflicts of interest" and "potential material conflicts of interest" in order to make the statements consistent with related amendments in the proposed rule change.[23] In relevant part, the Revised Interpretive Notice would read:

> 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

[23] The MSRB notes that the proposed rule change would preserve existing language from the 2012 Interpretive Notice that the syndicate manager may deliver the dealer-specific disclosures of the other syndicate members in a single package, but the MSRB views this simply as a permissive function of delivery rather than an obligation to craft adequate disclosures on the part of other parties.

> disclosures includes material conflicts of interest arising after the time of engagement with the issuer, as noted [therein].

viii. Incorporate Statements Regarding the Timing for the Delivery of Certain Disclosures

The Implementation Guidance and FAQs clarify the timing for the delivery of the disclosures under the 2012 Interpretive Notice. More specifically, the Implementation Guidance states that, "[n]ot all transactions proceed along the same timeline or pathway and on rare occasions precise compliance with some of the timeframes set out in the [2012 Interpretive Notice] may not be feasible." It further states:

> The timeframes set out in the [2012 Interpretive Notice] should be viewed in light of the overarching goals of Rule G-17 and the purposes that required disclosures are intended to serve as described in the [2012 Interpretive Notice]. . . . That is, the issuer (i) has clarity throughout all substantive stages of a financing regarding the roles of its professionals, (ii) is aware of conflicts of interest promptly after they arise and well before it effectively becomes fully committed (either formally or due to having already expended substantial time and effort) to completing the transaction with the underwriter, and (iii) has the information required to be disclosed with sufficient time to take such information into consideration before making certain key decisions on the financing.

On this particular point, the Implementation Guidance concludes by stating that, ". . . the timeframes set out in the [2012 Interpretive Notice] are not intended to establish hair-trigger tripwires resulting in technical rule violations so long as underwriters act in substantial compliance with such timeframes and have met the key objectives for providing such disclosures under the [2012 Interpretive Notice]."

The FAQs provide that certain disclosures be made at different points in a transaction. More specifically, the FAQs specify that:

- the underwriter's disclosure regarding the arm's length nature of the relationship must be disclosed "at the earliest stage of the relationship, generally at or before a

response to a request for proposals or promotional materials are delivered to an issuer;"

- the other role disclosures and disclosures regarding the underwriter's compensation must be disclosed "[a]t or before the time the underwriter has been engaged to perform the underwriting services;"
- those dealer-specific conflicts of interest known at the time of the engagement must be disclosed "[a]t or before the time the dealer has been engaged to serve as underwriter" in the case of a sole underwriter or syndicate manager where a syndicate has been formed;
- a co-managing underwriter joining a syndicate must disclose any dealer-specific conflicts of interest known at that time concurrent with the formation of the syndicate or upon the co-managing underwriter joining an already-formed syndicate;
- those dealer-specific conflicts of interest discovered or arising after being engaged as an underwriter must be disclosed "as soon as practicable after [being] discovered and with sufficient time for the issuer to evaluate the conflict and its implications;"
- any conflicts arising in connection with a recommendation of a complex municipal securities financing must be disclosed "[b]efore the execution of a commitment by the issuer (which may include a bond purchase agreement) relating to such recommendation, and with sufficient time to allow the issuer to evaluate the conflict and its implication;"

- the disclosures regarding the material aspects of a routine financing must be disclosed "[b]efore the execution of a commitment by the issuer (which may include a bond purchase agreement) relating to the financing, and with sufficient time to allow the issuer to evaluate the features of the financing;" and
- the disclosures regarding the material financial risks and characteristics of a complex financing must be disclosed "[b]efore the execution of a commitment by the issuer (which may include a bond purchase agreement) relating to the financing, and with sufficient time to allow the issuer to evaluate the features of the financing."

The proposed rule change would incorporate these timeline concepts from the Implementation Guidance and FAQs into the Revised Interpretive Notice with certain conforming edits (e.g., by utilizing the Revised Interpretive Notice's defined terms of "standard disclosure", "dealer-specific disclosures," and "transaction-specific disclosures").

The proposed rule change would also incorporate clarifying language regarding the intent of these timelines. More specifically, the intent that the timelines are defined to ensure that underwriters act promptly to deliver disclosures in light of all the relevant facts and circumstances, but are not "intended to establish strict, hair-trigger tripwires resulting in mere technical rule violations."[24] In relevant part, the Revised Interpretive Notice would read:

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[24] Relatedly, the comments received by the MSRB regarding the incorporation of this language are discussed further below in the MSRB's summary of comments. See related discussion under Summary of Comments Received in Response to the Concept Proposal – Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into a Single Interpretive Notice – Modification of Implementation Guidance's Language Regarding the "No Hair-Trigger" and related note 95 and Summary of Comments Received in Response to the Request for Comment – Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into a Single Interpretive Notice – Reincorporation of the "No Hair-Trigger" Language from the Implementation Guidance and related notes 157 et. seq. infra.

> 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.

ix. Incorporate Statements Regarding Whether Underwriters May Rely on Certain Representations of Issuer Officials

The FAQs clarify the circumstances under which an underwriter may rely on the representations of issuer officials, stating:

> Absent red flags, an underwriter may reasonably rely on a written representation from an issuer official in, among other things, the issuer's request for proposals that he or she has the ability to bind the issuer by contract with the underwriter. Moreover, the underwriter may reasonably rely on a written statement from such person that he or she is not a party to a disclosed conflict.

The proposed rule change would incorporate this language from the FAQs into the Revised Interpretive Notice with clarifying language regarding the relevance of facts discovered during the course of an underwriter's due diligence, including diligence related to the transaction generally or pursuant to an underwriter's own determination of whether it has any actual material

conflicts of interest or potential material conflicts of interest. Specifically, the Revised Interpretive Notice supplements the existing statement from the FAQs with the following text:

> 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.

This statement is intended to clarify that if an underwriter becomes aware of a fact through the normal course of its diligence that would lead it to doubt a representation of an issuer official, such information may rise to the level of a red flag that would not allow the underwriter to reasonably rely on the written representation.

x. Incorporate Statements Regarding an Underwriter Having a Reasonable Basis for Its Representations and Other Material Information Provided to Issuers

The 2012 Interpretive Notice states that underwriters must "have a reasonable basis for representations and other material information provided to issuers" and clarifies that the obligation "extends to the reasonableness of assumptions underlying the material information being provided." The Implementation Guidance further contextualizes this reasonable basis standard, stating:

> The less certain an underwriter is of the validity of underlying assumptions, the more cautious it should be in using such assumptions and the more important it will be that the underwriter disclose to the issuer the degree and nature of any uncertainties arising from the potential for such assumptions not being valid. . . . If an underwriter is uncomfortable having an issuer rely on any statements made or information provided to such issuer, it should refrain from making the statement or providing the information, or should provide any appropriate disclosures or other information that would allow the issuer to adequately assess the reliability of the statement or information. . . . 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. . . . 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.

The proposed rule change would incorporate this language from the Implementation Guidance into the Revised Interpretive Notice with conforming edits and the following exception.[25] The proposed rule change omits the statements from the 2012 Implementation Guidance that:

> The less certain an underwriter is of the validity of underlying assumptions, the more cautious it should be in using such assumptions and the more important it will be that the underwriter disclose to the issuer the degree and nature of any uncertainties arising from the potential for such assumptions not being valid.

The MSRB views this statement to be potentially confusing and likely redundant with the preceding statement regarding the need for an underwriter to have a reasonable basis for its assumptions underlying any material information being provided to an issuer. Accordingly, the MSRB views the omission of this text as non-substantive. In relevant part, the Revised Interpretive Notice would read as follows:

> 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

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[25] Relatedly, the comments received by the MSRB regarding the incorporation of this language are discussed further below in the MSRB's summary of comments. See related discussion under Summary of Comments Received in Response to the Concept Proposal – Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into a Single Interpretive Notice – General Comments Encouraging the Consolidation of the Implementation Guidance, and the FAQs and related notes 91 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into a Single Interpretive Notice – Inclusion of Language Regarding a Reasonable Basis for Underwriter Representations related note 155 infra.

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.

xi. Incorporate Statements Regarding Whether a Particular Recommended Financing Structure or Product is Complex

The 2012 Implementation Guidance describes a complex municipal securities financing as "a new issue financing that is structured in a unique, atypical, or otherwise complex manner that issuer personnel responsible for the issuance of municipal securities would not be well positioned to fully understand or to assess the implications of a financing in its totality." The Implementation Guidance clarifies that, "[u]nderwriters must make reasonable judgments regarding 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." The 2012 Interpretive Notice then provides a non-exclusive, illustrative list of examples of new issue structures that constitute a complex municipal securities financing, inclusive of variable rate demand obligations (VRDOs); financings involving derivatives (such as swaps); and financings in which the interest rate is benchmarked to an index that is commonly used in the municipal marketplace (e.g., LIBOR or SIFMA), which may be complex to an issuer that does not understand the components of that index or its possible interaction with other indexes.

The proposed rule change would incorporate this language from the Implementation Guidance into the Revised Interpretive Notice with conforming edits and an update to the illustrative, non-exclusive list of interest rate benchmarks to include the Secured Overnight Financing Rate (SOFR).[26] The MSRB believes this edit is a necessary update to ensure that the

[26] SOFR is published by the Federal Reserve Bank of New York and is based on a broad measure of the cost of borrowing cash overnight collateralized by U.S. Treasury securities in the

Revised Interpretive Notice would reflect current market practices. In relevant part, the Revised Interpretive Notice would read as follows, "[e]xamples 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)." The Revised Interpretive Notice would also incorporate the following footnote to this language:

> 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.

xii. Incorporate Statements Regarding the Specificity of Disclosures

The 2012 Interpretive Notice provides that an underwriter of a negotiated issue that recommends a complex municipal securities transaction or product to an issuer has an obligation to disclose all financial material risks known to the underwriter and reasonably foreseeable at the time of the disclosure, financial characteristics, incentives, and conflicts of interest regarding the transaction or product. The Implementation Guidance clarified the scope of this obligation, stating:

> The disclosures concerning a complex municipal securities financing must address the specific elements of the financing, rather than being general in nature. . . . An underwriter cannot satisfy this requirement by providing an issuer a single document setting out general descriptions of the various complex municipal securities financing structures or products it may recommend from time to time to its various issuer clients that would effectively require issuer personnel to

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repurchase agreement market. SOFR was chosen by the Alternative Reference Rates Committee ("ARRC") as the rate that represents best practice for use in certain new USD derivatives and other financial contracts, representing the ARRC's preferred alternative to USD LIBOR. See http://www.msrb.org/EducationCenter/Municipal-Market/About/Market/Market-Indicators.aspx.

> discover which disclosures apply to a particular recommendation and to the particular circumstances of that issuer. . . . An underwriter can create, in advance, individualized descriptions, with appropriate levels of detail, of the material financial characteristics and risks for each of the various complex municipal securities financing structures or products (including any typical variations) it may recommend from time to time to its various issuer clients, with such standardized descriptions serving as the base for more particularized disclosure for the specific complex financing the underwriter is recommending to a particular issuer. The 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.

The Implementation Guidance further states that "[p]age after page of complex legal jargon in small print would not satisfy this requirement" and that "[u]nderwriters should be able to leverage such materials for purposes of assisting issuers to more efficiently prepare disclosures to the public included in official statements in a manner that promotes more consistent marketplace disclosure of a particular financing type from issue to issue, and also should be able to leverage the materials for internal training and risk management purposes." The Implementation Guidance also clarifies that "[n]ot all negotiated offerings involve a recommendation by the underwriter, such as where an underwriter merely executes a transaction already structured by the issuer or its financial advisor." The proposed rule change would incorporate this language from the Implementation Guidance into the Revised Interpretive Notice with conforming edits and the following exception.

In terms of the exception, the proposed rule change omits the statement regarding how such materials might assist issuers. Accordingly, in relevant part, the Revised Interpretive Notice would simply read, "[u]nderwriters should be able to leverage such materials for internal training and risk management purposes." The MSRB views this statement as unnecessary and so its deletion is non-substantive for purposes of the Revised Interpretive Notice.

xiii. Incorporate Statements Regarding Profit Sharing Arrangements

The 2012 Interpretive Notice states that, "[a]rrangements between the underwriter and an investor purchasing new issue securities from the underwriter 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." The Implementation Guidance further clarifies that:

> 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 without the existence of a formal written agreement. . . . An underwriter should carefully consider whether any such arrangement, regardless of whether it constitutes a violation of MSRB Rule G-25(c) precluding a dealer from directly or indirectly sharing in the profits or losses of a transaction in municipal securities with or for a customer, may evidence a potential failure of the underwriter's duty with regard to new issue pricing [as further described in the Implementation Guidance].

The proposed rule change would incorporate this concept into the Revised Interpretive Notice as stated in the Implementation Guidance, which reads, in relevant part, "[u]nderwriters 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."

B. Amending the Nature, Timing, and Manner of Disclosures

The proposed rule change would define certain categories of underwriter disclosures and assign the responsibility for the delivery of certain disclosures to the syndicate manager in circumstances where a syndicate is formed, as further described below.

i. Define Certain Categories of Underwriter Disclosures

The proposed rule change would define the following terms in order to delineate a dealer's various fair dealing obligations under the Revised Interpretive Notice: "standard disclosures" as collectively referring to the disclosures concerning the role of an underwriter[27] and an underwriter's compensation;[28] "dealer-specific disclosures" as collectively referring to the disclosures concerning an underwriter's actual material conflicts of interest and potential material conflicts of interest; and "transaction-specific disclosures" as collectively referring to the disclosures concerning the material aspects of financing structures that the underwriter recommends.

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[27] Under the 2012 Interpretive Notice, these disclosures currently state: (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; (iii) unlike municipal advisors, underwriters do not have a fiduciary duty to the issuer under the federal securities laws and are, therefore, not required by federal law to act in the best interests of the issuer without regard to their own financial or other interests; (iv) 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 (v) 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. The proposed rule change incorporates one additional disclosure into the Revised Interpretive Notice, 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. See related discussion under Summary of Comments Received in Response to the Concept Proposal – Underwriter Discouragement of Use of Municipal Advisor; Addition of a New Standard Disclosure Regarding the Engagement of Municipal Advisors and related notes 134 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor and related notes 201 et. seq. infra.

[28] Under the 2012 Interpretive Notice, an underwriter must disclose to an issuer whether its underwriting compensation will be contingent on the closing of a transaction. It 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 underwriter to recommend a transaction that it is unnecessary or to recommend that the size of the transaction be larger than is necessary.

ii. Assign the Syndicate Manager the Exclusive Responsibility for the Standard Disclosures and Transaction-Specific Disclosures

The 2012 Interpretive Notice states that a syndicate manager is permitted, but not required, to make the standard disclosures and the transaction-specific disclosures on behalf of the other underwriters in the syndicate. The amendments in the proposed rule change would obligate only the syndicate manager[29] of a syndicate – or sole underwriter, as the case may be – to make the standard disclosures and transaction-specific disclosures and eliminates any obligation of other co-managing underwriters in the syndicate to make the standard disclosures and transaction-specific disclosures. By eliminating the obligation of such other syndicate members to deliver the standard disclosures and transaction-specific disclosures upon the formation of the syndicate, the syndicate manager would no longer be delivering the disclosures "on behalf of" any other syndicate members, and such other syndicate members would be under no obligation to ensure the delivery of such disclosures on their behalf.[30] As further described in

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[29] For purposes of the proposed rule change, 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, the proposed rule change would clarify that the syndicate manager is obligated to make the standard disclosures and transaction-specific disclosures. In the event that there are joint-bookrunning senior managers, the proposed rule change would state that only one of the joint-bookrunning senior managers would be obligated under the Revised Interpretive 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 solely responsible for providing the standard disclosures and transaction-specific disclosures under the Revised Interpretive Notice. Notwithstanding the obligation of a syndicate manager to deliver the standard disclosures and transaction-specific disclosures under the Revised Interpretive Notice, nothing in the Revised Interpretive Notice would prohibit an underwriter from making a disclosure in order to, for example, comply with another regulatory or statutory obligation.

[30] In light of, and consistent with, these obligations placed on the syndicate manager, only the syndicate manager must maintain and preserve records of the applicable disclosures it delivers in accordance with MSRB rules.

the MSRB's summary of comments,[31] the MSRB believes that this proposed change will result in issuers receiving fewer duplicative boilerplate disclosures, because a syndicate member will not be obligated to deliver its own disclosures.

In addition, the proposed rule change provides that any disclosures delivered by a syndicate manager prior to or concurrent with the formation of a syndicate would not need to be identified as delivered in the capacity of the syndicate manager or otherwise redelivered "on behalf" of the syndicate. It would suffice for purposes of the proposed rule change that an underwriter – later syndicate manager – has delivered the standard disclosures and/or transaction-specific disclosures to the issuer regardless of whether a syndicate may form or has already been formed in the course of the transaction.[32]

Each member of the syndicate would remain responsible for ensuring the delivery of any dealer-specific disclosures if, but only if, such syndicate member had actual material conflicts of interest or potential material conflicts of interest that must be disclosed. The MSRB continues to believe that the obligation for each underwriter to deliver dealer-specific disclosures is warranted because such disclosures are, by their nature, not uniform, and must be tailored to each

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[31] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Syndicate Manager Responsibility for the Standard Disclosures and Transaction-Specific Disclosures and notes 102 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Syndicate Manager Responsibility for the Standard Disclosures and Transaction-Specific Disclosures and notes 169 et. seq. infra.

[32] For the avoidance of any doubt, the proposed change would apply to all applicable timeframes for the development of a syndicate, including situations when an underwriter – later syndicate manager – has previously delivered the disclosures prior to the formation of the syndicate and also when a syndicate manager delivers the disclosures concurrent with or after the formation of the syndicate.

underwriter's unique circumstances.[33] As currently stated in the 2012 Interpretive Notice, if an underwriter does not have any actual material conflicts of interest or potential material conflicts of interest, the proposed rule change would not require the underwriter to deliver an affirmative written statement to the issuer regarding the absence of such dealer-specific conflicts, but the underwriter is permitted to do so.

iii. Require the Separate Identification of the Standard Disclosures

The 2012 Interpretive Notice currently permits the delivery of omnibus disclosure documents, in which the standard disclosures need not be separately identified from the transaction-specific disclosures and dealer-specific disclosures. The proposed rule change would require the separate identification and formatting of the standard disclosures (i.e., disclosures concerning the role of the underwriter and the underwriter's compensation) from the transaction-specific disclosure and the dealer-specific disclosures. For example, when providing the various disclosures in the same document, an underwriter would be required to clearly identify the standard disclosures and separate them from the other disclosures (e.g., by placing the standard disclosures in an appendix or attachment).

iv. Clarify the Meaning of "Recommendation" for Purposes of Disclosures Related to Complex Municipal Securities Financings

The 2012 Interpretive Notice provides that an underwriter in a negotiated offering that recommends a complex municipal securities financing to an issuer must disclose the material financial characteristics of the complex municipal securities financing, as well as the material

[33] As currently stated in the 2012 Interpretive Notice and Implementation Guidance, nothing in the Revised Interpretive Notice would preclude – or require – a syndicate manager from delivering each of the dealer-specific conflicts to the issuer as part of a single package of disclosures, if the syndicate manager and other co-managing underwriters of the syndicate so agreed.

financial risks of the financing that are known to the underwriter and reasonably foreseeable at the time of the disclosure (a "complex municipal securities financing disclosure"). Accordingly, as stated in the Implementation Guidance, the requirement to provide a complex municipal securities financing disclosure is triggered if – the new issue is sold in a negotiated offering; the new issue is a complex municipal securities financing; and such financing was recommended by the underwriter. These aspects of the 2012 Interpretive Notice would remain applicable under the Revised Interpretive Notice.

However, the 2012 Interpretive Notice does not define the term "recommendation" for purposes of this requirement. As further described in the MSRB's summary of comments,[34] the MSRB believes it is important to provide this clarification to facilitate dealer compliance with the proposed rule change. The proposed rule change would clarify that a communication by an underwriter is a "recommendation" that triggers the obligation to deliver a complex municipal securities financing disclosure if – given its content, context, and manner of presentation — the communication reasonably would be viewed as a call to action to engage in a complex municipal securities financing or reasonably would influence an issuer to engage in a particular complex municipal securities financing.[35] For the reasons described in the MSRB's summary of

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[34] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Clarification of the Meaning of "Recommendation" and related notes 131 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Guidance Regarding Meaning of "Recommendation" and related notes 219 et. seq. infra.

[35] In proposing this change the MSRB draws upon, by analogy, the analysis applicable to dealers making recommendations to customers under MSRB Rule G-19, on the suitability of recommendations and transactions. While Rule G-19 does not apply to the recommendations made by underwriters to issuers in connection with new issues of municipal securities for the reasons discussed below, the Revised Interpretive Notice draws, by analogy, on the analysis of when a dealer has made recommendation under Rule G-19. As discussed in existing MSRB guidance, this analysis under Rule G-19 is informed by the related suitability standard promulgated by the Financial Industry Regulatory Authority (FINRA). More specifically, when

comments below,[36] the MSRB considered, and ultimately determined not to, adopt the standard that has been developed for purposes of municipal advisor recommendations under Rule G-42, on the duties of non-solicitor municipal advisors.[37]

v. Establish a "Reasonably Likely" Standard for Disclosure of Potential Material 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. As described in the Implementation Guidance, the requirement to provide such disclosure is triggered if: the new issue is sold in a negotiated underwriting; the matter to be disclosed

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proposed amendments to Rule G-19 were approved in March 2014, the MSRB noted that "[g]iven the extensive interpretive guidance surrounding FINRA Rule 2111 [on suitability] and the impracticality and inefficiency of republishing each iteration of that guidance, substantively similar provisions of Rule G-19 will be interpreted in a manner consistent with FINRA's interpretations of Rule 2111." See Release No. 34-71665; 77 FR 14321 (March 7, 2014) (File No. SR-MSRB-2013-07) (Mar. 7, 2014) and MSRB Regulatory Notice 2014-07 (March 2014). FINRA's suitability guidance has long provided that the determination of whether a "recommendation" has been made is an objective rather subjective inquiry. See FINRA Notice to Members 01-23 (March 2001). In guidance relating to FINRA Rules 2090 and 2011, FINRA reiterated this prior guidance, stating that an important factor in this inquiry "is whether – given its content, context and manner of presentation – a particular communication from a firm or associated person to a customer reasonably would be viewed as a suggestion that the customer take action or refrain from taking action regarding a security or investment strategy." See FINRA Regulatory Notice 11-02 (Know Your Customer and Suitability) (January 2011). Rule G-19 in this situation does not directly apply to a recommendation made by an underwriter to an issuer in transactions involving the sale by the issuer of a new issue of its securities, because, by its terms, Rule G-19 governs recommendations to "customers," and MSRB Rule D-9 provides that an issuer is not a "customer" within the meaning of that rule in the case of a sale by it of a new issue of its securities. See MSRB Rule D-9 (available here) and related interpretive guidance (available here).

[36] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Clarification of the Meaning of "Recommendation" and related notes 131 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Guidance Regarding Meaning of "Recommendation" and related notes 219 et. seq. infra.

[37] See FAQs Regarding MSRB Rule G-42 and Making Recommendations (June 2018) (hereinafter, the "G-42 FAQs").

represents a conflict of interest, either in reality or potentially; and any such actual or potential conflict of interest is material. These aspects of the 2012 Interpretive Notice would remain applicable under the Revised Interpretive Notice. However, the proposed rule change provides 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. This revision would narrow 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 further described below in the MSRB's summary of comments, the MSRB believes this amendment will benefit issuers and underwriters alike by reducing the volume of disclosure that must to be provided to those conflicts that are most concrete and probable.[38] Underwriters will benefit from this change by no longer having to draft and deliver longer disclosures that identify and describe remote or hypothetical conflicts that are unlikely to materialize during the course of a given transaction. The MSRB believes that issuers will also benefit from this change because they will no longer have to review and analyze such longer-form disclosures, which will allow them to focus their time and other resources to the consideration of those material conflicts that are present, or reasonably likely to be present, during the course of the transaction, and, thereby, not expend time and resources discerning likely dealer conflicts from unlikely conflicts,

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[38] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Disclosure of Potential Material Conflicts of Interest and related notes 98 et. seq. infra., and see also Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Disclosure of Potential Material Conflicts of Interest and related notes 161 et. seq. infra.

or otherwise evaluating potential material conflicts that are not reasonably likely to materialize during the course of the transaction.

Additionally, the proposed rule change will not diminish an underwriter's fair dealing obligation to update, or otherwise supplement, its dealer-specific disclosures in circumstances when a previously undisclosed potential conflict of interest later ripens into an actual material conflict of interest. Thus, the MSRB believes that the proposed rule change does not compromise municipal entity protection, because municipal entity issuers would continue to receive timely information about all material conflicts of interest that ripen during the course of a transaction. More specifically, at or before the time an underwriter is engaged, issuers would continue to receive a dealer-specific disclosure describing any actual material conflicts of interest that are present at that time and any potential material conflicts of interest that, based on the reasonable judgement of the dealer at that time, are likely to mature into an actual material conflict of interest – assuming there are any such actual material conflicts of interest or potential material conflicts of interest.[39] Thereafter, an underwriter's fair dealing obligation would continue to require it to deliver an updated or supplemental dealer-specific disclosure for any actual material conflict of interest or potential material conflict of interest that has not been previously disclosed to the issuer and arising after the triggering of the initial dealer-specific disclosure.[40]

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[39] In the absence of any such actual material conflict of interest or potential material conflict of interest, an underwriter would not have a fair dealing obligation under the Revised Interpretive Notice to disclose the absence of such a conflict, but may choose to provide an affirmative written statement regarding the absence of such conflicts at its discretion (e.g., for the benefit of establishing a written record of such absence).

[40] For example, the 2012 Interpretive Notice states: ". . . 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.'" This concept would remain applicable under the Revised Interpretive Notice.

vi. Clarify that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties

As outlined above, the 2012 Interpretive Notice requires underwriters to provide issuers with certain standard disclosures, dealer-specific disclosures, and transaction-specific disclosures, when and if applicable. By their respective definitions, the standard disclosures cover generic conflicts of interest that could apply to any underwriter in any underwriting; the dealer-specific disclosures are the actual material conflicts of interest and potential material conflicts of interest generally unique to a specific underwriter; and the transaction-specific disclosures relate to the specific financing structure recommended by an underwriter. None of the requirements in the 2012 Interpretive Notice prescribe that the underwriter must provide the issuer with written disclosures on the part of any other transaction participants, including issuer personnel, but does not expressly state this fact. In response to the concern of a commenter more fully described in the MSRB's summary of comments below,[41] the MSRB believes that this express clarification is warranted to avoid potential misinterpretation of the disclosure requirements of the proposed rule change. Accordingly, the proposed rule change would expressly state that underwriters 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.

vii. Clarify that Disclosures must be "Clear and Concise"

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[41] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties and related note 114, and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties and related notes 194 et. seq infra.

The 2012 Interpretive Notice currently requires disclosures to be "designed to make clear to such official the subject matter of such disclosures and their implications for the issuer." The proposed rule change would clarify that an underwriter's disclosures must be delivered in a "clear and concise" manner, which the MSRB believes is consistent with, and substantially equivalent to, the standard currently articulated in the 2012 Interpretive Notice. Nevertheless, in response to the concern of commenters more fully described in the MSRB's summary of comments below, the MSRB believes that this clarification is warranted to provide further guidance to all stakeholders regarding the accessibility and readability of an underwriter's disclosures.

viii. Update the Definition of Municipal Entity

The 2012 Interpretive Notice currently provides a definition of "municipal entity" that references Section 15B(e)(8) under the Exchange Act.[42] Notably, the 2012 Interpretive Notice does not reference the definition of municipal entity under Exchange Act Rule 15Ba1-1, because the 2012 Interpretive Notice was issued prior to the effectiveness of the Commission's permanent registration regime for "municipal advisors" pursuant to the amendments to Section 15B of the Exchange Act effectuated by Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act[43] (collectively, the "Final MA Rules"), including Exchange Act Rule

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42 The 2012 Interpretive Notice states: "The term 'municipal entity' is defined by Section 15B(e)(8) of the Securities Exchange Act of 1934 (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.'"

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

15Ba1-1.[44] Exchange Act Rule 15Ba1-1 defines a "municipal entity" to mean: "any State, political subdivision of a State, or municipal corporate instrumentality of a State or of a political subdivision of a State, including – (1) Any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (2) 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 (3) Any other issuer of municipal securities."[45] Relatedly, Rule G-42 includes this same reference to the definition of municipal entity as used in the Final MA Rules.

In light of the Commission's definition contained in the Final MA Rules and the MSRB's definition of "municipal entity" as used under Rule G-42, the proposed rule change would incorporate a specific reference to this rule definition, in addition to the general statutory definition, to avoid any confusion about the scope of the Revised Interpretive Notice and to promote harmonization with the Final MA Rules and Rule G-42. In relevant part, the Revised Interpretive Notice would read, " . . . 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."

C. Require an Additional Standard Disclosure Regarding the Engagement of Municipal Advisors

The 2012 Interpretive Notice currently requires an underwriter to make five discrete statements regarding the underwriter's role as part of the standard disclosures, including a

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44 See Registration of Municipal Advisors, Release No. 34-70462 (September 20, 2013), 78 FR 67467 (hereinafter, the "MA Rule Adopting Release") (November 12, 2013) (available at http://www.sec.gov/rules/final/2013/34-70462.pdf).

45 See Exchange Act Rule 15Ba1-1(g).

disclosure that, "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 interest of the issuer without regard to its own or other interests."[46] The proposed rule change would incorporate a 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." As a standard disclosure, this additional disclosure would be subject to the same principles for its timing as the other similar standard disclosures (i.e., at or before the time the underwriter has been engaged to perform the underwriting services) and separate delivery as the other standard disclosures (i.e., separately identified when provided with the transaction-specific disclosures and/or dealer-specific disclosures). In response to the concern of commenters more fully described in the MSRB's summary of comments below,[47] 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.

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46 See note 27 supra for the other four disclosures currently required under the 2012 Interpretive Notice.

47 See related discussion under Summary of Comments Received in Response to the Concept Proposal – Underwriter Discouragement of Use of Municipal Advisor; Addition of a New Standard Disclosure Regarding the Engagement of Municipal Advisors and related notes 134 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor and related notes 201 et. seq. infra.

D. Permit E-mail Read Receipt to Serve as Issuer Acknowledgement

The 2012 Interpretive Notice currently requires underwriters to attempt to receive written acknowledgement of receipt by the official of the issuer other than by evidence of automatic e-mail receipt. The proposed rule change would permit an e-mail read receipt to serve as the issuer's acknowledgement under the Revised Interpretive Notice.[48] The proposed rule change would define the term "e-mail read receipt" to mean "an automatic response generated by a recipient issuer official confirming that an e-mail has been opened." The proposed rule change would also clarify that, "[w]hile 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."

In response to the concern of commenters more fully described in the MSRB's summary of comments below,[49] the MSRB believes that this amendment will ease the burden of the acknowledgement requirement on underwriters and issuers alike, as both issuer and underwriter commentators indicated that an underwriter's fair dealing obligation to obtain a written acknowledgement, as currently defined under the 2012 Interpretive Notice, creates burdens

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[48] While an e-mail read receipt would serve as acknowledgement of disclosures delivered for purposes of an underwriter's fair dealing obligations under the Revised Interpretive Notice, the MSRB does not intend to create any implication or inference that an e-mail read receipt may serve as an acknowledgment for any other regulatory purposes.

[49] See related discussion under Summary of Comments Received in Response to the Concept Proposal – E-mail Read Receipt as Issuer Acknowledgement and related notes 125 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – E-mail Read Receipt as Issuer Acknowledgement and related notes 213 et. seq. infra.

without offsetting benefits.[50] The MSRB believes that underwriters would benefit from this change by being able to more efficiently obtain issuer acknowledgement of the disclosures electronically through the automated process of an e-mail system, while issuers that desire to provide such acknowledgement to an underwriter can similarly take advantage of the efficiency of the e-mail system to electronically reply to an underwriter's electronic request. At the same time, under the Revised Interpretive Notice, issuers would still have the choice not to provide acknowledgement to an underwriter in this manner by opting not to send an e-mail read receipt in response to the underwriter's e-mail communication.

Moreover, the MSRB believes that this proposed change will not compromise issuer protection, because, like any other form of acknowledgement under the Revised Interpretive Notice, the proposed rule change would require the e-mail read receipt to come from an issuer official that is not party to a conflict, based on the underwriter's knowledge, and either has been specifically identified by the issuer to receive such disclosure communications or, in the absence of such specific identification, is an issuer official who the underwriter reasonably believes has the authority to bind the issuer by contract with the underwriter. Similarly, the proposed rule change would provide that an underwriter may not rely on an e-mail read receipt as the issuer's written acknowledgement when such reliance is unreasonable under all of the facts and circumstances. Accordingly, the proposed change will not compromise issuer protection because an underwriter still must meet the overarching fair dealing obligation of Rule G-17 when relying on an e-mail read receipt, and, thus, an underwriter cannot reasonably rely on e-mail read receipts as written acknowledgement when the particular facts and circumstances indicate that

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[50] See, e.g., SIFMA Letter I, at p. 17 ("SIFMA and its members strongly believe that the issuer's acknowledgement of receipt of disclosures do not provide any benefit, create significant burdens and should be eliminated").

doing so would be deceptive, dishonest, or unfair, as in the case where an 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.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2) of the Act,[51] which provides that:

> The Board shall propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.

Section 15B(b)(2)(C) of the Act[52] provides that the MSRB's rules shall:

> . . . be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

The proposed rule change is consistent with Section 15B(b)(2)(C) of the Exchange Act[53] because it will protect issuers of municipal securities from fraudulent and manipulative acts and practices, remove impediments to and perfect the mechanism of a free and open market, and promote just

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51 15.U.S.C. 78o-4(b)(2).

52 15 U.S.C. 78o-4(b)(2)(C).

53 15.U.S.C. 78o-4(b)(2).

and equitable principles of trade, and promote the protection of municipal entities, for the reasons set forth below.

A. Defining the Various Categories of Underwriter Disclosures and Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into the Revised Interpretive Notice

The proposed rule change would promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market through its amendment of the 2012 Interpretive Notice to define the various categories of underwriter disclosures and through the incorporation of the content of the Implementation Guidance and FAQs. These amendments promote equitable principles of trade and the removal of impediments to and perfection of the mechanism of a free and open market by allowing underwriters to reference and review a single consolidated document with uniform terms under Rule G-17, which facilitates the efficient determination of any applicable fair dealing obligations and, thereby, allows for more efficient and less burdensome compliance. At the same time, this amendment does not compromise issuer protection, because these amendments to the 2012 Interpretive Notice are primarily of a technical nature that do not alter the substance of the information delivered to issuers of municipal securities.

B. Amending the Nature, Timing, and Manner of Disclosures

i. Assign the Syndicate Manager the Exclusive Responsibility for the Standard Disclosures and Transaction-Specific Disclosures

The proposed rule change would promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market by amending the 2012 Interpretive Notice to obligate only the syndicate manager – or the sole underwriter, as the

case may be – to deliver the standard disclosures and transaction-specific disclosures, and eliminating the concept that the disclosures must be provided "on behalf of" any other members of the syndicate. This would remove impediments to and perfect the mechanism of a free and open market by eliminating certain redundant and generic disclosures currently delivered by underwriters to issuers that provide little, if any, novel informational benefits to issuers, but do create non-trivial compliance and record-keeping burdens on underwriters. The amendment will also promote the goal of protecting municipal entity issuers because issuers will be able to more efficiently evaluate the information contained in the disclosures they do receive, rather than having to differentiate generic and duplicative disclosures from disclosures that are more particularized to the facts and circumstances of the transaction.

ii. Require the Separate Identification of the Standard Disclosures

The proposed rule change would prevent fraudulent and manipulative acts and practices and promote the protection of municipal entity issuers by amending the 2012 Interpretive Notice to require the separate identification and formatting of the standard disclosures by underwriters. This would prevent fraudulent and manipulative acts and practices and promote the protection of municipal entity issuers because issuers will be able to more efficiently differentiate an underwriter's dealer-specific disclosures and transaction-specific disclosures from an underwriter's standard disclosures, and, thereby, more efficiently evaluate those disclosures that are unique to a given underwriting firm and transaction type from those that are more generic and common to all underwriting relationships.

iii. Clarify the Meaning of "Recommendation" for Purposes of Disclosures Related to Complex Municipal Securities Financings

The proposed rule change would promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market by amending the 2012 Interpretive Notice to define the analysis applicable to when an underwriter has made a recommendation triggering the obligation to deliver complex municipal securities financing disclosures. The 2012 Interpretive Notice does not currently define what constitutes a "recommendation" for these purposes. The absence of a definition creates a burden for underwriters to appropriately interpret and operationalize the 2012 Interpretive Notice. Clarifying the applicable definition would eliminate any legal ambiguity under the Revised Interpretive Notice regarding the applicable standard for determining when a recommendation of a complex municipal securities financing has been made. For similar reasons, the proposed change will promote just and equitable principles of trade by clarifying the circumstances when underwriters must provide these particularized transaction-specific disclosures to issuers, which will reduce the compliance burden for all dealers who act as underwriters.

iv. Establish a "Reasonably Likely" Standard for Disclosure of Potential Material Conflicts of Interest

The proposed rule change would remove impediments to and perfect the mechanism of a free and open market by amending the 2012 Interpretive Notice to more narrowly define which potential material conflicts of interest must be disclosed by underwriters. The disclosures regarding remote and unlikely conflicts provide little, if any, actionable informational benefits to issuers, but do create non-trivial compliance and record-keeping burdens on underwriters. The proposed rule change would prevent fraudulent and manipulative acts and practices and also promote the protection of municipal entity issuers by facilitating issuers' ability to more efficiently evaluate and consider those potential material conflicts of interest that are most

concrete and probable, rather than having to differentiate likely material conflicts of interest from a longer inventory of conflicts that includes remote material conflicts of interest that are hypothetical and unlikely to materialize during the course of the transaction.

As further described below in the MSRB's summary of comments, the MSRB believes this amendment will benefit market participants by reducing the volume of disclosure that must be provided to those conflicts that are most concrete and probable.[54] Moreover, the MSRB believes that the proposed rule change does not compromise municipal entity protection, and may in fact bolster issuer protection, by providing more focused and actionable information to issuers. The MSRB believes that issuers will benefit from this change because they will no longer have to review and analyze longer-form disclosures discussing potential material conflicts of interest that are not reasonably likely to materialize during the course of the transaction. Streamlining the disclosures in this way will allow issuers to focus their time and other resources to the consideration of those material conflicts that are currently present and/or reasonably likely to be present during the course of the transaction.

Additionally, the proposed rule change will not diminish an underwriter's fair dealing obligation to update, or otherwise supplement, its dealer-specific disclosures in circumstances when a previously undisclosed potential conflict of interest later ripens into an actual material conflict of interest.[55] An underwriter must provide disclosure to the issuer regarding the actual

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[54] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures and related notes 96 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures and related notes 159 et. seq. infra.

[55] The FAQs presently state that dealer-specific conflicts of interest "discovered or arising after engagement" must be disclosed "[a]s soon as practicable after discovered and with sufficient time for the issuer to evaluate the conflict and its implication."

presence of a material conflict that arises during the course of the transaction in accordance with the following timelines:

- If an actual material conflict of interest is present at the time the underwriter is engaged, then the underwriter must disclose the conflict at or before the time the underwriter is so engaged.
- If a conflict of interest does not rise to the level of an actual material conflict of interest at the time of the underwriter's initial engagement, but is reasonably likely to mature into an actual material conflict of interest during the course of the transaction between the issuer and the underwriter, then the underwriter must disclose the conflict as a potential material conflict of interest at or before the time the underwriter is so engaged.
- If the material conflict of interest is not present at the time of the underwriter's initial engagement, and the underwriter reasonably determines at that time that a conflict of interest is not likely to mature into an actual material conflict of interest during the course of the transaction, then the underwriter would not have a fair dealing obligation under this notice to disclose the conflict upon its engagement. But, for example, if that same undisclosed conflict later ripened into an actual material conflict of interest during the course of the transaction, then the underwriter would continue to have a fair dealing obligation under the Revised Interpretive Notice to disclose the conflict as soon as practicable after it arises or upon its discovery by the dealer.

In this regard, the Revised Interpretive Notice would not diminish the amount of information provided to an issuer about the presence of any actual material conflicts of interest as compared

to the 2012 Interpretive Notice. It may only change the timing by which certain of those conflicts of interest are first disclosed to an issuer. [56]

To the degree that the Revised Interpretive Notice does result in a change in timing, the MSRB believes that the proposed rule change provides more actionable information to issuers regarding such conflicts, even if at a potentially later date, and, thereby, any detriment to issuers in regard to timing under the Revised Interpretive Notice generally would be positively offset in terms of issuers' increased informational certainty. While issuers may have less time to act in such scenarios, issuers would have the benefit of knowing that the conflicts being disclosed are more concrete and non-hypothetical.

Thus, the MSRB believes that the proposed rule change does not compromise municipal entity protection, and may in fact bolster issuer protection, by providing more actionable information to issuers, because issuers would continue to receive timely information about all material conflicts of interest that are present during the course of the transaction, and, more

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[56] As an illustration of this point, in the factual scenario discussed in the last bullet above, an underwriter may have identified the conflict as a potential material conflict of interest under the terms of the 2012 Interpretive Notice's broader disclosure standard, which requires an underwriter to disclose any potential material conflict of interest, not just those that are reasonably likely. Consequently, under the terms of the 2012 Interpretive Notice, the underwriter may have incorporated the conflict into its initial dealer-specific disclosure as a potential conflict and so delivered notice of the conflict to the issuer at or before the time of the underwriting engagement.

Under the proposed rule change, the same conflict would still be disclosed to the issuer, but the timing of its initial disclosure to the issuer could be delayed until no later than the conflict ripening into an actual material conflict of interest. In such a scenario, an issuer would receive notice of such a conflict at a potentially later date into the transaction under the Revised Interpretive Notice than under the 2012 Interpretive Notice, and, correspondingly, the amount of time an issuer would have to analyze and react to such a conflict would be abridged as a result. However, by knowing such conflicts are concrete and non-hypothetical, an issuer may not need as much time to act to analyze and resolve any such conflict. Moreover, the MSRB believes that differing timing outcomes exemplified by this scenario described in the last bullet above, in actuality, would occur relatively infrequently.

importantly, the revised standard eliminates some of the uncertainty regarding how an issuer should evaluate an underwriter's conflicts disclosure. Specifically, if the underwriter provides a material conflict disclosure to an issuer, then, under the Revised Interpretive Notice, the issuer is certain that the material conflict is actually present and/or reasonably likely to be present during the course of the transaction, rather than a mere hypothetical potential conflict. Thereby, issuers will benefit by not expending time and resources in distinguishing likely dealer conflicts from unlikely conflicts, or otherwise evaluating potential material conflicts of interest that are not reasonably likely to materialize during the course of the transaction.

v. Clarify that Underwriters Are Not Obligated to Provide Written Disclosures Regarding the Conflicts of Other Parties to the Transaction

The proposed rule change would remove impediments to and perfect the mechanism of a free and open market by amending the 2012 Interpretive Notice to clarify that underwriters are not obligated to provide written disclosures regarding the conflicts of issuer personnel or other parties to the transaction as part of the standard disclosures, dealer-specific disclosures, or the transaction-specific disclosures. The 2012 Interpretive Notice does not expressly state this fact, although the MSRB understands that the 2012 Interpretive Notice by its terms was not intended to create such a burden of written disclosure. Accordingly, the amendments providing this technical clarification in the Revised Interpretive Notice would reduce ambiguity regarding the nature of disclosures to be made under the 2012 Interpretive Notice and, thereby, reduce the burden on dealers that may be operating with such ambiguity.

vi. Clarify that Disclosures Must Be Clear and Concise

The proposed rule change would remove impediments to and perfect the mechanism of a free and open market by amending the 2012 Interpretive Notice to clarify that disclosures must

be made in a clear and concise manner. These amendments promote equitable principles of trade and the removal of impediments to and perfection of the mechanism of a free and open market by granting underwriters clarity regarding the standard by which the disclosures will be evaluated. The 2012 Interpretive Notice does not currently express this standard by its terms, although the MSRB understands that this standard is consistent with the 2012 Interpretive Notice. Accordingly, providing this technical clarification in the Revised Interpretive Notice would reduce ambiguity regarding the application of the 2012 Interpretive Notice and, thereby, reduce the burden on dealers that may be operating with such ambiguity.

C. Require an Additional Standard Disclosure Regarding the Engagement of Municipal Advisors

The proposed rule change would prevent fraudulent and manipulative acts and practices and promote the protection of municipal entity issuers by amending the 2012 Interpretive Notice to require underwriters to incorporate a 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." This proposed change would augment current disclosures by further emphasizing to an issuer the arm's-length, commercial nature of the underwriting relationship and expressly informing the issuer that it may obtain the advice of a municipal advisor, who serves as a fiduciary to the issuer, rather than relying solely upon the advice of an underwriter, who may have commercial interests that differ from the issuer's best interests.

D. Permit E-mail Read Receipt to Serve as Issuer Acknowledgement

Finally, the proposed rule change would remove impediments to and perfect the mechanism of a free and open market, and facilitate transactions in municipal securities, by amending the 2012 Interpretive Notice under Rule G-17 to permit an e-mail read receipt to serve

as the issuer's acknowledgement of receipt of the applicable disclosures. For purposes of the Revised Interpretive Notice, the term "e-mail read receipt" would mean an automatic response generated by a recipient issuer official confirming that an e-mail has been opened. This amendment would remove impediments to and perfect the mechanism of a free and open market by improving the efficiency of the disclosure process by allowing underwriters to seek, and issuers to provide, acknowledgement electronically through the built-in, automatic process of an e-mail system. In those instances where a municipal entity is familiar with an underwriter's disclosures, because, for example, it frequently utilizes the underwriter in the sale of its municipal securities, the issuer can choose to affirm an e-mail read receipt to provide electronic acknowledgement of receipt of the underwriter's disclosures, rather than taking the additional time to recognize such receipt by, for example, returning a signature execution of a hard copy acknowledgement.[57] This potential for increased efficiency and added flexibility removes impediments to and perfects the mechanism of a free and open market, and facilitates transactions in municipal securities, by flexibly permitting underwriters and issuers to utilize additional electronic methods to seek and provide, respectively, acknowledgements in a less-burdensome manner. [58]

Moreover, an e-mail read receipt enables an issuer to respond to an underwriter's request for an acknowledgement that more efficiently ensures the issuer is only providing an acknowledgement of receipt, rather than agreeing to legal terms beyond receipt confirmation.

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[57] The MSRB understands that personnel of certain frequent issuers may desire more flexible methods to provide acknowledgment of receipt. See, e.g., NAMA Letter I, at p. 2 ("Issuers currently acknowledge receiving disclosures from underwriters. This practice should continue, and should allow for issuers to execute acknowledgment as they see fit.").

[58] Id.

The MSRB understands that issuers can be hesitant to provide a signature acknowledgement to a hard-copy receipt of disclosures out of an abundance of caution that providing such a signature may be an execution of legal terms beyond the acknowledgement of receipt, and, relatedly, issuers oftentimes seek legal counsel before providing a signature acknowledgement in such circumstances to ensure that the execution of an underwriter disclosure does not legally bind them to any terms. Allowing for an e-mail read receipt to constitute acknowledgement may help alleviate issuer concerns in such circumstances and, thereby, save issuers from spending the time and resources to more fully evaluate whether a hard copy execution of an underwriter disclosure may legally commit an issuer to more than just a mere acknowledgement of having received a disclosure. Accordingly, the proposed rule change would eliminate the need for underwriters to repeatedly request a hard-copy, signature execution of an acknowledgement from an issuer in such circumstances where the issuer has determined not to provide such a hard-copy execution, but will provide an e-mail read receipt, and also would eliminate the need for issuers to respond to such repeated underwriter requests for hard-copy acknowledgements.[59] This potential reduction in issuer and underwriter burdens removes impediments to and perfects the mechanism of a free and open market, and facilitates transactions in municipal securities, by enabling the more efficient execution of municipal securities transactions.

At the same time, the MSRB believes that this proposed amendment would not compromise municipal entity issuer protection, because underwriters would be required under the Revised Interpretive Notice to attempt to receive written acknowledgement by an official

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[59] The FAQs provide that, "[i]f an authorized issuer official agrees to proceed with the underwriting after receipt of the disclosures but will not provide a written acknowledgment, an underwriter must document specifically why it was unable to obtain such written acknowledgment." The MSRB understands that some underwriters will repeatedly ask for an issuer's acknowledgement, despite having been told no such acknowledgement will be provided, in order to comply with this guidance.

identified as the issuer's primary contact for the receipt of such disclosures. Thus, under the Revised Interpretive Notice, if an underwriter wanted to rely on an e-mail read receipt as written acknowledgement, then the underwriter would have a fair dealing obligation to receive the e-mail read receipt from a specific official identified as the issuer's primary contact for the receipt of such disclosures. In the absence of such an issuer's designation of a primary contact, the underwriter would have a fair dealing obligation to receive an e-mail read receipt from an issuer official that the underwriter reasonably believes has authority to bind the issuer by contract with the underwriter. Moreover, the Revised Interpretive Notice would not permit an underwriter to rely on an e-mail read receipt as an issuer's 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.

The electronic delivery of the disclosures to such an official in either scenario (i.e., in a scenario in which an issuer has identified a specific primary contact, or in the alternative scenario in which no such identification has been made by an issuer, and, so, the underwriter must make a reasonable determination about an issuer official with the requisite authority) ensures that the issuer's decision of whether to provide acknowledgement by means of an e-mail read receipt is made by an official with the authority and ability to make such decisions on the issuer's behalf. Stated differently, not any e-mail read receipt will suffice under the Revised Interpretive Notice, as the proposed rule change would permit an e-mail read receipt only from certain issuer officials to satisfy an underwriter's fair dealing obligation.

In proposing this change to the acknowledgement requirement, the MSRB notes that Rule G-42, which was adopted subsequent to the 2012 Interpretive Notice, does not require an

acknowledgement from an issuer or obligated person client of the client's receipt of the applicable conflict and disciplinary event disclosures under Rule G-42(b), nor in the case of disclosures required to be made by a municipal advisor who has given inadvertent advice under Supplementary Material. 07 to Rule G-42, so long as the municipal advisor has a reasonable belief that the documentation was in fact received by the client.[60] In view of the MSRB's experience with disclosures under Rule G-42, where no client acknowledgement is expressly required, the MSRB believes that it is appropriate, [61] and consistent with the protection of issuers, to adopt a revised acknowledgement standard as part of the Revised Interpretive Guidance.

Additionally, the MSRB believes that this proposed amendment would not compromise municipal entity issuer protection because recipients of such an automatic e-mail read receipt request would still have the option to not provide this form of acknowledgement. Thus, if an issuer official did not desire to provide such an e-mail read receipt, for whatever reason, then the underwriter would continue to have the obligation to seek acknowledgement by other means in order to document why it was unable to obtain such acknowledgement, as currently required under the 2012 Interpretive Notice.

B. Self-Regulatory Organization's Statement on Burden on Competition

Section 15B(b)(2)(C) of the Exchange Act requires that MSRB rules not be designed to impose any burden on competition not necessary or appropriate in furtherance of the purposes of

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60 See Exchange Act Release No. 34-76753 (December 23, 2015), 80 FR 81614, at 81617 note 18 (December 30, 2015) ("While no acknowledgement from the client of its receipt of the documentation would be required, the MSRB notes that a municipal advisor must, as part of the duty of care it owes its client, reasonably believe that the documentation was received by its client.").

61 Id.

the Exchange Act.[62] The MSRB has considered the economic impact of the proposed rule change, including a comparison to reasonable alternative regulatory approaches.[63] The MSRB does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The MSRB's proposed amendments to the 2012 Interpretive Notice are intended to update and streamline certain obligations specified in the 2012 Interpretive Notice and, thereby, benefit issuers and underwriters alike by reducing the burdens associated with those obligations, including the obligation of underwriters to make, and the burden on issuers to acknowledge and review, written disclosures that are duplicative, itemize risks and conflicts that are unlikely to materialize during the course of a transaction, and/or are not unique to a particular transaction or underwriting engagement. The MSRB believes that the overall impact of the proposed rule change will improve market practices, better protect issuers, and reduce the burdens on market participants.

Based on the feedback of some market participants, the 2012 Interpretative Notice has created unintended consequences in the market. For example, certain market participants, including issuers and underwriters, have indicated their belief that the disclosure obligations specified in the 2012 Interpretive Notice have led to the delivery of voluminous disclosures with mostly boilerplate information. Similarly, market participants have indicated that the disclosure obligations specified in the 2012 Interpretive Notice place a significant burden on underwriters to draft and deliver disclosures that are dense and otherwise difficult or inefficient for issuers to utilize in making informed decisions about the issuance of municipal securities, and also

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62 15 U.S.C. 78o-4(b)(2)(C).

63 Id.

inadvertently bury disclosures of important conflicts and risks. Commenters also stated that the duplicative nature of some disclosures unnecessarily increases the overall volume of disclosures and, equally important, increases the likelihood that an issuer will receive similar information in a non-uniform or redundant manner, which makes it more difficult for an issuer to evaluate the information included in the disclosures it receives.[64]

The MSRB believes the proposed rule change is necessary to update and streamline the burdens placed on market participants and to increase the efficiency of certain market practices, such as enhancing the ability of issuers to efficiently and properly evaluate the risks associated with a given transaction, and, thereby, improving the protection of issuers. The MSRB further believes that the proposed rule change will provide clarity to underwriters regarding the scope of their regulatory obligations to municipal entity issuers by expressly affirming and defining certain significant concepts in the Revised Interpretive Notice.

Identifying and Evaluating Reasonable Alternative Regulatory Approaches

The MSRB has assessed alternative approaches to amend the 2012 Interpretative Notice and has determined that the respective amendments in the proposed rule change are superior to these alternatives.

To clarify the nature, timing, and manner of disclosures of conflicts of interest, the MSRB considered strictly limiting the dealer-specific disclosures required under the Revised Interpretive Notice to only an underwriter's actual material conflicts of interest (rather than an underwriter's actual material conflicts of interest and potential material conflicts of interest, as

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[64] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures and related notes 96 et. seq. infra; see also Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures and related notes 159 et. seq. infra.

prescribed in the proposed rule change).[65] Eliminating the requirement for an underwriter to make disclosures regarding its potential material conflicts of interest would reduce the overall regulatory burden on dealers, but also delay the timing of disclosures regarding material conflicts of interest that are known at the outset of the engagement as being likely to materialize during the course of the transaction until such time as the conflicts in fact arise and, thereby, compromise certain protections currently afforded to issuers under the 2012 Interpretive Notice.[66] Accordingly, the MSRB determined that such an alternative was inferior and did not incorporate this alternative regulatory approach into the Revised Interpretive Notice.

The MSRB also considered amending the 2012 Interpretative Notice to permit issuers to opt out of receiving certain disclosures required under the 2012 Interpretive Notice. The 2012 Interpretive Notice does not provide such an opt-out process and, as a result, underwriters are generally required to deliver the applicable disclosures to an issuer regardless of an issuer's preference in this regard. The MSRB declined to incorporate this alternative regulatory approach into the Revised Interpretive Notice, because it was concerned that it may increase the likelihood that an issuer who has opted-out of certain disclosures may not receive all the information necessary to evaluate a given underwriting relationship and/or transaction structure.[67] Based on

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65 See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Disclosure of Potential Material Conflicts of Interest and related notes 98 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Disclosure of Potential Material Conflicts of Interest and related notes 161 et. seq. infra.

66 See related discussion under Summary of Comments Received in Response to the Concept Proposal – Issuer Opt-Out and Summary of Comments Received in Response to the Request for Comment – Issuer Opt-Out.

67 Id.

certain comments it received, the MSRB is persuaded that the risks associated with such an opt-out concept outweigh the potential benefits.[68]

The MSRB also considered amending the 2012 Interpretative Notice to incorporate the meaning of "recommendation" under Rule G-42, on duties of non-solicitor municipal advisors, which describes a two-prong analysis for determining whether advice is a recommendation for purposes of that rule (a "G-42 Recommendation"). The relevant guidance under Rule G-42 provides the following two-prong analysis for such a G-42 Recommendation:

> First, the [municipal advisor's] advice must exhibit a call to action to proceed with a municipal financial product or an issuance of municipal securities and second, the [municipal advisor's] advice must be specific as to what municipal financial product or issuance of municipal securities the municipal advisor is advising the [municipal entity client or obligated person client] to proceed with.[69]

However, as discussed in more detail below, the MSRB declined to incorporate this G-42 Recommendation standard into the Revised Interpretive Notice, because of the likelihood that issuers may receive less disclosures on the risks associated with complex municipal securities financings under this standard.[70]

The MSRB considered amending the 2012 Interpretative Notice to eliminate all requirements regarding an issuer's acknowledgement of receipt of the disclosures. However, the MSRB believes that such an alternative approach would eliminate an important issuer protection

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68 Id.

69 G-42 FAQs, at p. 2 (note 37 supra).

70 See related discussion under Proposed Rule Change – Amending the Nature, Timing, and Manner of Disclosures – Clarification of the Meaning of "Recommendation"; see also Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Clarification of the Meaning of "Recommendation" and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Clarification of the Meaning of "Recommendation".

and increase overall risks in the market without significant offsetting benefits.[71] Instead, to reduce the burden on underwriters and issuers alike, the proposed rule change incorporates into the Revised Interpretive Notice the concept that an underwriter may substantiate its delivery of a required disclosure by an e-mail read receipt.[72]

The MSRB also considered amending the 2012 Interpretive Notice to only obligate the syndicate manager, rather than each underwriter in the syndicate, to make the dealer-specific disclosures. The 2012 Interpretive Notice currently requires each underwriter to deliver such disclosures. The MSRB declined to incorporate this alternative regulatory approach into the Revised Interpretive Notice, because the elimination of this requirement would mean that issuers would no longer receive the benefit of this disclosure from each underwriter in the syndicate and the omission of this unique and tailored information would eliminate an issuer protection without a significant offsetting benefit to the market.

Lastly, the MSRB considered amending the 2012 Interpretive Notice to create different disclosure tiers based on the particular characteristics of an issuer, such as the issuer's size, knowledge, issuance frequency, or experience of issuer personnel. At this time, the MSRB believes that there are significant drawbacks to such an approach that outweigh possible benefits, including the ongoing costs and difficulties of ensuring that a given issuer remained in an appropriate disclosure tier and whether such tiers could be adequately drawn in a definitive fashion that would reduce regulatory burdens without harming overall issuer protection.

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[71] See related discussion under Summary of Comments Received in Response to the Concept Proposal – E-mail Read Receipt as Issuer Acknowledgement and related notes 125 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – E-mail Read Receipt as Issuer Acknowledgement and related notes 213 et. seq. infra.

[72] Id.

Accordingly, the MSRB declined to incorporate this alternative regulatory approach into the Revised Interpretive Notice.

Assessing the Benefits and Costs of the Proposed Rule Change

The MSRB's regulation of the municipal securities market is designed to protect investors, municipal entities, obligated persons, and the public interest by promoting a fair and efficient municipal securities market. The proposed rule change is intended, in part, to reduce burdens on underwriters without decreasing benefits to municipal entity issuers or otherwise diminishing municipal entity issuer protections. The MSRB's analysis below shows that the proposed amendments accomplish this objective. For the purpose of this analysis, the baseline is the current 2012 Interpretative Notice.

A. Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into the Revised Interpretive Notice

Since this is primarily a technical change from the 2012 Interpretative Notice, the MSRB does not believe there are any significant costs relevant to market participants. However, the MSRB believes that incorporating the Implementation Guidance and FAQs into the Revised Interpretive Notice will promote more efficient dealer compliance in that dealers will only have to reference a single regulatory notice in the future, rather than three separate notices.

B. Amending Nature, Timing, and Manner of Disclosures

i. Define Certain Categories of Underwriter Disclosures

The MSRB believes the added definitions of standard disclosures, transaction-specific disclosures, and dealer-specific disclosures in the proposed rule change would clarify the categories of disclosures and assist underwriters with their compliance with certain new standards in the Revised Interpretive Notice. The MSRB does not believe there is any associated

cost to underwriters as a result of these changes, as the changes are more in the nature of a technical amendment.

ii. Assign the Syndicate Manager the Exclusive Responsibility for the Standard Disclosures and Transaction-Specific Disclosures

At present, the 2012 Interpretative Notice allows, but does not require, a syndicate manager to make the standard disclosures and transaction-specific disclosures on behalf of the other syndicate members. The MSRB understands that in accordance with current market practices, the syndicate manager rarely, if ever, provides disclosures for the other syndicate members, and, so, issuers typically receive separate disclosures from other underwriters in the syndicate.

The Revised Interpretive Notice would require the syndicate manager (or the sole underwriter as the case may be) to provide the standard disclosures and transaction-specific disclosures, and eliminate the obligation for the other syndicate members to make these disclosures.[73] The MSRB believes this amendment will alleviate certain burdens associated with the duplication of disclosures where there is a syndicate. The MSRB further believes that this amendment will reduce the likelihood of issuers receiving duplicative standard disclosures and transaction-specific disclosures in potentially inconsistent manners. Ultimately, the MSRB believes such a requirement would simplify issuers' review of standard disclosures and

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[73] See related discussion under Proposed Rule Change – Amending the Nature, Timing, and Manner of Disclosures – Assign the Syndicate Manager the Exclusive Responsibility for the Standard Disclosures and Transaction-Specific Disclosures; see also Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Syndicate Manager Responsibility for Standard Disclosures and Transaction-Specific Disclosures and related notes 102 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Syndicate Manager Responsibility for Standard Disclosures and Transaction-Specific Disclosures and related notes 169 et. seq. infra.

transaction-specific disclosures and allow them to more closely analyze any dealer-specific disclosures that may be received. The MSRB also believes that this amendment will make the process procedurally easier for dealers participating in an underwriting syndicate, because they only have a fair dealing obligation under the Revised Interpretive Notice to deliver their dealer-specific disclosures, if any existed, and would have no obligation to deliver the standard disclosures or transaction-specific disclosures.

iii. Require the Separate Identification of the Standard Disclosures

The proposed rule change would create a new requirement for underwriters that, when providing the various disclosures in the same document, an underwriter would have to clearly identify the standard disclosures. The MSRB believes this amendment will help prevent the disclosures regarding underwriter conflicts and transaction risks from being disclosed within other more boilerplate information.[74] The MSRB believes that the benefits of this amended requirement will be to provide clarity to issuers; diminish certain information asymmetries between underwriters and issuers; [75] reduce the burden of disclosure for syndicate members; and make it easier for issuers to assess the conflicts of interest and risks associated with a given transaction. The costs to dealers for clearly identifying and separating the standard disclosures

[74] See related discussion under Proposed Rule Change – Amending the Nature, Timing, and Manner of Disclosures – Require the Separate Identification of the Standard Disclosures; see also Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Require the Separate Identification of the Standard Disclosures and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Require the Separate Identification of the Standard Disclosures.

[75] In economics, information asymmetry refers to transactions where one party has more or better information than the other.

from the dealer-specific and transaction-specific disclosures should be minimal, and the MSRB believes that the benefits would outweigh the costs.[76]

iv. Clarify the Meaning of "Recommendation" for Purposes of Disclosures Related to Complex Municipal Securities Financings

The 2012 Interpretative Notice requires an underwriter to make transaction-specific disclosures to the issuer based on the transaction or financing structure it recommends and the level of knowledge and experience of the issuer with that type of transaction or financing structure. In relevant part, the 2012 Interpretive Notice states:

> The level of 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, and financial ability to bear the risks of the recommended financing, in each case based on the reasonable belief of the underwriter. In all events, the underwriter must disclose any incentives for the underwriter to recommend the complex municipal securities financing and other associated conflicts of interest.

The proposed rule change would clarify what constitutes a recommendation by adopting a definition for "recommendation" from analogous dealer guidance from Rule G-19.[77] As

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[76] See related discussion under Proposed Rule Change – Amending the Nature, Timing, and Manner of Disclosures – Require the Separate Identification of the Standard Disclosures; see also Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Require the Separate Identification of the Standard Disclosures and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Require the Separate Identification of the Standard Disclosures.

[77] See related discussion under Proposed Rule Change – Amending the Nature, Timing, and Manner of Disclosures – Clarify the Meaning of Recommendation for Purposes of Disclosures Related to Complex Municipal Securities Financings; see also Summary of Comments Received in Response to the Concept Proposal – Clarification of the Meaning of "Recommendation" and related notes 131 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Guidance Regarding Meaning of "Recommendation" and related notes 219 et. seq. infra. As further discussed herein, the proposed rule change would clarify that a communication by an underwriter is a "recommendation" that triggers the obligation to deliver a complex municipal securities financing disclosure if – given its content, context, and manner of

discussed further below, the MSRB believes many underwriters are already familiar with the practical application of this language,[78] and, as a result, the MSRB believes there would be no major implicit or explicit costs associated with the clarification of recommendation, as the MSRB believes the volume of the disclosures generally would remain the same. However, underwriters should experience the benefit of more efficient regulatory compliance by having an expressly defined standard.

v. Establish a "Reasonably Likely" Standard for Disclosure of Potential Material Conflicts of Interest

The 2012 Interpretative Notice requires each underwriter to disclose any potential material conflict of interest. The proposed rule change would amend the 2012 Interpretive Notice to require an underwriter to disclose any potential material conflict of interest that is reasonably likely to mature into an actual material conflict of interest during the course of that specific transaction.[79] Potential material conflicts of interest that are not reasonably likely (or do not have such a significant probability) to mature into an actual material conflict of interest during the

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presentation — the communication reasonably would be viewed as a call to action to engage in a complex municipal securities financing or reasonably would influence an issuer to engage in a particular complex municipal securities financing.

[78] Id. In the absence of an express standard in the 2012 Interpretive Notice, it is likely that at least some underwriters are already applying a form of this standard in determining whether a "recommendation" has been made.

[79] See related discussion under Proposed Rule Change – Amending the Nature, Timing, and Manner of Disclosures – Establish a Reasonably Likely Standard for Disclosure of Potential Material Conflicts of Interest; see also Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Disclosure of Potential Material Conflicts of Interest and related notes 98 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Disclosure of Potential Material Conflicts of Interest and related notes 161 et. seq. infra.

transaction between the issuer and the underwriter are not required to be disclosed to the issuer at the outset of the engagement. The MSRB believes that a given potential material conflict of interest may have various chances of ripening into an actual material conflict of interest and, at a general level, can reflect a low likelihood, moderate likelihood, or high likelihood of occurring at any given point in time. The proposed rule change should reduce the length and complexity of a dealer's initial dealer-specific disclosures, as the MSRB understands that underwriters presently are inclined to disclose a potential material conflict of interest to an issuer as part of its dealer-specific disclosures even when such conflict is not reasonably likely to mature into an actual material conflict of interest during the course of the transaction because there is some remote likelihood.

The MSRB acknowledges that one potential cost to issuers of this proposed change would be the lost opportunity to evaluate potential material conflicts of interest that, according to the reasonable judgement of the dealer, are not likely to mature into an actual material conflict of interest. Consequently, there is a chance that the proposed change would hinder the issuer's ability to conduct a full risk assessment, particularly around the decision of whether to engage a particular underwriter for a given transaction.[80]

Nevertheless, the MSRB believes the benefits of the proposed change outweigh its potential costs, as this change will both reduce the burden placed on underwriters and also reduce

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[80] For example, if a potential material conflict of interest is first omitted from the dealer-specific disclosures – because the dealer correctly deems the risk to be possible, but not reasonably likely – and the conflict of interest, in actuality, has a higher likelihood and, ultimately, ripens into an actual material conflict of interest during the course of the transaction, then the dealer would still be required to timely disclose the conflict of interest when it ripens into an actual material conflict. However, the failure to disclose this possible conflict of interest at the first delivery of the dealer-specific disclosures, as currently required under the 2012 Interpretative Notice, may result in an inadequate due diligence performed by the issuer on the underwriter due to the information asymmetry between the issuer and the underwriter. See Id.

the volume of disclosures received by issuers, while continuing to ensure that issuers are notified in writing of relevant conflicts of interest, and, thereby, promoting the protection of issuers by facilitating the ability of issuers to more efficiently evaluate and consider those potential material conflicts of interest that are most concrete and probable. Issuers would not have to review potential material conflicts of interest that are not reasonably likely to ripen during the course of the transaction. When there are too many disclosures, it is possible that an issuer's ability to make a comprehensive and efficient assessment of the disclosures is diminished. With the proposed rule change, issuers should be able to discern which conflicts of interest present actual material risks or material risks that are reasonably likely to actually develop during the course of the transaction, therefore reducing asymmetric information between the underwriters and issuers. Relatedly, excluding potential material conflicts of interest that are unlikely to occur would create initial/upfront costs to underwriters since underwriters would have to amend their policies and procedures to specify what constitutes a "reasonably likely" potential material conflict of interest, though the MSRB believes that such costs would be minor and are justified by offsetting benefits.

vi. Clarify that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties

None of the requirements in the 2012 Interpretative Notice require the underwriter to provide the issuer with disclosures on the part of any other transaction participants, including issuer personnel. However, the MSRB received comments requesting clarification on this point,[81] and the proposed rule change would provide a clarification that underwriters are not

[81] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties

required to make any disclosures on the part of issuer personnel or any other parties to the transaction. This clarification should reduce the burden on firms that were mistakenly under the impression that underwriters are required to disclose the conflicts of other transaction participants, as well as provide clarity to regulatory authorities examining and enforcing MSRB rules. Assuming underwriters are already compliant with the 2012 Interpretative Notice, there are no implicit or explicit economic benefits or costs associated with the clarification in the proposed rule change. To the degree that regulators may be inappropriately interpreting and applying the 2012 Interpretative Notice in connection with examination and enforcement proceedings, regulators and underwriters will benefit from the clarification in that it should reduce the amount of time spent on such activity.[82]

vii. Clarify that Disclosures must be "Clear and Concise"

Assuming underwriters are already compliant with the requirements under the 2012 Interpretative Notice, the MSRB believes there are no implicit or explicit economic benefits or costs associated with not amending the statement from the 2012 Interpretive Notice that "disclosures must be made in a manner designed to make clear to such officials the subject

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and related note 114 and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties and related notes 194 et. seq. infra.

[82] SIFMA expressed concern that "regulators conflate conflicts of interest." See SIFMA Letter I, at p. 7 note 15 ("We also note that, in some cases, it appears that regulators conflate conflicts of interest that might exist on the part of other parties to a financing, including in particular conflicts on the part of issuer personnel, with conflicts on the part of the underwriter, and therefore regulators appear to expect that the conflicts disclosure under the [2012 Interpretive Notice] should include these conflicts of other parties. SIFMA and its members request that the MSRB clarify that the [2012 Interpretive Notice] does not require the underwriter to disclose conflicts on the part of parties other than the underwriter.").

matter of such disclosures and their implications to the issuer"[83] and amending the 2012 Interpretive Notice to further clarify that, consistent with the existing language, disclosures must be drafted in a "clear and concise manner."[84]

C. Require an Additional Standard Disclosure Regarding the Engagement of Municipal Advisors

The 2012 Interpretative Notice prohibits an underwriter from recommending that an issuer not retain a municipal advisor. By supplementing this language with the requirement that underwriters affirmatively state in their standard disclosures 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," the proposed rule change would further promote an issuer's understanding of the distinct roles of an underwriter and a municipal advisor.[85] Moreover, the MSRB believes that coupling this amendment with the incorporation of the existing language

[83] See related discussion under Proposed Rule Change – Amending the Nature, Timing, and Manner of Disclosures – Clarify that Disclosures Must Be Clear and Concise; see also Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Clarity of Disclosures and related notes 117 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Clarity of Disclosures and related notes 196 et. seq. infra.

[84] As indicated by one commenter, this standard should minimize any re-drafting of existing disclosure templates. See SIFMA Letter II, at p. 6 (stating a clear and concise standard "is in line with the MSRB's disclosure principles as well as the goals of the retrospective review").

[85] See related discussion under Proposed Rule Change – Require an Additional Standard Disclosure Regarding the Engagement of Municipal Advisors; see also Summary of Comments Received in Response to the Concept Proposal – Underwriter Discouragement of Use of Municipal Advisor; Addition of a New Standard Disclosure Regarding the Engagement of Municipal Advisors and related notes 134 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor and related notes 201 et. seq. infra.

from the Implementation Guidance will promote issuer protection in the market by further ensuring that issuers are able to more freely evaluate their potential engagements with municipal advisors without undue bias.[86]

The possible benefits of this proposed change are demonstrated by a study from 2006, showing that an issuer's use of a financial advisor in the municipal bond issuance process reduces underwriter gross spreads, provides statistically significant borrowing costs savings, and lower reoffering yields.[87] The results of the study are consistent with the interpretation that the monitoring and information asymmetry reduction roles of financial advisors potentially reduce the perceived risk for issuers. Another study from 2010 found lower interest costs with municipal issues using financial advisors, and the interest cost savings were significantly large especially for more opaque and complex issues.[88] Given that an underwriter does not have the same fiduciary responsibility of a municipal advisor, the MSRB believes that clarifying the distinct roles of underwriters and municipal advisors should continue to improve market practices and further ensure that an issuer's decision to engage a municipal advisor is made without undue interference, which may obscure the issuer's overall evaluation of the costs and benefits of municipal advisory services.

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[86] Id.

[87] Vijayakumar Jayaraman and Kenneth N. Daniels, "The Role and Impact of Financial Advisors in the Market for Municipal Bonds," Journal of Financial Services Research, 2006. After investigating how using a financial advisor affects the interest costs of issuers, Vijayakumar and Daniels, find that a financial advisor significantly reduces municipal bond interest rates, reoffering yields, and underwriters' gross spreads.

[88] Allen, Arthur and Donna Dudney, "Does the Quality of Financial Advice Affect Prices?" The Financial Review 45, 2010.

As to the potential costs of compliance, underwriters would have to affirmatively state in their standard disclosures that an issuer may choose to engage the services of a municipal advisor with a fiduciary obligation to represent the issuer's interests in the transaction. Therefore, underwriters would incur additional cost associated with revising their policies and procedures (a one-time upfront cost) and delivering the statement in their standard disclosures during a transaction. Beyond this update to their standard disclosures and any related updates to their policies and procedures, the MSRB does not believe there will be any further ongoing implementation costs to underwriters.

D. Permit E-mail Read Receipt to Serve as Issuer Acknowledgement

Currently, the 2012 Interpretative Notice requires underwriters to attempt to receive written acknowledgement of receipt of the disclosures by an official of the issuer. The proposed rule change would allow for an e-mail read receipt to serve as an acknowledgement.[89] The MSRB believes that the acknowledgement requirement continues to have value to ensure that issuers receive the disclosures. Allowing for an e-mail read receipt to constitute written acknowledgement should reduce burdens on underwriters (including syndicate managers, when there is a syndicate) and on issuers, in that underwriters and issuers will no longer be required to follow up with written acknowledgements when such receipt is utilized. Nevertheless, underwriters should expect minor initial upfront costs (which are optional) associated with the implementation of the use of e-mail read receipts, and related compliance, supervisory, training,

[89] See related discussion under Proposed Rule Change – Permit E-mail Read Receipt to Serve as Issuer Acknowledgement; see also related discussion under Summary of Comments Received in Response to the Concept Proposal – E-mail Read Receipt as Issuer Acknowledgement and related notes 125 et. seq. infra., and Summary of Comments Received in Response to the Request for Comment – E-mail Read Receipt as Issuer Acknowledgement and related notes 213 et. seq. infra.

and record-keeping procedures. However, the MSRB believes that the benefits associated with the reduced burden of spending time to obtain written acknowledgement would accrue over time and should exceed the initial costs.

Effect on Competition, Efficiency and Capital Formation

The MSRB believes that the proposed amendments to the 2012 Interpretative Notice as reflected in the Revised Interpretive Notice should improve the municipal securities market's operational efficiency by promoting consistency in underwriters' disclosures to issuers and promoting greater transparency. At present, the MSRB is unable to quantitatively evaluate the magnitude of the efficiency gains or the cost of compliance with the new requirements, but believes the benefits outweigh the costs. Additionally, the MSRB believes that the proposed rule change should also reduce confusion and risk to both underwriters and issuers; reduce information asymmetry between underwriters and issuers; and allow issuers to make more informed financing decisions. Therefore, the proposed amendments to the 2012 Interpretative Notice would improve capital formation. Finally, since the proposed rule change would be applicable to all underwriters, it would not have a negative impact on market competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The MSRB published the Concept Proposal on June 5, 2018 and published the Request for Comment on November 16, 2018. The Concept Proposal sought public comment on various aspects of the 2012 Interpretive Notice, including the benefits and burdens of the 2012 Interpretive Notice at a general level, and how the 2012 Interpretive Notice might be amended to ensure that it continues to achieve its intended purpose in light of current practices in the municipal securities market.

The Request for Comment incorporated the comments received on the Concept Proposal by providing specific amendments to the text of the 2012 Interpretive Notice. Additionally, through a series of questions, the MSRB sought more specific feedback from market participants in the Request for Comment regarding how the 2012 Interpretive Notice might be improved to remove unnecessary burdens on market participants, while at the same time ensuring that it continues to achieve its intended purpose.

The following discussion summarizes the comments received in response to the Concept Proposal and the Request for Comment and sets forth the MSRB's responses thereto. The discussion does not provide specific responses for every comment, as, for example, when the MSRB only received a high-level general comment on a topic area. Comments to the Concept Proposal are discussed first and comments to the Request for Comment are discussed in the immediately following section. The summary includes cross-references from the discussion of the Concept Proposal to the discussion of the Request for Comment, and vice versa, in order to identify the discussion of comments received on the same or similar topics for ease of review. For topics that were incorporated into the Concept Proposal, but subsequently not incorporated into the Request for Comment, the discussion below incorporates a footnote statement indicating that no further discussion of the topic is included in the summary of comments to the Request for Comment, along with a brief summary discussion of any significant comments received to the Request for Comment.

I. Summary of Comments Received in Response to the Concept Proposal

The MSRB received five comment letters in response to the Concept Proposal.[90] Each of the commenters generally indicated their support of the retrospective review of the 2012

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[90] See note 8 supra.

Interpretive Notice as outlined in the Concept Proposal and each had specific suggestions on how the 2012 Interpretive Notice could be improved, as discussed further below.

A. Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into a Single Interpretive Notice

i. General Comments Encouraging the Consolidation of the Implementation Guidance and the FAQs

SIFMA's response to the Concept Proposal stated that, if the MSRB were to amend the 2012 Interpretive Notice, ". . . it would be critical to incorporate or otherwise preserve the guidance included in the Implementation Guidance and FAQs, with any modifications appropriate in light of the changes to the [2012 Interpretive Notice]."[91] SIFMA further elaborated on this request, indicating that the Implementation Guidance provides a "deeper understanding" of the 2012 Interpretive Notice and that the FAQs provide important guidance in "response to questions raised by underwriters based on their experience with initial implementation" of the 2012 Interpretive Notice.[92] No other commenters on the Concept Proposal addressed this issue.[93] In response to SIFMA's comments, the MSRB proposed to incorporate the substance of the Implementation Guidance and FAQs into the Request for Comment, along with certain conforming edits and supplemental modifications to address other proposed amendments.[94]

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91 SIFMA Letter I, at p. 4.

92 Id., at pp. 3-4.

93 It should be noted that the MSRB did not seek specific comment on this topic in the Concept Proposal.

94 As further discussed herein, the MSRB ultimately chose to incorporate these amendments into the proposed rule change. This general concept of incorporating the substantive language of the Implementation Guidance and FAQs into the Revised Interpretive Notice is not discussed

ii. Modification of Implementation Guidance's Language Regarding the "No Hair-Trigger"

As stated above, the Implementation Guidance provides the following regarding the timing and delivery of disclosures under the 2012 Interpretive Notice:

> The timeframes set out in the Notice should be viewed in light of the overarching goals of Rule G-17 and the purposes that required disclosures are intended to serve as described in the [2012 Interpretive Notice]. That is, the issuer (i) has clarity throughout all substantive stages of a financing regarding the roles of its professionals, (ii) is aware of conflicts of interest promptly after they arise and well before it effectively becomes fully committed (either formally or due to having already expended substantial time and effort) to completing the transaction with the underwriter, and (iii) has the information required to be disclosed with sufficient time to take such information into consideration before making certain key decisions on the financing. Thus, the timeframes set out in the [2012 Interpretive Notice] are not intended to establish hair-trigger tripwires resulting in technical rule violations so long as underwriters act in substantial compliance with such timeframes and have met the key objectives for providing such disclosures under the [2012 Interpretive Notice].

SIFMA's comment letter on the Concept Proposal urged the MSRB to reconfirm this language, stating SIFMA's belief that the language is a critical acknowledgement of the market reality that transactions rarely proceed on uniform timelines. Like the incorporation of the other language from the Implementation Guidance and FAQs described above, the MSRB agrees that this language provides an important supplementary gloss to the language of the 2012 Interpretive Notice. However, the MSRB believed at the time that it drafted the Request for Comment that it was worthwhile to propose certain modifications to this language in order to solicit additional input regarding the practical effects of the language in the market and, in particular, its practical

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again under the Summary of Comments Received in Response to the Request for Comment, but the MSRB does provide a summary of comments received in response to the incorporation of particular concepts and language from the Implementation Guidance and FAQs (e.g., comments regarding whether the no-hair trigger language should be incorporated into the Revised Interpretive Notice).

impact on dealer compliance. Accordingly, the MSRB incorporated modified language in the Request for Comment by omitting its final sentence (i.e., deleting the statement that, ". . . the timeframes set out in the [2012 Interpretive Notice] are not intended to establish hair-trigger tripwires resulting in technical rule violations so long as underwriters act in substantial compliance with such timeframes and have met the key objectives for providing such disclosures under the [2012 Interpretive Notice]."). In effect, the Request for Comment proposed withdrawing this particular language of the Implementation Guidance.[95]

B. Amending the Nature, Timing, and Manner of Disclosures

Each of the five commenters on the Concept Proposal offered improvements to the nature, timing, and manner of disclosures required under the 2012 Interpretive Notice. At a more general level, several commenters shared the view that the municipal securities market would benefit from reducing the volume and "boilerplate" nature of the disclosures required under the 2012 Interpretive Notice, as there was a shared belief among these commenters that the level of disclosure required by the 2012 Interpretive Notice, in many respects, overly burdened underwriters and issuers alike without any offsetting benefits. [96]

i. Disclosures Concerning the Contingent Nature of Underwriting Compensation

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[95] The proposed rule change reincorporates this language with certain revisions, as further discussed herein. See related discussion under Summary of Comments Received in Response to the Request for Comment – Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into a Single Interpretive Notice – Reincorporation of the "No Hair-Trigger" Language from the Implementation Guidance and related notes 157 et. seq. infra.

[96] In this regard, GFOA commented that the disclosures currently required "are often boilerplate and cumbersome." GFOA Letter I, at p. 1. NAMA similarly commented that "disclosures are buried within lengthy documents that contain hypothetical potential conflicts and risks." NAMA Letter I, at p. 1. Similarly, SIFMA encouraged the MSRB to "be cognizant of the substantial compliance burden on underwriters and complaints expressed by some issuers regarding excessive documentation resulting from the [2012 Interpretive Notice]" and "more precisely define the content of and the process for providing the disclosures required by the [2012 Interpretive Notice]." SIFMA Letter I, at p. 5.

The 2012 Interpretive Notice requires underwriters to disclose the contingent nature of their underwriting compensation. The Concept Proposal requested feedback on this topic. SIFMA commented that disclosures concerning the contingent nature of underwriting compensation should be eliminated, because contingent underwriting compensation effectively is a universal practice. In response, the MSRB incorporated a proposed amendment into the Request for Comment that would require the disclosure concerning the contingent nature of underwriting compensation to be incorporated into an underwriter's standard disclosures, in acknowledgement of the fact that contingent compensation is a nearly-universal practice, yet continues to present an inherent conflict of interest. The Request for Comment clarified, however, that if a dealer were to underwrite an issuer's offering with an alternative compensation structure, the dealer would need to both indicate in its transaction-specific disclosures that the information included in its standard disclosure on underwriter compensation does not apply and also explain the alternative compensation structure as part of its transaction-specific disclosures, to the extent that such alternative compensation structure also presents a conflict of interest.[97]

ii. Disclosure of Potential Material Conflicts of Interest

The 2012 Interpretive Notice requires an underwriter to disclose certain actual material conflicts of interest and potential material conflicts of interest (i.e., the dealer-specific disclosures), including certain conflicts regarding payments received from third parties, profit-sharing arrangements with investors, credit default swap activities, and/or incentives related to the recommendation of a complex municipal securities financing. Several commenters to the

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[97] Ultimately, the proposed rule change did not incorporate this amendment to the 2012 Interpretive Notice, as further discussed herein. See related discussion under Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Disclosures Concerning the Contingent Nature of Underwriting Compensation and related notes 159 et. seq. infra.

Concept Proposal suggested that the dealer-specific disclosures, as currently required, cause underwriters to deliver overly voluminous disclosures, which do not differentiate the most concrete and probable material conflicts from those that are merely possible.

From the dealer perspective, SIFMA stated its belief that "issuers in many cases are receiving excessive amounts of disclosures of potential and often remote conflicts that are of little or no practical relevance to issuers or the particular issuances and would benefit from more focused disclosure on conflicts that actually matter to them."[98] BDA concurred, stating its belief that "one of the factors that contributes to the length and complexity of Rule G-17 Disclosures is that underwriters disclose all potential conflicts of interests instead of known, actual conflicts of interests."[99] Similarly, GFOA stated that "the documents are full of non-material potential disclosures where key material disclosures are not highlighted nor flagged, and in many cases buried in the information provided."[100]

Based on these comments, the MSRB proposed an amendment to the 2012 Interpretive Notice in the Request for Comment clarifying that a dealer would have a fair obligation to disclose a potential material conflict of interest if, but only if, it is "reasonably foreseeable" that such a conflict would mature into an actual material conflict of interest during the course of a specific transaction between the issuer and the underwriter. The MSRB believed that the revision would preserve the requirement that issuers continue to receive disclosures regarding potential material conflicts of interest, while narrowing the amount of potential material conflicts to

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98 SIFMA Letter I, at p. 7.

99 BDA Letter I, at p. 2.

100 GFOA Letter I, at p. 1.

eliminate the need for those disclosures that are highly remote and generally unlikely to ripen into actual material conflicts of interest.[101]

iii. Syndicate Manager Responsibility for the Standard Disclosures and Transaction-Specific Disclosures

Under the 2012 Interpretive Notice, a syndicate manager may make the standard disclosures and transaction-specific disclosures on behalf of other syndicate members. The Concept Proposal requested feedback on how often this option has been utilized and whether such option was effective. The MSRB received four specific comments in response. BDA commented that large, frequent issuers receive so many disclosures because co-managers of a syndicate do not exercise their ability to collectively make the required disclosures in this manner and, further, recommended that the MSRB amend the 2012 Interpretive Notice to provide that "co-managers have no requirement to deliver any Rule G-17 disclosures except for the circumstance where the co-manager has a discrete conflict of interest that materially impacts its engagement with the issuer."[102] The Florida Division of Bond Finance also recognized the issue of duplication when there is a syndicate,[103] and NAMA stated its belief that syndicate members should not be allowed to provide boilerplate disclosures when they are provided by the

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[101] Ultimately, the proposed rule change incorporates a version of this concept, but refined to a "reasonably likely" standard, rather than a "reasonably foreseeable" standard, as further discussed herein. See related discussion under Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Disclosure of Potential Material Conflicts of Interest and notes 161 et. seq. infra.

[102] BDA Letter I, at pp. 2-3.

[103] Florida Division of Bond Finance Letter (stating "such disclosures are duplicative when multiple underwriters are involved in the same transaction").

syndicate manager.[104] Finally, SIFMA noted that dealers do not consistently utilize the option of having a syndicate manager make the standard and transaction-specific disclosures on behalf of other co-managing underwriters in the syndicate, and suggested that this may be the result because it is procedurally easier for a co-managing underwriter to provide these disclosures when delivering their dealer-specific disclosures, or because it may be more difficult or risky from a compliance perspective to rely on the syndicate manager.[105]

Given the stated positions of these commenters that disclosures provided by co-managing underwriters in a syndicate often are duplicative and, therefore, voluminous, the MSRB incorporated a proposed amendment into the Request for Comment requiring, rather than permitting, the standard disclosures and transaction-specific disclosures to be made by a syndicate manager on behalf of the syndicate. The MSRB believed that such a revision would promote market efficiency by reducing the amount of duplicative disclosures that underwriters in a syndicate must deliver and, consequently, the number of duplicative disclosures that an issuer must acknowledge and review.[106]

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[104] NAMA Letter I, at p. 2.

[105] SIFMA Letter I, at p. 14 ("One reason this may be the case is that each syndicate member is obligated to provide its own disclosure of actual or potential conflicts of interest, and it is often procedurally easier to combine role disclosures and conflicts disclosures into a single document. Another reason may be that a particular underwriter has determined not to rely on another firm's actions to meet the underwriter's own regulatory obligations, or only permits such reliance upon confirmation that the syndicate manager has provided the required disclosure and has found that providing its own disclosure may be administratively easier than obtaining confirmation of the syndicate manager's disclosure.").

[106] Ultimately, the proposed rule change incorporates a version of this concept, but with certain refinements, as further discussed herein. See related discussion under Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Syndicate Manager Responsibility for the Standard Disclosures and Transaction-Specific Disclosures and notes 169 et. seq. infra.

iv. Alternative to the Transaction-by-Transaction Delivery of the Disclosures Proposed in the Request for Comment

The 2012 Interpretive Notice currently requires underwriters to provide issuers all of the disclosures on a transaction-by-transaction basis. In response to the Concept Proposal, SIFMA suggested an alternative manner of providing the required disclosures to address the issues of volume and duplication, and to reduce the burdens on both dealers and issuers. Specifically, SIFMA proposed that, when an underwriter engages in one or more negotiated underwritings with a particular issuer, the underwriter would be able to fulfill its disclosure requirements with respect to an offering by reference to, or by reconfirming to the issuer, its disclosures provided in the previous 12 months (e.g., disclosures provided in connection with a prior offering during such period or provided on an annual basis in anticipation of serving as underwriter on offerings during the next 12 months).[107] Under this construct, SIFMA explained that the underwriter would be required to provide any new disclosures or changes to previously disclosed information when they arise. SIFMA recommended that this manner of providing disclosures would be a permissible alternative and that an underwriter could continue to provide its disclosures on a transaction-by-transaction basis. Relatedly, and as previously mentioned, GFOA indicated in its response to the Concept Proposal that providing non-material or boilerplate disclosures annually might improve the disclosure process.[108] NAMA's response to the Concept Proposal stated its belief that it would be difficult to make disclosures on an annual basis without the need for supplementary material throughout the year and, therefore, commented that the easiest manner of disclosure delivery is to leave the relevant portions of the 2012 Interpretive Notice unchanged.

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[107] SIFMA Letter I, at p. 10-11.

[108] GFOA Letter I, at p. 2.

The MSRB was persuaded by SIFMA's suggestion to allow for an alternative to a transaction-by-transaction approach to disclosure, but also thought that NAMA's concern about the need to allow for updates and other supplementary material merited incorporation into any such alternative approach. Accordingly, the MSRB incorporated proposed amendments to the 2012 Interpretive Notice in the Request for Comment that would have permitted standard disclosures to be furnished to an issuer one time and then subsequently referenced and reconfirmed in future offerings, unless the issuer requests that the standard disclosures be made on a transaction-by-transaction basis.[109]

v. Separate Identification of the Standard Disclosures

The Concept Proposal asked for general feedback on alternative approaches for the delivery of the disclosures required under the 2012 Interpretive Notice. Among other comments discussed herein, GFOA suggested that the MSRB emphasize the current obligation within the 2012 Interpretive Notice requiring underwriters to identify generic or boilerplate disclosures.[110] Similarly, NAMA stated that the MSRB should "ensure that underwriters provide material transaction risks and conflicts disclosures in a manner that is easily identifiable by the issuer (including various members of the issuing entity's internal finance team and governing

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[109] The Request for Comment further clarified that, if the original standard disclosure needed to be amended, the syndicate manager would be permitted to deliver such amended standard disclosures. Similarly, in cases where such syndicate members may, themselves, subsequently be syndicate managers or sole underwriters, the Request for Comment would have allowed them to reference and reconfirm prior disclosures made on their behalf. Ultimately, the proposed rule change does not incorporate a version of this concept for the reasons discussed herein. See related discussion under Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Alternative to the Transaction-by-Transaction Delivery of the Disclosures as Proposed in the Request for Comment and related notes 183 et. seq. infra.

[110] GFOA Letter I, at p. 2.

body),"[111] and the Florida Division of Bond Finance stated that "the disclosures provided to issuers are boilerplate, and may inadvertently bury disclosures of specific conflicts and risks within pages of nonmaterial information and legalese."[112] Accordingly, the MSRB incorporated a requirement in the Request for Comment that would have required clear identification of each category of disclosures and separated them by placing the standard disclosures in an appendix or attachment. The MSRB suggested that such a change would allow issuers to discern and focus on the disclosures most important to them.[113]

vi. Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties

As previously stated, the 2012 Interpretive Notice requires underwriters to provide issuers with the standard, dealer-specific, and transaction-specific disclosures. In its response to the Concept Proposal, SIFMA commented that, in some cases, it appears that other regulators conflate conflicts of interest that might exist on the part of other parties to a financing, including, in particular, conflicts of issuer personnel,[114] and, therefore, those other regulators appear to

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[111] NAMA Letter I, at p. 2.

[112] Florida Division of Bond Finance Letter.

[113] Ultimately, the proposed rule change incorporates a version of this concept, as further discussed herein. See related discussion under Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Separate Identification of the Standard Disclosures and related notes 189 et. seq. infra.

[114] See SIFMA Letter I, at p. 7 note 15 ("We also note that, in some cases, it appears that regulators conflate conflicts of interest that might exist on the part of other parties to a financing, including in particular conflicts on the part of issuer personnel, with conflicts on the part of the underwriter, and therefore regulators appear to expect that the conflicts disclosure under the [2012 Interpretive Notice] should include these conflicts of other parties. SIFMA and its members request that the MSRB clarify that the [2012 Interpretive Notice] does not require the underwriter to disclose conflicts on the part of parties other than the underwriter.").

expect that the conflicts disclosure under the 2012 Interpretive Notice should include these conflicts of interest of other parties. SIFMA requested clarification on this point.[115] In response, the MSRB incorporated a proposed amendment in the Request for Comment that explicitly stated that "underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction."[116]

vii. Clarity of Disclosures

The 2012 Interpretive Notice requires that disclosures be made in a manner designed to make clear to an issuer official the subject matter of such disclosures and their implications for the issuer. In their comments to the Concept Proposal, GFOA encouraged the MSRB to require the disclosures be provided in a "plain English" manner,[117] and NAMA indicated that the disclosures should be presented in a straight-forward manner.[118] Believing that the standard for the manner of disclosures currently in the 2012 Interpretive Notice are consistent and substantially similar to GFOA's proposed "plain English" standard, the MSRB proposed

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[115] Id.

[116] Ultimately, the proposed rule change incorporates a version of this concept, but with certain refinements, as further discussed herein. See related discussion under Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties and related notes 194 et. seq. infra.

[117] GFOA Letter I, at p. 2.

[118] NAMA Letter I, at p. 2 (stating, ". . . information should be presented in a straight forward manner, with other general disclosures presented separately from the statements and discussions of material transaction risks and conflicts disclosures (including [the] statement that the underwriter does not have a fiduciary duty to the issuer)").

amendments to the 2012 Interpretive Notice in the Request for Comment that explicitly clarified that the disclosures be drafted in plain English.[119]

viii. Disclosures Regarding Third-Party Marketing Arrangements

SIFMA's comment letter on the Concept Proposal encouraged the MSRB to eliminate the dealer-specific disclosures regarding third-party marketing arrangements, stating that "we do not believe that the conflicts disclosure requirement under the 2012 Guidance is the appropriate mechanism for ensuring that issuers understand the participation of such third-parties."[120] SIFMA argued that these disclosure requirements should be eliminated because "the use of retail distribution agreements is not an activity involving suspicious payments to a third party and does not increase costs to issuers; rather, it simply passes on a discounted rate to a motivated dealer, which is commonly available to dealers after the bonds have become free to trade in any event, notwithstanding any agreement."[121]

The MSRB chose not to incorporate this amendment into the Request for Comment and did not incorporate any such amendment into the proposed rule change. While the MSRB agrees with SIFMA's point that third-party marketing agreements are not inherently "suspicious" activity, the MSRB believes that such agreements could create material conflicts of interest and that there may be circumstances in which an issuer would not or could not have certain dealers participate in the underwriting in such capacity. For example, an issuer may be subject to jurisdictional requirements that could dictate the participation or non-participation of certain

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[119] See related discussion under Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures – Clarity of Disclosures and related notes 196 et. seq. infra.

[120] SIFMA Letter I, at p. 8.

[121] Id.

dealers, or an issuer may have a preference to not involve certain dealers in their offering due to reputational concerns. The MSRB believes that it remains important for underwriters to disclose this information to issuers and, accordingly, did not propose any such changes in the Request for Comment and is not proposing any such change to this aspect of the 2012 Interpretive Notice in the proposed rule change.[122]

ix. Disclosures Regarding Credit Default Swaps

The 2012 Interpretive Notice specifically references an underwriter's engagement in certain credit default swap activities as a potential material conflict of interest that would require disclosure to the issuer. Similar to its request that the MSRB eliminate the disclosure requirements regarding third-party marketing arrangements, SIFMA also requested that the MSRB eliminate this specific reference to credit default swaps. SIFMA noted that dealer use of, and participation in, credit default swaps has significantly decreased since the financial crisis and the adoption of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and, as a result, in SIFMA's view, the reference is no longer as relevant.[123] The MSRB believes that, even if credit default swaps are less prevalent in the municipal securities market, the possibility for underwriters to issue or purchase credit default swaps for which the reference is the issuer remains. The MSRB believes that it remains important for underwriters to disclose this information to issuers and, accordingly, did not propose any such changes in the Request for

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[122] This concept is not discussed again under the Summary of Comments Received in Response to the Request for Comment. The MSRB did not receive any further significant comments on this concept subsequent to the Request for Comment other than SIFMA's reiteration that these disclosures should be eliminated. SIFMA Letter II, at pp. 4-5, note 12.

[123] SIFMA Letter I, pp. 8-9.

Comment and is not proposing any such change to this aspect of the 2012 Interpretive Notice in the proposed rule change.[124]

C. E-mail Read Receipt as Issuer Acknowledgement

The 2012 Interpretive Notice requires underwriters to attempt to receive written acknowledgement of receipt of the disclosures by an official of the issuer (other than by automatic e-mail receipt). 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 may proceed with the engagement after documenting with specificity why it was unable to obtain such written acknowledgement during the course of the engagement.

In its response to the Concept Proposal, SIFMA commented that this requirement creates a significant burden for underwriters with no corresponding benefit to issuers.[125] SIFMA encouraged the MSRB to eliminate the acknowledgement requirement.[126] To address this issue, SIFMA recommended that receipt of an e-mail return receipt should be conclusive proof of delivery if other transaction documentation has also been provided to the same e-mail address.[127] GFOA did not comment on this issue of changing the form or type of acknowledgement, but did

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[124] Given that the MSRB did not incorporate this particular concept into the proposed rule change, this concept is not discussed again under the Summary of Comments Received in Response to the Request for Comment. The MSRB did not receive any further significant comments on this concept subsequent to the Request for Comment other than SIFMA's reiteration that these disclosures should be eliminated. SIFMA Letter II, at pp. 4-5, note 12.

[125] SIFMA Letter I, at p. 13 (stating, ". . . we believe the requirement for the underwriter to attempt to receive an issuer acknowledgment and the efforts to document cases where the issuer does not provide such acknowledgment create a significant degree of non-productive work on the part of underwriter personnel and provide no value to the issuer, but often produce unwanted follow-up inquiries from the underwriter").

[126] Id.

[127] Id.

indicate that frequent issuers are burdened by the acknowledgement requirement in that they must "tackle and acknowledge the paperwork" many times.[128] NAMA stated its belief that the acknowledgement requirement should remain in place, but provide greater flexibility to allow "issuers to execute acknowledgements as they see fit."[129]

Based on such comments, the MSRB proposed in the Request for Comment to retain the acknowledgement requirement, but allow for e-mail delivery of the disclosures to the official of the issuer identified as the primary contact for the issuer and provide that an automatic e-mail receipt confirming electronic delivery of the applicable disclosures may be a means to satisfy the acknowledgement requirement.[130]

D. Clarification of the Meaning of "Recommendation"

Under the 2012 Interpretive Notice, whether an underwriter must make the transaction-specific disclosures, as well as the type of transaction-specific disclosures it must deliver, depends on whether the underwriter recommends certain financing structures to the issuer. In its response to the Concept Proposal, SIFMA requested clarification as to whether the MSRB's guidance on the meaning of "recommendation" under Rule G-42, on duties of non-solicitor

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[128] GFOA Letter I, at p. 2. Relatedly, GFOA's comments to the Concept Proposal also stated that certain "boilerplate disclosures" could be provided on an annual basis for frequent issuers, indicating that a more flexible approach to the acknowledgement of at least boilerplate disclosures could alleviate burdens on such issuers. Id.

[129] NAMA Letter I, at p. 2.

[130] The proposed rule change incorporates a version of this concept, but with certain refinements that would distinguish e-mail read receipts – which would be permitted to serve as acknowledgement under the Revised Interpretive Notice – from e-mail delivery receipts – which would not be permitted to serve as acknowledgement under the Revised Interpretive Notice, but may be used to evidence the timing of such disclosures – all as further discussed herein. See related discussion under Summary of Comments Received in Response to the Request for Comment – E-mail Read Receipt as Issuer Acknowledgement and related notes 213 et. seq. infra.

municipal advisors, describing a two-prong analysis for determining whether advice is a recommendation for purposes of that rule (i.e., a G-42 Recommendation) applies when determining whether an underwriter has recommended a complex municipal securities financing.[131] More specifically, the relevant guidance under Rule G-42 provides the following two-prong analysis for a G-42 Recommendation:

> First, the [municipal advisor's] advice must exhibit a call to action to proceed with a municipal financial product or an issuance of municipal securities and second, the [municipal advisor's] advice must be specific as to what municipal financial product or issuance of municipal securities the municipal advisor is advising the [municipal entity client or obligated person client] to proceed with.[132]

Persuaded by SIFMA's request for clarification on this point, the MSRB proposed an amendment to the 2012 Interpretive Notice in the Request for Comment clarifying that "[f]or purposes of determining when an underwriter recommends a financing structure, the MSRB's guidance on the meaning of 'recommendation' under Rule G-42, on duties of non-solicitor municipal advisors is applicable" and seeking further input on this issue.[133]

E. Underwriter Discouragement of Use of Municipal Advisor; Addition of a New Standard Disclosure Regarding the Engagement of Municipal Advisors

The 2012 Interpretive Notice currently states that "[t]he underwriter must not recommend that the issuer not retain a municipal advisor." In their responses to the Concept Proposal, both GFOA and NAMA commented that this language should be strengthened by requiring the

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131 SIFMA Letter I, at p. 9.

132 G-42 FAQs, at p. 2 (note 39 supra).

133 Ultimately, the proposed rule change does define the term "recommendation," but not in relation to the interpretive guidance issued under Rule G-42 as first proposed in the Concept Proposal, as further described herein. See Summary of Comments Received in Response to the Request for Comment – Guidance Regarding Meaning of "Recommendation" and related notes 219 et. seq. infra.

underwriter to affirmatively state that the issuer may hire a municipal advisor and by stating that the underwriter take no action to discourage or deter the use of a municipal advisor. More specifically, GFOA's comment asked the MSRB to amend the 2012 Interpretive Notice to require underwriters to "affirmatively state" both that "issuers may choose to hire a municipal advisor to represent their interests in a transaction" and also that underwriters are "to take no actions to discourage issuers from engaging a municipal advisor."[134] Similarly, NAMA asked that the MSRB amend the 2012 Interpretive Notice to include a statement that: "[t]he underwriter may not make direct or indirect statements to the issuer that the issuer not hire a municipal advisor or otherwise make statements to deter the use of a municipal advisor or blur the distinction between the underwriting and municipal advisor functions and/or duties."[135]

The MSRB attempted to address NAMA's and GFOA's comments to the Concept Proposal by incorporating existing language from the Implementation Guidance, as described above, which states that "an underwriter may not discourage an issuer from using a municipal advisor or otherwise imply that the hiring of a municipal advisor would be redundant because the underwriter can provide the same services that a municipal advisor would." The MSRB believed that, as a practical matter, this would address the concerns of NAMA and GFOA.[136]

F. Disclosures to Conduit Borrowers

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134 GFOA Letter I, at p. 3.

135 NAMA Letter I, at p. 3.

136 Ultimately, the proposed rule change does incorporate these concepts, but also incorporates a new standard disclosure regarding an issuer's choice to engage a municipal advisor, as further discussed herein. See related discussion under Summary of Comments Received in Response to the Request for Comment – Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor and related notes 201 et. seq. infra.

As discussed above, the 2012 Interpretive Notice specifies underwriters' fair-dealing obligations to issuers, but does not apply specific requirements to underwriters dealing with conduit borrowers. At the same time, the Implementation Guidance expressly acknowledges that underwriters must deal fairly with all persons, including conduit borrowers, and that a dealer's fair-dealing obligations to a conduit borrower depends on the specifics of the dealer's relationship with the borrower and other facts and circumstances specific to the engagement.

The Concept Proposal requested feedback on whether the MSRB should extend the requirements enumerated in the 2012 Interpretive Notice to underwriters' fair dealing obligations with conduit borrowers. Providing this feedback, GFOA stated in its comment letter on the Concept Proposal its belief that the MSRB should make clear that the information in the disclosures would best be utilized if it was sent to the party making decisions about the issuance and liable for the debt, which it indicated is the conduit borrower in most cases.[137] SIFMA indicated in its response to the Concept Proposal that it is common, but not universal, for underwriters to provide a conduit borrower with a copy of the disclosures provided to the conduit issuer.[138] SIFMA, otherwise, did not comment on whether that common practice should be required under Rule G-17.

Although it may be common practice by some underwriters, the MSRB, at this time, does not believe the 2012 Guidance should be amended to extend the obligations contained therein to underwriters' dealings with conduit borrowers. The MSRB understands that the level of engagement between underwriters and conduit borrowers is not consistent across the market, such that, in some circumstances, the underwriter(s) works directly with the conduit borrower to

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[137] GFOA Letter I, at p. 2.

[138] SIFMA Letter I, at p. 16.

build the deal team and structure a financing prior to enlisting a conduit issuer to facilitate the transaction, while, in others, the underwriter(s) are engaged by the conduit issuer and subsequently connected to a conduit borrower seeking financing. The MSRB declined to address these issues in the Request for Comment – and continues to decline to incorporate such obligations into the proposed rule change – because the issues presented by the relationship between underwriters and conduit borrowers are unique enough to merit their own full consideration apart from this retrospective review.[139] Accordingly, the MSRB may consider this issue of the fair dealing obligations underwriters owe to conduit borrowers at a later date.

G. Tiered Disclosure Requirements Based on Issuer Characteristics

The 2012 Interpretive Notice applies to underwriters in their dealings with all issuers in the same manner. The Concept Proposal posed the question whether there should be different disclosure obligations for different classes of issuers. In response, the Florida Division of Bond Finance stated that a "one size fits all" approach is not effective and that issuers could benefit from underwriters tailoring such disclosures based on issuer size and sophistication.[140] Similarly, SIFMA noted in its response to the Concept Proposal that the size of the issuer may have some bearing on issuer sophistication, but that it is most appropriate to focus on the knowledge, expertise, and experience of the issuer personnel, as well as the issuer's engagement of the

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[139] This concept is not discussed again under the Summary of Comments Received in Response to the Request for Comment. The MSRB did receive one comment from SIFMA on this concept in response to the Request for Comment, which stated SIFMA's belief that the Revised Interpretive Notice should not require disclosures to conduit borrowers. SIFMA Letter II, at pp. 5-6.

[140] Florida Division of Bond Finance Letter.

advice of an independent registered municipal advisor ("IRMA").[141] Relatedly, BDA commented that the disclosure obligations of the 2012 Interpretive Notice should not apply if an issuer has an IRMA with respect to the same aspects of an issuance of municipal securities.[142]

BDA's response to the Concept Proposal further stated that its belief that there should not be different obligations for different types of issuers for two reasons. First, because even the personnel of large issuers that frequently issue municipal securities "change regularly" and so continue to need the disclosures; and, second, because the uniform requirement allows for a "consistent, standard process for dealers."[143] In their responses to the Concept Proposal, NAMA indicated that it does not support the varying of underwriters' responsibilities for different issuers,[144] and GFOA stated its belief that the wide variety of issuers would make it nearly impossible to develop ways to modify the 2012 Guidance for some issuers but not others.[145]

The MSRB does not believe there is 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. In light of these considerations, the MSRB did not propose any classification

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141 SIFMA Letter I, at p. 12 (In terms of factoring in the engagement of an IRMA, SIFMA stated that, ". . . if the issuer is relying on the advice of a municipal advisor that meets the independent registered municipal advisor exemption . . . and the underwriter invokes the IRMA exemption to the SEC's registration rule for municipal advisors," the underwriter should be able to factor this into its analysis regarding the appropriate level of disclosure.).

142 BDA Letter I, at p. 2.

143 BDA letter I, at p. 1.

144 NAMA Letter I, at pp. 1-2.

145 GFOA Letter I, at p. 2.

of, and varied disclosure requirements for, issuers in the Request for Comment, nor is it proposing to do so in the proposed rule change.[146]

On the more specific topic of SIFMA's and BDA's comments regarding the IRMA exemption, the MSRB believes that the issuer's retention of an IRMA and the underwriter's corresponding invocation of the IRMA exemption should not relieve the underwriter from the obligations to provide disclosures. The MSRB believes that many of the disclosures are so fundamental that they should not be optional and that issuers should always have the benefit of receiving them. For example, even if an IRMA assists an issuer in understanding the role and responsibilities of the underwriter, the MSRB believes that an underwriter should still be required to make the representations regarding its role in the transaction. For transaction-specific disclosures, the MSRB does not believe that an issuer's retention of an IRMA should obviate the need to provide transaction-specific disclosure – particularly, disclosures regarding complex municipal securities financings – because the transaction-specific disclosures would continue to serve the crucial purpose of highlighting important risks for an issuer to discuss with its municipal advisor. However, in response to SIFMA's and BDA's comments, the Request for Comment incorporated the concepts that the level of transaction-specific disclosures can vary over time and, among other factors, an underwriter may consider the issuer's retention of an IRMA when assessing the issuer's level of knowledge and experience with a given type of transaction.[147]

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[146] This concept is not discussed again under the Summary of Comments Received in Response to the Request for Comment. The MSRB did receive a comment on this concept in response to the Request for Comment. SIFMA reiterated that tiered disclosure requirements may be beneficial issuers and underwriters. SIFMA Letter II, at p. 9.

[147] See related discussion under Summary of Comments Received in Response to the Request for Comment – Tiered Disclosure Requirements Based on Issuer Characteristics and related note 229 infra.

H. Issuer Opt-Out

Under the 2012 Interpretive Notice, all issuers receive the disclosures required to be provided by underwriters and they may not opt out. In response to a specific inquiry in the Concept Proposal, GFOA opposed the concept of an issuer opt-out, while SIFMA argued that issuers should have the choice to not receive the standard disclosures in a written election based on their knowledge, expertise, experience, and financial ability, upon which underwriters should be permitted to conclusively rely. The MSRB believes that it is important for issuers to receive or have access to the disclosures for all of their negotiated transactions and that it has addressed many of commenters concerns regarding the need for an issuer opt-out through other proposed amendments to the 2012 Interpretive Notice. Accordingly, the MSRB did not incorporate such an opt-out concept into the Request for Comment, nor is it proposing to do so in the proposed rule change.[148]

I. Evaluating Issuer Sophistication and the Delivery of the Transaction-Specific Disclosures

The 2012 Interpretive Notice provides that, absent unusual circumstances or features, the typical fixed rate offering may be presumed to be well understood by issuer personnel, which may obviate the need for an underwriter to provide a disclosure on the material aspects of a fixed rate financing when the underwriter recommends such a structure in connection with a negotiated offering. Conversely, the 2012 Interpretive Notice allows for a variance in the level of disclosure required for complex municipal securities financings based on the reasonable belief of the underwriter regarding: the issuer's knowledge or experience with the proposed financing

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148 See related discussion under Summary of Comments Received in Response to the Request for Comment – Issuer Opt-Out and related note 231 infra.

structure or similar structures; the issuer's capability of evaluating the risks of the recommended financing; and the issuer's financial ability to bear the risks of the recommended financing.

SIFMA's comment letter on the Concept Proposal stated its belief that all transaction-specific disclosures, for negotiated offerings of fixed rate and complex municipal securities financings, should be triggered by the same standard, which would create the possibility that an underwriter need not provide disclosures about the material aspects of a complex municipal securities financing if it reasonably believes that the issuer has sufficient knowledge or experience with the proposed financing structure. The MSRB acknowledges that the rationale espoused by SIFMA is conceptually consistent with the 2012 Interpretive Notice and that it is possible for certain issuers to develop a level of knowledge and experience with certain complex municipal securities financings that would diminish the need for the disclosures related to the structure of such financings. However, the MSRB believes that the inherent nature of such unique and atypical financings requires a higher standard for the protection of issuers. Specifically, the MSRB believes that the risk of an underwriter inaccurately determining that such transaction-specific disclosures are not necessary is too great. The possible harms of an issuer's inability to understand the structure of a complex municipal securities financing and corresponding risks are very difficult to remedy after the transaction. Accordingly, the MSRB did not incorporate such a concept into the Request for Comment, nor is it proposing to do so in the proposed rule change.[149]

J. EMMA as a Tool for Disclosures

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[149] See related discussion under Summary of Comments Received in Response to the Request for Comment – Tiered Disclosure Requirements Based on Issuer Characteristics and related note 229 infra.

The 2012 Interpretive Notice requires underwriters to deliver in writing the required disclosures. In response to a question in the Concept Proposal on whether EMMA could or should be used as a tool to improve the utility of disclosures and the process for providing them to issuers, there was agreement among the commenters that responded to this question that EMMA was not an appropriate vehicle for the disclosures. Specifically, GFOA indicated in its response to the Concept Proposal that the use of EMMA could cause underwriters to provide even more boilerplate disclosures and that underwriters may be concerned about investor use of the information.[150] In their responses to the Concept Proposal, SIFMA stated that using EMMA would not be appropriate in light of the information disclosed,[151] and NAMA stated that it would undermine the purpose of the 2012 Interpretive Notice by requiring issuers to have to seek out the disclosures instead of receiving them directly.[152] Accordingly, the MSRB did not incorporate such a concept into the Request for Comment, nor is it proposing to do so in the proposed rule change.[153]

II. Summary of Comments Received in Response to the Request for Comment

The MSRB received five comment letters in response to the Request for Comment.[154] Each of the commenters generally indicated their support of the retrospective review of the 2012 Interpretive Notice as outlined in the Request for Comment and each had specific suggestions on

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[150] GFOA Letter I, at p. 3.

[151] SIFMA Letter I, at pp. 8, 19-20.

[152] NAMA Letter I, at p. 2.

[153] This concept is not discussed again under the Summary of Comments Received in Response to the Request for Comment. The MSRB did receive a specific comment on this concept from NAMA, which was supportive of not using EMMA as a means to satisfy the G-17 requirement. NAMA Letter II, at p. 2.

[154] See note 10 supra.

how the proposed amendments to the 2012 Interpretive Notice incorporated into the Request for Comment could be improved, as discussed further below.

A. Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into a Single Interpretive Notice

In response to the Request for Comment, the MSRB received comments from GFOA, NAMA, BDA and SIFMA on the MSRB's proposal of amending the 2012 Interpretive Notice to consolidate the Implementation Guidance and the FAQs into a single publication. Commenters were generally supportive of the inclusion of the Implementation and the FAQs, but had specific suggestions in supplementing, revising, and/or deleting the proposed amendments, which are discussed below.

i. Inclusion of Language Regarding Underwriters' Fair Dealing Obligations to Other Parties in a Municipal Securities Financing

As previously discussed, the Request for Comment incorporated existing language from the Implementation Guidance that:

> The fair practice duties outlined in this notice are those duties that a dealer owes to a municipal entity when the dealer underwrites its 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.

BDA's response to the Request for Comment stated its belief that this this inclusion is "unnecessary" and will make compliance with the proposed rule change "burdensome."[155] The MSRB believes that the proposed change merely reiterates Rule G-17's general principle of fair dealing in relation to a dealer's municipal securities activities and so is a useful and necessary

155 BDA Letter II, at p. 1.

reminder to dealers of their obligations to other parties participating in a given municipal securities transaction. Moreover, given that this language is taken from the existing Implementation Guidance, the MSRB believes that it should not create a new compliance burden for underwriters, as it should be incorporated into existing policies, procedures, and training. Accordingly, the MSRB incorporated this language into the proposed rule change with a slight modification to clarify that a dealer's fair dealing obligation under Rule G-17 extends only as far as its municipal securities activities. In relevant part, the Revised Interpretive Notice would read:

> 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.

ii. Inclusion of Language Regarding a Reasonable Basis for Underwriter Representations

The Request for Comment incorporated existing language from the Implementation Guidance stating:

> 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. The less certain an underwriter is of the validity of underlying assumptions, the more cautious it should be in using such assumptions and the more important it will be that the underwriter disclose to the issuer the degree and nature of any uncertainties arising from the potential for such assumptions not being valid. 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.

BDA objected to the inclusion of this language in its response to the Request for Comment as redundant, in that the language is "already covered in the existing language" of the 2012 Interpretive Notice.[156] The MSRB understands BDA's comment to suggest that, because the 2012 Interpretive Notice already addresses the requirement for an underwriter to have a reasonable basis for its representations, the Implementation Guidance language is a superfluous addition. The MSRB believes that this language from the Implementation Guidance generally provides an important illustrative gloss on Rule G-17's general principle of fair dealing in relation to a dealer's specific obligations regarding certain representations and the assumptions upon which such representations are based. Moreover, given that this language is taken from the existing Implementation Guidance, the MSRB believes that it should not create a new compliance burden for underwriters, as it should be incorporated into existing policies, procedures, and training.

Accordingly, the MSRB incorporated this language into the proposed rule change as generally proposed in the Request for Comment with one minor exception. The MSRB omitted the statement that, "[t]he less certain an underwriter is of the validity of underlying assumptions, the more cautious it should be in using such assumptions and the more important it will be that the underwriter disclose to the issuer the degree and nature of any uncertainties arising from the potential for such assumptions not being valid." The MSRB agrees with BDA that this language is redundant and potentially confusing. In relevant part, the Revised Interpretive Notice would read as follows:

> 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

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[156] BDA Letter II, at p. 2.

> 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.

iii. Reincorporation of the "No Hair-Trigger" Language from the Implementation Guidance

As described above, the Request for Comment did not incorporate the existing language from the Implementation Guidance providing that, ". . . the timeframes set out in the [2012 Interpretive Notice] are not intended to establish hair-trigger tripwires resulting in technical rule violations so long as underwriters act in substantial compliance with such timeframes and have met the key objectives for providing such disclosures under the [2012 Interpretive Notice]." SIFMA "strongly objected" to the omission of this language, stating that the "language has been an important reassurance to our members who have acted in substantial compliance with prescribed timeframes despite transactions that have proceeded along unforeseen timelines and pathways."[157] SIFMA argued that this statement in the Implementation Guidance has benefited dealers and regulators alike, by preserving valuable time and resources, and, more importantly, that it should be retained "as-is" unless the MSRB "can point to prevalent abuses."[158] The other commenters to the Request for Comment did not address the omission of this language. The MSRB is persuaded by SIFMA's concerns and believes there is a benefit to preserving aspects of the existing language from the Implementation Guidance, as it should be incorporated into existing policies, procedures, and training.

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157 SIFMA Letter II, at p. 5.

158 Id.

Accordingly, the proposed rule change would incorporate this concept from the Implementation Guidance into the Revised Interpretive Notice with certain clarifying and conforming edits to the language in order to promote consistency with the other amendments and to emphasize the facts and circumstances nature of the scope of an underwriter's fair dealing obligation under the Revised Interpretive Notice. In relevant part, the Revised Interpretive Notice would read as follows:

> 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.

B. Amending the Nature, Timing, and Manner of Disclosures

Each of the five commenters on the Request for Comment offered improvements to the nature, timing, and manner of disclosures required under the 2012 Interpretive Notice. At a more general level, commenters continued to share the view that the municipal securities market would benefit from reducing the volume and "boilerplate" nature of the disclosures required under the 2012 Interpretive Notice as generally proposed in the Request for Comment.

i. Disclosures Concerning the Contingent Nature of Underwriting Compensation

As described above, the Request for Comment proposed an amendment to the 2012 Interpretive Notice that would require underwriters to deliver disclosures concerning the contingent nature of their underwriting compensation in their standard disclosures.[159] To the degree that an underwriter's compensation on a particular transaction deviates from the structure described in the standard disclosures, under the language of the Request for Comment, the dealer would need to indicate in its transaction-specific disclosures that the information included in the standard disclosure on underwriter compensation does not apply and explain the alternative compensation structure as part of the transaction-specific disclosures, to the extent that such alternative compensation structure also presents a conflict of interest.

In its response to the Request for Comment, SIFMA indicated its belief that the proposed changes in the Request for Comment are contrary to the goals of the retrospective review, because "it would invariably result in more standardized and generic disclosures that may district from more specific ones."[160] SIFMA stated its preference to retain the current method of providing the disclosures. The MSRB did not receive any other comments on this proposed change and is persuaded by SIFMA's concerns. The MSRB believes that retaining the existing requirements regarding the disclosures of underwriter's compensation would be consistent with the goals of the retrospective review and not harm current municipal entity issuer protections. Accordingly, the proposed rule change does not adopt the Request for Comment's approach to

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159 See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Disclosures Concerning the Contingent Nature of Underwriting Compensation and related notes 97 et. seq. supra.

160 Id., at p. 8.

the disclosure of underwriter compensation and proposes to retain the existing requirements and structure under the 2012 Interpretive Notice.

ii. Disclosure of Potential Material Conflicts of Interest

As previously described, the Request for Comment proposed certain revisions to the 2012 Interpretive Notice clarifying that a potential material conflict of interest must be disclosed if, but only if, it is "reasonably foreseeable" that it will mature into an actual material conflict of interest during the course of that specific transaction between the issuer and the underwriter.[161] The MSRB received several comments to the Request for Comment on this proposed change. GFOA and the City of San Diego supported the revision, while SIFMA continued to advocate for the elimination of this category of disclosure altogether. More specifically, GFOA stated that this "reasonably foreseeable" standard should be used, because continuing to require the disclosure of all potential material conflicts of interest "could diminish the meaningful inclusions that issuers need to know."[162] The City of San Diego indicated that the reasonably foreseeable standard provided a reasonable "limit" to what constitutes a potential material conflict of interest and indicated that the MSRB should not set a standard with "a greater likelihood."[163]

On the other hand, SIFMA reiterated its concern that the disclosure requirement, ". . . be limited to actual, and not merely potential, material conflicts of interest, or in the very least, a highly likely standard."[164] SIFMA stated that continuing to require the disclosure of potential

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161 See related discussion under Summary of Comments Received in Response to the Concept Release – Amending the Nature, Timing, and Manner of Disclosures – Disclosure of Potential Material Conflicts of Interest and related notes 98 et. seq. infra.

162 GFOA Letter II, at p. 2.

163 City of San Diego Letter.

164 SIFMA Letter II, at p. 4.

material conflicts of interest would be "unnecessary, distracting, and does not advance the goal of the retrospective review" and suggested that the proposed reasonably foreseeable standard "would be exceedingly difficult to implement and monitor from a compliance standpoint."[165] SIFMA's response to the Request for Comment further explained that, because any potential material conflict of interest that ripens into an actual conflict prior to the execution of the bond purchase agreement must be disclosed under the 2012 Interpretive Notice, the advance disclosure of such potential material conflicts of interest are unnecessary and distracting. Moreover, SIFMA stated that the consequence of misjudging whether and when a potential conflict of interest becomes material is too great, and, consequently, the reasonably foreseeable standard proposed in the Request for Comment would not reduce the volume of disclosures provided to issuers, as underwriters "would be inclined," out of an abundance of caution or otherwise, to deliver the same level of disclosure as they currently deliver under the 2012 Interpretive Notice. [166] SIFMA encouraged the MSRB to either eliminate the category of potential material conflicts altogether or, in the alternative, adopt a "highly likely" standard for those potential material conflicts of interest that must be disclosed.[167]

As indicated in the Request for Comment, 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.[168] To the degree that an underwriter has knowledge that a material conflict of

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[165] Id., pp. 4-5.

[166] Id.

[167] Id.

[168] For example, the MSRB notes the requirements to disclose conflicts of interest – including potential material conflicts of interest – under the 2012 Interpretive Notice may serve

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 believes 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.

At the same time, the MSRB understands from issuers and dealers that the disclosures required under the 2012 Interpretive Notice can result in a long list of generic boilerplate disclosures with little actionable information, and which may distract an issuer's attention from conflicts of interest that are more concrete and specific to the transaction's participants, facts and circumstances. In this regard, the MSRB is persuaded by SIFMA's concerns that the Request for Comment's proposed "reasonably foreseeable" standard could be difficult to implement from a compliance perspective and so may not serve the goal of reducing boilerplate disclosure regarding potential material conflicts of interest and facilitating the more focused disclosure of the most likely and immediate conflicts.

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as an important tool for the issuer and underwriter to discuss and address other disclosure obligations that may arise in the course of a primary offering of municipal securities. See, e.g., Exchange Act Release No. 34-33741, "Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others" (Mar. 9, 1994) (the "SEC's 1994 Interpretive Release"), 59 FR 12748, at p. 12751 (March 17, 1994) (stating that ". . . revelations about practices in the municipal securities offering process have highlighted the potential materiality of information concerning financial and business relationships, arrangements or practices, including political contributions, that could influence municipal securities offerings. . . . For example, such information could indicate the existence of actual or potential conflicts of interest, breach of duty, or less than arm's length transactions. Similarly, these matters may reflect upon the qualifications, level of diligence, and disinterestedness of financial advisors, underwriters, experts and other participants in an offering. Failure to disclose material information concerning such relationships, arrangements or practices may render misleading statements made in connection with the process, including statements in the official statement about the use of proceeds, underwriter's compensation and other expenses of the offering.").

Accordingly, the proposed rule change incorporates a "reasonably likely" standard to define what potential material conflicts of interest must be disclosed in advance of ripening into an actual material conflict of interest during the course of a transaction. The MSRB believes that a reasonably likely standard appropriately balances competing policy interests, including by ensuring that issuers continue to benefit from the disclosure of potential material conflicts of interest, while at the same time attempting to reduce the volume of disclosures received by issuers and focusing the content of the disclosures to those conflicts that are more concrete and probable.

iii. Syndicate Manager Responsibility for the Standard Disclosures and Transaction-Specific Disclosures

As described above, the Request for Comment proposed an amendment to the 2012 Interpretive Notice that would require, rather than permit, the standard disclosures and transaction-specific disclosures to be made by a syndicate manager "on behalf of" the other syndicate members.[169] The MSRB received specific comments from the City of San Diego, SIFMA, and BDA on this proposed change. As discussed below, the City of Sand Diego questioned the proposed change and encouraged the MSRB to retain a version of the existing requirements under the 2012 Interpretive Notice,[170] while BDA and SIFMA supported the proposed change, but encouraged the MSRB to adopt clarifying amendments to the concept. The following provides a separate discussion regarding the MSRB's rationale for: assigning to the

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[169] See related discussion under Summary of Comments Received in Response to the Concept Proposal– Amending the Nature, Timing, and Manner of Disclosures – Syndicate Manager Responsibility for the Standard Disclosures and Transaction-Specific Disclosures and notes 102 et. seq. supra.

[170] City of San Diego Letter, at p 1.

syndicate manager's the sole obligation to deliver the standard disclosures and transaction-specific disclosures where a syndicate is formed; continuing to require co-managing underwriters in the syndicate to disclose in writing any applicable dealer-specific conflicts of interest; and the elimination of the Request for Comment's "on behalf of" concept related to the syndicate manager's obligation to deliver the standard disclosures and transaction-specific disclosures.

1. Amending the 2012 Interpretive Notice to Require the Syndicate Manager to Make the Standard Disclosures and Transaction-Specific Disclosures

The City of San Diego objected to the inclusion of the proposed change and encouraged the MSRB to adopt a standard that would ensure each syndicate member is "responsible for delivering the standard and transaction specific disclosures" and "required to obtain acknowledgement of receipt from the issuer."[171] The City of San Diego reasoned that the burden placed on issuers of receiving multiple disclosures is manageable, even for frequent issuers.

As outlined above, the MSRB remains persuaded by the comments to the Concept Proposal from BDA, NAMA, and the Florida Division of Bond Finance that requiring, rather than merely allowing, the syndicate manager to deliver the standard disclosures and transaction-specific disclosures is an efficient way to reduce the duplication of disclosures received by issuers where a syndicate is formed. The MSRB understands that in many instances syndicate members may be reluctant to rely on the syndicate manager's delivery of the disclosures, as currently permitted by the 2012 Interpretive Guidance, because confirming delivery of its disclosures provides greater regulatory certainty that it has met its fair dealing obligations to the issuer. Additionally, the MSRB continues to be persuaded by GFOA's comment on the Concept Proposal that "issuers who may be frequently in the market have to tackle and acknowledge the

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[171] Id.

paperwork many times."[172] Accordingly, the proposed rule change incorporates the concept of only obligating the syndicate manager to provide the standard disclosures and transaction-specific disclosures where a syndicate is formed.

2. Declining to Amend the 2012 Interpretive Notice to Require Only the Syndicate Manager to Provide the Dealer-Specific Disclosures

In contrast to the City of San Diego's view on this topic, BDA's comment on the Request for Comment encouraged the MSRB to go even further in reducing an underwriter's disclosure obligations by only requiring the syndicate manager to have an obligation to deliver the dealer-specific disclosures, and eliminating the obligation that co-managers must deliver their individual dealer-specific disclosures. BDA cautioned the MSRB that continuing to require dealers who serve as co-managers to provide the dealer-specific conflicts of interest result in "roughly the same number of disclosures to issuers as currently is the case."[173] BDA reasoned that, "[a]s a practical matter, conflicts of interest tend to be specific to dealers in that each dealer has specific arrangements that create the conflict," yet the disclosures of only the syndicate manager's dealer-specific conflicts of interest are sufficient, because "the role of co-manager does not entail the kind of active discussions with an issuer to merit disclosure by all co-managers of their specific conflicts."[174]

The MSRB understands BDA's concern that continuing to require co-managing underwriters to deliver their dealer-specific disclosures may not advance the goal of seeking to

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172 GFOA Letter I, at p. 1.

173 BDA Letter II, at p. 3.

174 Id.

reduce the volume of disclosures to issuers.[175] The MSRB, however, continues to be persuaded by comments to the Concept Proposal and the Request for Comment that non-boilerplate disclosures regarding specific material conflicts of interest must be received by an issuer from each underwriter in the syndicate. While the general uniformity of the standard disclosures and the transaction-specific disclosures lend themselves to a single delivery in most circumstances, the MSRB believes that the relative uniqueness of the dealer-specific disclosures require a delivery obligation on the part of each co-managing underwriter. A co-managing underwriter's failure to deliver such disclosures could result in an issuer being unable to fully evaluate such co-managing underwriter's engagement in the syndicate and to make any appropriate disclosures to investors about the municipal securities offering. Accordingly, the MSRB declines to incorporate BDA's suggestion into the proposed rule change that only the syndicate manager is obligated to deliver the dealer-specific disclosures. Relatedly, the proposed rule change would not amend the guidance that, while each co-managing underwriter in the syndicate must disclose any applicable dealer-specific conflicts of interest, a co-managing underwriter has no obligation to affirmatively disclose in writing the absence of such conflicts.[176]

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[175] The MSRB also notes that pursuant to the existing requirements under the 2012 Interpretive Notice and the FAQs, a co-managing underwriter would not have an obligation to deliver an affirmative statement in writing to the issuer indicating that no such dealer-specific conflicts exist, although a co-managing underwriter is not prohibited from doing so. The MSRB believes that one benefit of not requiring a co-managing underwriter to deliver such a disclosure is that issuers should be able to focus on the dealer-specific disclosures it does receive.

[176] For the avoidance of doubt, the proposed rule change would preserve the ability of an underwriter to deliver an affirmative statement providing that the underwriter does not have an actual material conflict of interest or potential material conflicts of interest subject to disclosure. Moreover, the proposed rule change incorporates the reminder in the Implementation Guidance that underwriters are obligated to disclose such conflicts of interest arising after the time of engagement with the issuer.

3. Clarifying that an Underwriter that Becomes a Syndicate Manager is Not Required to Make the Standard Disclosures and Transaction-Specific Disclosures on Behalf of Co-Managing Underwriters

SIFMA's response to the Request for Comment "welcome[d] this proposal to reduce oftentimes duplicative disclosures to issuers," but also requested certain refinements to it.[177] Specifically, SIFMA was concerned that the proposed change would require the syndicate manager to "affirmatively state" that the standard disclosures are provided "on behalf of the other syndicate members."[178] SIFMA suggested that this would be problematic in instances when an underwriter may need to provide the disclosures in order to meet the deadlines proposed in the 2012 Interpretive Notice, but co-managing underwriters have not yet been appointed and/or the underwriter is uncertain whether such a syndicate will be formed. SIFMA encouraged the MSRB to reconsider this "on behalf of" language to ensure that an underwriter is not required to suggest the appointment of co-managing underwriters in such instances or, presumably, to otherwise provide disclosures on behalf of a non-existent or still-forming syndicate.

Similarly, BDA encouraged the MSRB to clarify the timing of a syndicate manager's delivery of disclosures, requesting specifics regarding the scenario in which an "underwriter may deliver the standard disclosures and transaction-specific disclosures well before a syndicate is formed."[179] BDA stated that the amendments should "clarify that standard disclosures and transaction-specific disclosures delivered by a syndicate manager can be delivered before a

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177 SIFMA Letter II, at pp. 8-9.

178 Id.

179 BDA Letter II, at p. 3.

syndicate is formed and that the syndicate manager is not required to deliver new disclosures after a syndicate is formed or new syndicate members are added."[180]

The MSRB is persuaded by the scenarios that SIFMA and BDA describe and believes that requiring a syndicate manager to make the standard disclosures and the transaction-specific disclosures "on behalf of" the other members of the syndicate may unnecessarily be understood as requiring underwriters to deliver disclosures on behalf of non-existent syndicate members or otherwise defeat the purpose of the retrospective review by requiring an underwriter to re-deliver disclosures that had been provided, but delivered without such "on behalf of" language, in order to fulfill the dealer's fair dealing obligations to the issuer.[181] Accordingly, the proposed rule change would strike the "on behalf of" language as generally proposed in the Request for Comment and would expressly clarify that, in those instances in which an underwriter has provided the standard disclosures and/or transaction-specific disclosures prior to the formation of the syndicate, it would suffice that the disclosures have been delivered and no affirmative

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[180] Id.

[181] Here, the MSRB contemplates scenarios in which an underwriting syndicate unexpectedly forms subsequent to the delivery of the standard disclosures and/or transaction-specific disclosures and desires to clarify that underwriters are not obliged to re-deliver such disclosures "on behalf of" the syndicate in order to meet their fair dealing obligations. The proposed rule change is intended to clarify that a syndicate manager is not required to re-deliver any disclosures previously provided to an issuer upon the subsequent or concurrent formation of a syndicate. Notwithstanding this obligation, and for the avoidance of doubt, to the extent that the content of those disclosures may need to be supplemented or amended to account for a change in circumstances, an underwriter is still permitted to deliver such a supplement or amendment. As stated in the FAQs, "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."

statement that such disclosures are made "on behalf of" any future co-managing underwriter would be necessary.[182]

iv. Alternative to the Transaction-by-Transaction Delivery of the Disclosures as Proposed in the Request for Comment

As further described above, the MSRB incorporated proposed amendments to the 2012 Interpretive Notice in the Request for Comment that permitted underwriters to provide standard disclosures to an issuer one time and then subsequently refer to and reconfirm those disclosures.[183] The MSRB received specific comments from GFOA, NAMA, the City of San Diego, and SIFMA regarding this proposal and each comment was generally critical of the MSRB's proposed approach. GFOA's comment on the Request for Comment stated that the MSRB's proposal is "problematic" and encouraged the MSRB to adopt an approach "mandat[ing] that disclosures are provided to issuers for each transaction, to ensure that the issuers are aware of the fair dealing requirement for each issuance of securities."[184] Similarly, NAMA opposed any amendments that would eliminate the requirement for underwriters to provide disclosures for each transaction or otherwise allowed underwriters to reference back to previously provided disclosures. The City of San Diego agreed, stating that "[i]t is most straight forward to require disclosures on a transaction by transaction basis."[185] SIFMA appreciated the

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[182] The proposed rule change is intended to similarly permit a syndicate manager to provide the standard disclosures and/or transaction-specific disclosures concurrent with or after the formation of the syndicate without the reference to the "on behalf of" language.

[183] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Alternative to the Transaction-by-Transaction Delivery of the Disclosures and related note 107 et. seq. supra.

[184] GFOA Letter II, at pp. 1-2.

[185] City of San Diego Letter, at p. 1.

MSRB's attempt to respond to its request to provide an alternative manner of disclosure, but expressed concern that the MSRB's proposal "complicates matters even further."[186] SIFMA concluded that the MSRB's alternative proposal would be "operationally burdensome" and "do little to reduce the volume and nature of the paperwork."[187] SIFMA reiterated its original suggestion for an annual disclosure process "with bring-downs as necessary during the succeeding year."[188]

Given the lack of support from commenters regarding the MSRB's proposal, the MSRB did not incorporate the concept into the proposed rule change and declines to incorporate a different concept into the proposed rule change regarding an alternative to the transaction-by-transaction delivery of the disclosures, such as SIFMA's suggestion of annual disclosure process with bring-downs. The MSRB is persuaded by the comments from GFOA, NAMA, and City of San Diego that a transaction-by-transaction approach to disclosure better ensures that issuers and their personnel are apprised of an underwriter's fair dealing obligations for each offering.

v. Separate Identification of the Standard Disclosures

The MSRB incorporated a requirement in the Request for Comment that underwriters clearly identify each category of disclosure and generally separate them by placing the standard disclosures in an appendix or attachment.[189] The MSRB suggested that such a change would allow issuers to discern and focus on the disclosures most important to them. The MSRB

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186 SIFMA Letter II, at p. 7.

187 Id., at p. 8.

188 Id.

189 See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Separate Identification of the Standard Disclosures and related notes 110 et. seq. infra.

received several specific comments on this proposed change. GFOA's response to the Request for Comment supported the separation of disclosures, stating: "[w]hen determining clarity and communication of disclosures, standard disclosures should be discussed separately from specific transaction and underwriter disclosures."[190] NAMA similarly supported the separation of the standard disclosures from the transaction-specific disclosures as a way to highlight key items to its issuer clients.[191] SIFMA suggested that the "separation of actual and non-standard disclosures is a reasonable proposal."[192] Accordingly, the proposed rule change incorporates the separation of the standard disclosures from the transaction-specific disclosures and dealer-specific disclosures.[193]

vi. Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties

The Request for Comment incorporated a proposed amendment to the 2012 Interpretive Notice in order to expressly emphasize that underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction.[194] The MSRB

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[190] GFOA Letter II, at p. 1.

[191] NAMA Letter II, at p. 2.

[192] SIFMA Letter II, at pp. 3-4.

[193] As discussed above, the MSRB reiterates, but is not amending at this time, the existing language from the 2012 Interpretive Notice that disclosures must be "designed to make clear" to issuer officials "the subject matter of such disclosures and their implications for the issuer." Thus, an underwriter's fair dealing obligation requires it to identify and separate transaction-specific disclosures from dealer-specific disclosures to the extent possible without putting form over substance, as in the case of failing to fully discuss a conflict in a disclosure because it may not fit squarely into one category of disclosure versus another.

[194] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Clarification

received one specific comment on this topic. More specifically, SIFMA's response to the Request for Comment "welcome[d]" the MSRB's proposed clarification.[195] The MSRB believes that this clarification is warranted to avoid any misinterpretation of the disclosure requirements of the proposed rule change. Accordingly, the proposed rule change would incorporate this language as generally proposed in the Request for Comment with supplemental language specifically clarifying that the an underwriter has no obligation to make any written disclosures described therein on the part of issuer personnel or any other parties to the transaction, as the standard disclosures, transaction-specific disclosures, and dealer-specific disclosures are limited to underwriter conflicts.

vii. Clarity of Disclosures

The MSRB proposed amendments to the 2012 Interpretive Notice in the Request for Comment that explicitly clarified that the disclosures be drafted in "plain English."[196] The MSRB received several comments on this topic in response to the Request for Comment. The City of San Diego, GFOA and NAMA each supported the requirement that the disclosures be drafted in plain English, while SIFMA objected to the incorporation of this particular standard.

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that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties and related note 114.

[195] SIFMA further asked the MSRB to provide examples of how the 2012 Interpretive Notice does not apply to other parties. Specifically, SIFMA requested "examples of conflicts of other parties that would not need to be disclosed." SIFMA Letter II, at p. 4. The MSRB is open to SIFMA's request for examples, but believes that it is premature to provide such examples prior to the approval of the amended language in the proposed rule change. Given the facts and circumstances nature of such examples, the MSRB believes that it can better respond to SIFMA's request, assuming approval of the proposed change, through an FAQ or other compliance resource at a later date, if there is a continuing need for such examples.

[196] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Amending the Nature, Timing, and Manner of Disclosures – Clarity of Disclosures and related notes 117 et. seq. infra.

Of those in support of the standard, notably, the City of San Diego encouraged the MSRB to require underwriters to state whether their descriptions of certain complex municipal securities financing structures can be explained in plain English and, if not, to explicitly state that fact within the disclosure to alert an issuer that it may need to ask more questions.[197] In contrast, SIFMA objected to the inclusion of a plain English standard, stating its belief that the standard would be "susceptible to different interpretations" and the formal adoption of such a standard would defeat the purposes of the retrospective review by causing underwriters to "completely redo all manner of their G-17 disclosures."[198] As an alternative, SIFMA suggested that the MSRB adopt a "clear and concise" standard.[199]

As discussed above, the MSRB's intent of incorporating the "plain English" standard into the Request for Comment was merely to formalize a substantially equivalent standard to the one presently required under the 2012 Interpretive Notice. The MSRB did not intend to create a substantively different standard that would require underwriters to redraft their existing disclosure language. Consequently, the MSRB is persuaded by SIFMA's concerns that the adoption of a "plain English" standard may defeat the purposes of the retrospective review, because it would require underwriters to redraft existing disclosures to meet, in SIFMA's view, a new and elusive standard. For similar reasons, the MSRB is declining to incorporate the City of San Diego's suggestion, at this time, that would require underwriters to explicitly state if a disclosure could not be provided in plain English. Rather, the MSRB is persuaded by SIFMA's alternative proposal that the MSRB adopt a "clear and concise" standard. The MSRB believes

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[197] City of San Diego Letter, at p. 2.

[198] SIFMA Letter II, at p. 6.

[199] Id.

that this addition is warranted to provide further clarification on the accessibility and readability of the disclosures required under the proposed rule change. Moreover, the MSRB believes that such a "clear and concise" standard is appropriate, because it has been adopted in other contexts related to the issuance of municipal securities, and, as a result, should be relatively familiar to issuers and underwriters alike.[200] Accordingly, the MSRB proposed rule change incorporates a clear and concise standard and omits any specific reference to plain English.

C. Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor

As discussed above, the Request for Comment incorporated existing language from the Implementation Guidance stating that "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."[201] BDA and SIFMA objected to the inclusion of this language, while GFOA and NAMA encouraged the MSRB to adopt even stronger requirements in this regard.

BDA objected to the inclusion of the language from the Implementation Guidance as redundant. Specifically, BDA stated that this language from the Implementation Guidance is "entirely covered" by the 2012 Interpretive Notice's statement that underwriters not "recommend

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[200] For example, the SEC has stated that, "[l]ike other disclosure documents, official statements need to be clear and concise to avoid misleading investors through confusion and obfuscation." See the SEC's 1994 Interpretive Release, at p. 12753.

[201] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Underwriter Discouragement of Use of Municipal Advisor; Addition of a New Standard Disclosure Regarding the Engagement of Municipal Advisors and related notes 134 et. seq. supra.

issuers not retain a municipal advisor."[202] SIFMA also thought that the proposed language was not necessary, and further stated that it would have unintended consequences by limiting "otherwise permissible advice, such as describing what services can and cannot be provided, between underwriters and their [issuer] clients for fear of implying that a [municipal advisor] may be redundant."[203] SIFMA further stated its belief that the language may create a "bias" against underwriter-only transactions that "could confuse issuers and discourage an issuer's flexibility to control the cost and scope of its financings in cases where it chooses not to use a [municipal advisor]."[204] SIFMA requested the MSRB eliminate the proposed language; clarify that neither municipal advisors, nor underwriters may misrepresent the services and duties that the other is permitted to provide; and prohibit municipal advisors from misrepresenting that there is a regulatory requirement for an issuer to hire a municipal advisor.[205]

Conversely, in their responses to the Request for Comment, GFOA and NAMA each indicated that the proposed language was helpful, but encouraged the MSRB to go beyond just incorporating the language of the Implementation Guidance by adopting new, stronger prohibitions regarding underwriters deterring the engagement of municipal advisors. GFOA restated its request that the MSRB include a requirement that "underwriters affirmatively state that issuers may choose to hire a municipal advisor to represent their interests in a

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[202] BDA Letter II, at p. 2 ("The BDA believes that the additional sentence is entirely covered by the existing sentence that precedes the new sentence. Any underwriter who discourages an issuer from retaining a municipal advisor for any reasons would be making already a prohibited recommendation to do so.").

[203] SIFMA Letter II, at p. 6.

[204] Id.

[205] Id.

transaction."[206] NAMA stated that its members are "aware of instances where both underwriters and bond counsel directly deter the use of a municipal advisor or bond counsel dictates who the municipal advisor should be."[207]

The MSRB is persuaded by the comments from GFOA and NAMA about deal participants improperly dissuading issuers from considering the engagement of a municipal advisor and unfairly influencing issuers to engage one particular municipal advisor over another. However, the MSRB also believes there is merit to BDA and SIFMA's concerns, particularly regarding how further prohibitions may unintendedly chill otherwise valid underwriter advice and, thus, deprive issuers of the full benefit of an underwriters' expertise and experience in the market.

Given that the language prohibiting underwriters from discouraging the engagement of a municipal advisor or implying a redundancy of services provided by a municipal advisor is taken from the existing Implementation Guidance, the MSRB believes that underwriters should already be familiar with the practical application of this language. The MSRB further believes that the language should already have been incorporated into existing policies, procedures and training and, as a result, should not significantly increase the regulatory burden on underwriters. Equally important, the MSRB does not believe that the statements are redundant, as BDA contends, because they add an important gloss on the general fair dealing obligation of underwriters. As the additional language makes clear, a recommendation not to engage a municipal advisor can come in many express or implied forms, including, but not limited to, express communications

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[206] GFOA Letter II, at p. 2.

[207] NAMA Letter II, at p. 3.

discouraging the use of a municipal advisor or by strong implication of the redundancy of a given municipal advisor's services.

The MSRB believes there is potential merit to SIFMA's concerns that the proposed language may chill certain underwriter communications with issuers regarding municipal advisors and/or create a bias against underwriter only transactions that could lead to increased issuer borrowing costs. Nevertheless, the MSRB finds GFOA's comments to the Concept Proposal and Request for Proposal to be most persuasive on this topic, particularly in light of the MSRB's statutory mandate to protect municipal entities.[208] In this way, municipal entity issuers, as represented by GFOA, desire the prohibitions on such underwriter communications to be strengthened, rather than relaxed. Moreover, while GFOA's comments did not directly address SIFMA's concerns regarding the possible negative effects that this proposed change may have on issuer decision-making, the MSRB generally understands GFOA's view to be that, at this time, the risks that an issuer misunderstands the distinctions between a municipal advisor's role and an underwriter's role, and/or that an issuer is unduly persuaded by an underwriter against the engagement of a municipal advisor, generally outweighs the risks that an underwriter will be compelled, out of an abundance of caution or otherwise, to abstain from certain conversations with an issuer during the course of a negotiated offering, or that an issuer may uninformedly decline an underwriter-only transaction to the detriment of its borrowing costs by engaging a municipal advisor.

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[208] In terms of municipal entity protection, the MSRB is further persuaded by academic evidence finding that issuers obtain real economic benefits from using municipal advisors. See note 87 supra and related discussion in the Self-Regulatory Organization's Statement on Burden on Competition.

In terms of SIFMA's other comments, the MSRB agrees that "neither [municipal advisors] nor underwriters may misrepresent the services and duties that the other is permitted to provide," and that municipal advisors cannot make a misrepresentation regarding "a regulatory requirement for an issuer to hire a [municipal advisor]."[209] However, the MSRB does not believe that the proposed rule change is the appropriate vehicle to address potential misrepresentations by municipal advisors, as the proposed rule change is limitedly focused on underwriters' fair dealing obligations to issuers, not the duties of loyalty and care that municipal advisors owe to their municipal entity clients.[210] Accordingly, the MSRB declines to incorporate SIFMA's suggestions on these particular matters into the proposed rule change.[211]

For these reasons, the MSRB is incorporating into the Revised Interpretive Notice language from the Implementation Guidance that "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," as generally proposed in the Request for Comment. Beyond this, the

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[209] SIFMA Comment Letter II, at p. 7.

[210] See Rule G-42. More specific to SIFMA's concern that a municipal advisor may misrepresent a regulatory requirement for an issuer to hire a municipal advisor, the MSRB notes that an issuer may be subject to state or local jurisdictional statutes, regulations, or other policies that may dictate such a requirement (i.e., if and when a municipal entity may or must engage a municipal advisor). To the degree that there is an actual jurisdictional requirement for a municipal entity to engage a municipal advisor, consistent with its duties of care and loyalty, a municipal advisor may accurately communicate such jurisdictional requirements to a municipal entity issuer.

[211] As a threshold matter, however, the MSRB notes that Rule G-42, on the duties of non-solicitor municipal advisors, requires a municipal advisor to conduct its municipal advisory activities with a municipal entity client in accord with a duty of care and a duty of loyalty. Absent potential exculpating facts and circumstances, knowingly misrepresenting the services of an underwriter or the regulatory requirements applicable to a municipal entity client would be a violation of a municipal advisor's duty of care and/or duty of loyalty.

proposed rule change would incorporate GFOA's and NAMA's requests to further bolster the disclosures regarding an issuer's choice to engage a municipal advisor by incorporating a new disclosure into an underwriter's standard disclosures. Specifically, the proposed rule change would require an underwriter to inform an issuer that "the issuer may choose to engage the services of a municipal advisor to represent its interests in the transaction" in a similar format and at the same time as the underwriter delivers certain other disclosures currently required under the 2012 Interpretive Notice.[212]

D. E-mail Read Receipt as Issuer Acknowledgement

The Request for Comment proposed a change to the acknowledgement requirement of the 2012 Interpretive Notice that would allow for an automatic e-mail return receipt to satisfy the acknowledgement requirement, as more fully described above.[213] The MSRB received several supportive comments specific to this proposed change. NAMA and SIFMA each expressed their support of the proposed change. Specifically, NAMA stated that it was ". . . pleased that the [Request for Comment] . . . would continue to mandate a form of acknowledgement from issuers that the disclosures are received, even through an e-mail return receipt."[214] SIFMA similarly expressed its support for the incorporation into the Request for Comment of the concept that an automatic e-mail return receipt could "evidence receipt of the underwriter disclosures."[215] The

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[212] Like the existing, similar disclosures regarding the underwriter's role, the proposed rule change would require the underwriter to deliver this new disclosure at or before the time the underwriter has been engaged to perform underwriting services.

[213] See related discussion under Summary of Comments Received in Response to the Concept Proposal – E-mail Read Receipt as Issuer Acknowledgement and related notes 125 et. seq. supra.

[214] NAMA Letter II, at p. 2.

[215] SIFMA Letter II, at p. 2.

City of San Diego was similarly supportive, stating that "a read receipt should be permitted so long as the underwriter has delivered the disclosure to the issuer designated primary contact."[216] Notably, GFOA did not directly address this particular issue in its response to the Request for Comment, but did reiterate its preference that "[t]ransaction specific and material underwriter conflicts of interest should be provided for each issuance of securities."[217]

Based on these comments, the MSRB believes the acknowledgement requirement continues to have value to ensure that issuers receive the disclosures. However, the MSRB does not believe underwriters should have to repeatedly seek a particularized form of acknowledgement, which an issuer may not provide. Accordingly, the proposed rule change would incorporate this change as generally proposed in the Request for Comment with additional emphasis and clarifications on three important aspects of the proposed change to the acknowledgement requirement.

First, the proposed rule change would provide greater clarity regarding what type of automatic e-mail receipt can meet an underwriter's fair dealing obligation to obtain written acknowledgement of an issuer's receipt of the applicable disclosures. Specifically, the proposed rule change would make clear that an automatic e-mail read receipt must be obtained, rather than a mere automatic e-mail delivery receipt, in order to meet the proposed rule change's acknowledgement obligations. The proposed rule change would define the term "e-mail read receipt" to mean an automatic response generated by a recipient issuer official confirming that an e-mail has been opened. An e-mail delivery receipt that simply shows that a disclosure was successfully delivered fails to demonstrate whether the recipient actually received the disclosure

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216 City of San Diego Letter, at p. 2.

217 GFOA Letter II, at p. 2.

in a working e-mail inbox folder or if, for example, the disclosure was in fact delivered to a spam or junk file folder. An e-mail delivery receipt that does not confirm that a recipient has in fact opened the e-mail communication would not satisfy an underwriter's fair dealing obligation to obtain acknowledgement regarding the receipt of disclosures under the Revised Interpretive Notice.[218]

Second, the proposed rule change would clarify that while an e-mail read receipt may generally be an acceptable form of an issuer's written acknowledgement under the Revised Interpretive Notice, an underwriter, would not be able to rely on 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. If an underwriter is on notice that, for example, an issuer official has not in fact received and/or opened an e-mail with the applicable disclosures, despite having received an affirmative e-mail read receipt confirmation, then the underwriter would not have met its fair dealing obligation under the Revised Interpretive Notice to obtain written acknowledgement from the issuer. This language in the proposed rule change is intended to ensure that disclosures are in fact delivered to an issuer, and, thereby, issuer protection is not compromised.

Finally, the proposed rule change would emphasize that an underwriter's fair dealing obligation to obtain an issuer's written acknowledgement can be satisfied by an e-mail read receipt, but only if such e-mail read receipt is from an appropriate issuer official. The Revised Interpretive Notice would state the underwriter has a fair dealing obligation to obtain such an e-

[218] Although, the proposed rule change would make clear that such an e-mail delivery receipt can still be used to evidence the timing regarding an underwriter's attempt to timely deliver a disclosure.

mail read receipt from the official of the issuer identified as the primary contact for receipt of such disclosures. In the absence of such identification, the underwriter would have a fair dealing obligation to receive an e-mail read receipt from an issuer official that the underwriter reasonably believes has authority to bind the issuer by contract with the underwriter. Only e-mail read receipts from such officials would meet an underwriter's fair dealing obligation under the Revised Interpretive Notice. Thus, the Revised Interpretive Notice would require underwriters to pay particular attention to the recipient providing an e-mail read receipt. The additional emphasis in the proposed rule change is intended to ensure that disclosures are in fact delivered to the appropriate issuer personnel, and, thereby, issuer protection is not compromised by the return of an e-mail read receipt from inappropriate issuer personnel.

E. Guidance Regarding Meaning of "Recommendation"

The Request for Comment proposed an amendment to the 2012 Interpretive Notice and requested comment on whether the use of the recommendation analysis applicable to a G-42 Recommendation should be applicable to the determination of whether an underwriter is recommending a complex municipal securities financing.[219] As currently provided in MSRB guidance, a G-42 Recommendation depends on the following "two-prong" analysis:

> First, the [municipal advisor's] advice must exhibit a call to action to proceed with a municipal financial product or an issuance of municipal securities and second, the [municipal advisor's] advice must be specific as to what municipal financial product or issuance of municipal securities the municipal advisor is advising the [municipal entity client or obligated person client] to proceed with.[220]

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[219] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Clarification of the Meaning of "Recommendation" and related notes 131 et. seq. supra.

[220] See G-42 FAQs (note 37 supra).

The MSRB received several comments on this topic. SIFMA's response to the Request for Comment stated its appreciation for the proposed change,[221] while GFOA's and NAMA's responses cautioned the MSRB on the adoption of such a standard. More specifically, GFOA questioned whether this standard is "the most appropriate" and stated its belief that the proposed standard in the Request for Comment "could prevent some issuers from receiving the right information they need to determine what financing structures are best for their government."[222] NAMA's response to the Request for Comment stated that the G-42 Recommendation analysis "is not the right standard" for this context.[223] NAMA cautioned that, "[a]pplying the G-42 [R]ecommendation[] standard to underwriter G-17 disclosures creates a false regulatory parity that is not appropriate given the MSRB's mission to protect issuers and the very different roles and duties that municipal advisors and underwriters have to issuers."

The MSRB understands GFOA's and NAMA's comments to be grounded in a concern that municipal advisors have a baseline fiduciary duty to protect the interests of municipal entity issuers, whereby any municipal advisor communication constituting advice to or on behalf of a municipal entity issuer must be in the best interests of the municipal entity client without regard to the financial or other interests of the municipal advisor. In contrast, underwriters have a more limited fair dealing obligation. Building upon this distinction, the MSRB's two-pronged analysis under Rule G-42 is primarily intended to clarify when a municipal advisor has additional

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[221] SIFMA Letter II, at p. 2 (stating, "[w]e appreciate that the MSRB has proposed adopting some of the suggestions we made in our comment letter to the MSRB's [Concept Proposal], including . . . clarifying the applicability of MSRB Rule G-42's two-prong analysis to a recommendation for complex municipal financings. . .").

[222] GFOA Letter II, at p. 2.

[223] NAMA Letter II, at p. 2.

suitability and record-keeping obligations when making a particular type of recommendation (i.e., a G-42 Recommendation)[224] to a municipal client and is not the analysis for more generally determining when a communication constitutes "advice" because it "involves a recommendation."[225] In consequence, GFOA's and NAMA's comments indicate their shared concern that, compared to the current disclosure obligations under the 2012 Interpretive Notice, issuers may receive less disclosure under the G-42 Recommendation standard and, thereby, have less information available to evaluate complex transactions.[226]

The MSRB is persuaded by GFOA's and NAMA's concerns that issuers may receive less disclosure under the G-42 Recommendation standard than issuers currently receive under the

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224 See the G-42 FAQs, at p. 2 (providing that, ". . . in order for a communication by a municipal advisor to be a G-42 Recommendation, it must, as a threshold matter, be advice and that advice must meet both prongs of a two-prong analysis. First, the advice must exhibit a call to action to proceed with a municipal financial product or an issuance of municipal securities and second, the advice must be specific as to what municipal financial product or issuance of municipal securities the municipal advisor is advising the MA Client to proceed with.").

225 The definition of the advice standard pursuant to Exchange Act Rule 15Ba1–1(d)(1)(ii), as adopted, "does not exclude information that involves a recommendation." Registration of Municipal Advisors, Release No. 34-70462 (Sept. 20, 2013), 78 FR 67467, at 67480 (Nov. 12, 2013). Additionally, the Commission stated that, ". . . for purposes of the municipal advisor definition, the Commission believes that the determination of whether a recommendation has been made is an objective rather than a subjective inquiry. An important factor in this inquiry is whether, considering its content, context and manner of presentation, the information communicated to the municipal entity or obligated person reasonably would be viewed as a suggestion that the municipal entity or obligated person take action or refrain from taking action regarding municipal financial products or the issuance of municipal securities." Id.

226 As one illustration of the possible distinctions in outcomes, if an underwriter presents a range of possible financing structures, but does not advise the issuer to proceed with any one specific structure, it may be ambiguous whether the underwriter met the second prong of the G-42 Recommendation analysis (i.e., whether the underwriter was specific enough as to what particular financing structure the issuer should proceed with). Under the Revised Interpretive Notice, if such a presentation reasonably would be viewed as a suggestion that the issuer take action regarding a financing structure or reasonably would influence the issuer to engage in a financing structure, then the underwriter would be deemed to have a made a recommendation regarding that financing structure and, thereby, triggered the applicable disclosure requirements.

2012 Interpretive Notice and, therefore, the MSRB has not incorporated the G-42 Recommendation standard in the proposed rule change. At the same time, the MSRB is still persuaded by SIFMA's comment on the Concept Proposal that the MSRB should clarify the standard that determines whether an underwriter has made a "recommendation" of a municipal securities financing to an issuer in a negotiated offering.

Accordingly, the proposed rule change expressly clarifies that the analysis to determine if an underwriter has made a "recommendation" triggering the complex municipal securities financing disclosures is whether – given its content, context, and manner of presentation – a particular communication from an underwriter to an issuer reasonably would be viewed as a call to action or reasonably would influence an issuer to engage in a complex municipal securities financing. This analysis to determine whether a recommendation has been made is not dissimilar to the analysis for municipal advisors,[227] and borrows an objective rather than subjective inquiry analysis applicable to dealers in the context of MSRB Rule G-19, on suitability of recommendations and transactions, and, in this way, the MSRB believes it should be familiar to dealers.

F. Disclosures to Conduit Borrowers

As discussed above, the MSRB declined to incorporate an amendment into the Request for Comment that would explicitly extend the requirements of the 2012 Interpretive Notice to the fair dealing obligations underwriters owe to conduit borrowers. The MSRB received a single

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227 See note 35 supra and related discussion.

specific comment from SIFMA on this topic, which supported the MSRB's approach in the Request for Comment. The proposed rule change does not include any changes in this regard.[228]

G. Tiered Disclosure Requirements Based on Issuer Characteristics

As discussed above, the MSRB declined to incorporate an amendment into the Request for Comment that would classify issuers into differing disclosure requirements based on various issuer characteristics, nor otherwise tailor the disclosure requirements applicable to specific categories of issuers.[229] However, in response to requests from SIFMA and BDA regarding assessing the level of knowledge and experience of the issuer in order to determine the appropriate level of disclosure regarding a recommended financing structure, the Request for Comment incorporated the concept that, among other factors, an underwriter may consider the issuer's retention of an IRMA when assessing the issuer's level of knowledge. The Request for Comment provided:

> Among other factors, a sole underwriter or syndicate manager (when there is an underwriting syndicate) may consider the issuer's retention of an IRMA, who can help the issuer evaluate underwriter recommendations and identify potential conflicts of interest, when assessing the issuer's level of knowledge and experience with the recommended financing structure, which may support a determination by the sole underwriter or syndicate manager that a more limited disclosure would satisfy the obligation for that transaction.

To further illustrate this point regarding the various factors involved in determining the appropriate level of disclosure, the Request for Comment also integrated existing language from the Implementation Guidance suggesting that the level of transaction-specific disclosures can

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[228] See discussion supra under Self-Regulatory Organization's Statement on Burden on Competition – Identifying and Evaluating Reasonable Alternative Regulatory Approaches.

[229] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Tiered Disclosure Requirements Based on Issuer Characteristics and related note 140 supra.

vary over time, particularly if an issuer's personnel become more or less experienced with a given structure. In this regard, the Request for Comment provided:

> The level of transaction-specific disclosure to be provided to a particular issuer also can vary over time. To the extent that an issuer gains experience with a complex financing structure or product over the course of multiple new issues utilizing that structure or product, the level of transaction-specific disclosure required to be provided to the issuer with respect to such complex financing structure or product would likely be reduced over time. If an issuer that previously employed a seasoned professional in connection with its complex financings who has been replaced by personnel with little experience, knowledge or training serving in the relevant responsible position or in undertaking such complex financings, the level of transaction-specific disclosure required to be provided to the issuer with respect to such complex financing structure or product would likely increase.

BDA objected to the inclusion of this language regarding the replacement of issuer personnel leading to increased disclosure, stating that, "[i]n the abstract, there is no way to determine whether the level should increase or not because it will depend on many factors."[230] The MSRB agrees with BDA's objection that the level of disclosure required in any given situation depends on numerous factors specific to that set of facts and circumstances and so the example provided from the Implementation Guidance may lead to confusion. For similar reasons, the MSRB also believes that the Request for Comment's language regarding an issuer's IRMA may similarly lead to confusion.

Accordingly, the proposed rule change does not incorporate this language from the Implementation Guidance regarding the replacement of issuer personnel and, for similar reasons, does not incorporate the language from the Request for Comment regarding an issuer's engagement of an IRMA, as the concepts may lead to more, rather than less, confusion regarding the underwriter's obligation to reasonably determine the level of transaction-specific disclosures

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[230] BDA Letter II, at p. 2.

required. However, the proposed rule change does incorporate existing language from the Implementation Guidance regarding the variability of such disclosures, providing:

> The level of 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, and financial ability to bear the risks of the recommended financing, in each case based on the reasonable belief of the underwriter. In this way, the level of disclosure to be provided to a particular issuer also can vary over time.

H. Issuer Opt-Out

As discussed above, the MSRB did not incorporate an issuer opt-out concept into the Request for Comment that would give issuer's the option of declining to receive certain disclosures from underwriters.[231] GFOA's and NAMA's response to the Request for Comment supported the omission of this concept. Accordingly, the proposed rule change does not incorporate such an opt-out concept.

The MSRB considered the above-noted comments in formulating the proposed rule change herein.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period of up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

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[231] See related discussion under Summary of Comments Received in Response to the Concept Proposal – Issuer Opt-Out and related note 148 supra.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-MSRB-2019-10 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-MSRB-2019-10. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission’s Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00 pm. Copies of the filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change. Persons submitting comments are

cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-2019-10 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, pursuant to delegated authority.[232]

Secretary

[232] 17 CFR 200.30-3(a)(12).

MSRB Notice

2018-10

Publication Date
June 5, 2018

Stakeholders
Municipal Securities Dealers, Municipal Advisors, Issuers, Investors

Notice Type
Request for Comment

Comment Deadline
August 6, 2018

Category
Fair Practice

Affected Rules
Rule G-17

Request for Comment: Retrospective Review of 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities

Overview

As part of its ongoing review of its rules and published interpretations, the Municipal Securities Rulemaking Board (MSRB) is requesting comment on interpretive guidance it issued in 2012 on the application of MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities, to underwriters of municipal securities ("2012 Guidance").[1] The 2012 Guidance established duties underwriters owe to issuers pursuant to their fair-dealing obligation. As part of its regulatory mission, the MSRB periodically revisits its rules and their interpretations over time to help ensure that they continue to achieve their intended purposes and reflect the current state of the municipal securities market. After receiving informal feedback from various market participants concerning the effectiveness and operation of the 2012 Guidance in practice, the MSRB now formally seeks comment from all interested parties on the benefits and burdens of, and possible alternatives to, the 2012 Guidance and the potential need for changes. The comments will assist the MSRB in determining whether and, if so, how to amend the 2012 Guidance and thereby modify underwriters' duties to issuers pursuant to their fair-dealing obligation. The primary purpose of any potential amendments would be to improve market practices and address any unnecessary burdens on market participants.

Comments should be submitted no later than August 6, 2018, and may be submitted in electronic or paper form. Comments may be submitted

Receive emails about MSRB Notices.

[1] The 2012 Guidance is incorporated into the MSRB Rule Book under Rule G-17. Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Aug. 2, 2012).

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electronically by clicking here. Comments submitted in paper form should be sent to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board, 1300 I Street NW, Suite 1000, Washington, DC 20005. All comments will be available for public inspection on the MSRB's website.[2]

Questions about this notice should be directed to Michael L. Post, General Counsel, or Carl E. Tugberk, Assistant General Counsel, at 202-838-1500.

Background

Rule G-17 requires that, in the conduct of municipal securities activities, brokers, dealers and municipal securities dealers (collectively, "dealers") must deal fairly with all persons and must not engage in any deceptive, dishonest or unfair practice. The MSRB has long held that this requirement extends to dealings with issuers in connection with the underwriting of their municipal securities.[3] In 2011, the MSRB sought to provide greater clarity to dealers' fair-dealing obligation to issuers when acting as an underwriter and proposed to publish interpretive guidance on a number of issues, including representations, required disclosures and conflicts of interest.[4] Later that year, the MSRB filed a proposed rule change with the SEC to adopt the 2012 Guidance,[5] which, after notice and comment, the SEC ultimately approved, and the 2012 Guidance became effective on August 2, 2012.[6] The MSRB subsequently published a Regulatory Notice intended to assist dealers in revising their written supervisory procedures concerning their fair-practice obligations under Rule G-17 and to clarify certain aspects of the 2012 Guidance.[7] Finally, in March 2013, to further support compliance, the MSRB answered frequently-asked questions to address operational matters pertaining to the 2012 Guidance.[8]

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[2] Comments generally are posted on the MSRB's website without change. For example, personal identifying information such as name, address, telephone number or email address will not be edited from submissions. Therefore, commenters should only submit information that they wish to make available publicly.

[3] *See* Reminder Notice on Fair Practice Duties to Issuers of Municipal Securities, MSRB Notice 2009-54 (Sept. 29, 2009) ("[T]he rule requires dealers to deal fairly with issuers in connection with all aspects of the underwriting of their municipal securities, including representations regarding investors made by the dealer."); Rule G-17 Interpretive Letter – Purchase of new issue from issuer (Dec. 1, 1997) ("Whether or not an underwriter has dealt fairly with an issuer is dependent upon the facts and circumstances of an underwriting and cannot be addressed simply by virtue of the price of the issue.").

[4] MSRB Notice 2011-12 (Feb. 14, 2011).

[5] *See* Securities Exchange Act of 1934 ("Exchange Act") Rel. No. 65263 (Sept. 6, 2011), 76 FR 55989 (Sept. 9, 2011) (SR-MSRB-2011-09).

[6] *See* Exchange Act Rel. No. 66927 (May 4, 2012), 77 FR 27509 (May 10, 2012) (SR-MSRB-2011-09); MSRB Notice 2012-25 (May 7, 2012).

[7] *See* MSRB Notice 2012-38 (July 18, 2012).

[8] *See* MSRB Notice 2013-08 (Mar. 25, 2013).

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The 2012 Guidance was adopted to promote fair dealing by underwriters with issuers, in part, by requiring disclosures to issuers related to underwriters' relationships with them and the nature and risks of the transactions recommended by the underwriters. For example, the 2012 Guidance requires underwriters to disclose their role in the issuance of municipal securities, actual and potential material conflicts of interest concerning the issuance, whether their underwriting compensation will be contingent on closing the transaction, other conflicts related to payments to or from third parties, profit-sharing with investors, credit default swaps and incentives for recommending complex financing structures. Recently, the MSRB has received informal feedback from some market participants regarding their experience with these requirements and the effectiveness of the required disclosures.

Some market participants have, among other things, conveyed the following information and views:

- Dealers provide overly boilerplate disclosures to issuers when underwriting their municipal securities, which (in the opinion of such commenters) devalues the utility of those disclosures;

- Multiple underwriters for the same transaction will provide the exact same disclosures to the issuer, which commenters believe can inundate the issuer with duplicative information; and

- Underwriters serving frequent issuers must provide successive disclosures to their client, which are identical to disclosures that they recently already provided.

Some commenters have expressed that the combination of the duplication and the large volume of disclosures can create an overly burdensome review process, during which issuers may overlook key details related to their relationship with the underwriters and/or the transactions at issue. Moreover, some commenters also have expressed the view that the 2012 Guidance clearly should permit more tailored disclosures than the commenters believe are required currently.

Since it has been several years since the adoption of the 2012 Guidance and in view of the informal feedback received from various market participants, the MSRB believes a retrospective review of the 2012 Guidance is warranted to determine how effective the 2012 Guidance has been and whether amendments to the 2012 Guidance should be considered.

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Request for Comment

The MSRB seeks public comment on the following questions, as well as on any other topic relevant to the 2012 Guidance or this request. The MSRB particularly welcomes statistical, empirical and other data from commenters that may support their views and/or support or refute the views, assumptions or issues raised in this request for comment.

1) What is the typical process, as implemented as a practical matter, for a dealer to provide the disclosures to issuers as required by the 2012 Guidance?

2) The 2012 Guidance allows for syndicate managers to make the disclosures concerning the role of the underwriter and the underwriter's compensation on behalf of other syndicate members, as long as the other syndicate members make the other conflicts disclosures that are particular to them.

    a. How often do syndicates utilize this option for making the disclosures? If it has been infrequent, please explain why.

    b. To the extent it has been used, has this option been effective? If not, how could it be improved?

    c. Does the senior manager or any other dealer explain the disclosures to the issuer client or are they simply provided without any further discussion?

2) Do dealers typically provide disclosures to both conduit issuers and conduit borrowers?

3) Has the 2012 Guidance, particularly relating to required disclosures, achieved its intended purpose of promoting fair dealing by underwriters with issuers? If no, what are the problems?

    a. Are the disclosures too boilerplate and/or too voluminous? If so, what are the consequences?

    b. Are issuers overly burdened?

    c. Are any problems with the 2012 Guidance the same or different for issuers of different sizes?

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d. Are the disclosures required to be provided at appropriate points in time in the course of the transaction?

e. Is the issuer's acknowledgment of receipt of the disclosures necessary and meaningful?

4) Should the MSRB amend the 2012 Guidance? If so, what are alternative approaches that could better achieve the intended purpose?

   a. Should the requirements be reduced or otherwise modified for different classes of issuers?

      i. If so, how should those classes be defined?

         1. Based on size?

         2. Based on frequency in the market?

         3. Relative to whether the issuer has an independent registered municipal advisor that is advising the issuer on the transaction?

         4. Based on the presence of dedicated issuer staff for debt management?

      ii. If so, how should the requirements be modified? Should issuers of any particularly defined class be able to opt out of receiving the disclosures?

   b. Should all issuers be able to opt out of receiving the disclosures?

   c. Should the frequency of making the disclosures to issuers be reduced? If so, how (*e.g.*, once per year unless there are material changes to any of the information provided and/or other new information requiring additional disclosure)?

   d. Could or should EMMA be a tool to improve the utility of disclosures and the process for providing them to issuers (*e.g.*, use EMMA to display more general disclosures but continue to require client- and deal-specific disclosures be provided directly to issuers by the dealers)?

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e. Has the level of detail provided by the MSRB in the disclosure requirements been useful in promoting compliance?

   i. If so, would greater prescription for any of the requirements be beneficial?

   ii. If not, should that prescription be modified? If so, how?

f. Have the sample disclosures provided by the MSRB in Exhibit A to MSRB Notice 2013-08 been useful in facilitating compliance, and to what extent has the sample been adopted? Should it be revised?

5) What have been the costs or burdens, direct, indirect or inadvertent, of complying with the 2012 Guidance? Are there data or other evidence, including studies or research, that support commenters' cost or burden estimates?

6) Aside from the disclosure requirements, are there any other requirements addressed in the 2012 Guidance that should be modified or removed or new requirements that should be added?

June 5, 2018

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ALPHABETICAL LIST OF COMMENT LETTERS ON NOTICE 2018-10 (JUNE 5, 2018)

1. Bond Dealers of America: Letter from Mike Nicholas, Chief Executive Officer, dated August 6, 2018

2. Government Finance Officers Association: Letter from Emily S. Brock, Director, Federal Liaison Center, dated August 6, 2018

3. National Association of Municipal Advisors: Letter from Susan Gaffney, Executive Director, dated August 6, 2018

4. Securities Industry and Financial Markets Association: Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, dated August 6, 2018

5. State of Florida, Division of Bond Finance: Letter from J. Ben Watkins III, Director, dated August 8, 2018

EXHIBIT 2c

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Washington, DC 20006
202.204.7900
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August 6, 2018

Submitted Electronically

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

RE: MSRB Request for Comment: Retrospective Review of 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities

Dear Mr. Smith:

On behalf of the Bond Dealers of America ("BDA"), I am submitting this letter to provide comments to the MSRB's Regulatory Notice 2018-10 (Request for Comment: Retrospective Review of 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities) (the "Notice"). BDA is the only DC-based group representing the interests of securities dealers and banks exclusively focused on the U.S. fixed income markets. We welcome this opportunity to present our comments.

The BDA strongly believes that the Rule G-17 Disclosures are important disclosures and Rule G-17 should continue to require them.

The BDA strongly believes that the disclosures (the "Rule G-17 Disclosures") required by the 2012 Guidance (as defined in the Notice) are important and valuable to the municipal securities market. The Rule G-17 Disclosures have established a critical, written communication that clarifies the nature of the role of the underwriter in municipal securities transactions and conflicts of interests, in addition to the other matters covered by the 2012 Guidance. The 2012 Guidance has created a needed formal platform through which underwriters clearly communicate these matters to issuers. Before the 2012 Guidance, many of these matters were relegated to either oral discussions or just underwriters assuming that issuers understood these matters. Accordingly, the BDA supports the continued requirement of the Rule G-17 Disclosures.

The BDA does not believe that the 2012 Guidance should be changed to provide different requirements for different kinds of issuers.

The BDA does not believe that the 2012 Guidance should be changed to provide different Rule G-17 Disclosures to different issuers for two reasons. First, while we understand that some large issuers who frequently issue municipal securities at times receive many Rule G-17 Disclosures, the personnel in those issuers do change regularly and continue to need full Rule G-17 Disclosures. Second, the requirement of the 2012 Guidance that underwriters send Rule G-17 Disclosures to all issuers allows for a consistent, standard process for dealers. If underwriters were required to deliver different disclosures to different issuers, it would impose a significant compliance burden on dealers to prepare those

disclosures. Accordingly, we do not support varying the kinds of disclosure depending on the kind of issuer.

The BDA makes four suggestions to improve the Rule G-17 Disclosures and the 2012 Guidance.

The BDA makes four suggestions regarding how the 2012 Guidance can improve Rule G-17 Disclosures, which we believe will make them more meaningful and also reduce the number of unnecessary Rule G-17 Disclosures:

- *The 2012 Guidance should be modified so that underwriters who secure the IRMA exception under the SEC's municipal advisor rule are not required to deliver Rule G-17 Disclosures.*

The BDA believes that if an underwriter is exempt under the SEC's municipal advisor rule by securing the exception for independent registered municipal advisors, then Rule G-17 Disclosures will be unnecessary and should not be required. The whole point of the Rule G-17 Disclosures is to ensure that issuers understand the role and responsibilities of the underwriter, and ensuring that the issuer understands the role and responsibilities of the underwriter falls within the responsibilities of a municipal advisor. Accordingly, the BDA believes that the Rule G-17 Disclosures would be unnecessary in these circumstances.

- *The 2012 Guidance should be modified to clarify that only material, actual conflicts of interests should be disclosed.*

The BDA believes that one of the factors that contributes to the length and complexity of Rule G-17 Disclosures is that underwriters disclose all potential conflicts of interests instead of known, actual conflicts of interests. The BDA believes that the MSRB should revise the 2012 Guidance so that it is clear that underwriters do not need to disclose a list of boilerplate conflicts of interests and, instead, should disclose known, actual conflicts of interests that could impact the underwriter in the municipal securities transaction. The BDA believes that the clearer that the MSRB can clarify which conflicts of interest really need to be disclosed, the more helpful and valuable those disclosures will be.

- *The 2012 Guidance should be modified to allow for the timing of some of the Rule G-17 Disclosures to vary depending on the circumstances.*

The 2012 Guidance overly prescribes when underwriters should deliver some of the Rule G-17 Disclosures – particularly the disclosures concerning complex municipal securities transactions. Underwriters should deliver some of the Rule G-17 Disclosures at the outset of any engagement – such as the disclosures concerning the role of the underwriter. But the BDA believes that the MSRB should revise the 2012 Guidance so that underwriters have more discretion concerning when to deliver some of the Rule G-17 Disclosures. Appropriate disclosures do evolve through the process of preparing municipal securities transactions. In particular, the BDA believes that the disclosures concerning complex municipal securities transactions are most helpful later on in the process once the characteristics and risks of those transactions are better defined.

- *The 2012 Guidance should be modified to clarify that co-managers usually have no requirement to deliver Rule G-17 Disclosures.*

One of the reasons why large, frequent issuers receive so many Rule G-17 Disclosures is that co-managers send entire Rule G-17 Disclosures which frequently have exactly the same content as the Rule G-17 Disclosures delivered by the senior manager. The BDA believes that the MSRB should revise the 2012 Guidance so that it is clear that co-managers have no requirement to deliver any Rule G-17 Disclosures except for the circumstance where the co-manager has a discrete conflict of interest that materially impacts its engagement with the issuer. Otherwise, the BDA believes it should be clear that co-managers have no requirement to deliver Rule G-17 Disclosures.

* * *

Thank you for the opportunity to provide these comments.

Sincerely,

Mike Nicholas
Chief Executive Officer

Government Finance Officers Association
660 North Capitol Street, Suite 410
Washington, D.C. 20001
202.393.8467 *fax*: 202.393.0780

August 6, 2018

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

RE: MSRB Notice 2018-10: Retrospective Review of 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities

Dear Mr. Smith:

The Government Finance Officers Association (GFOA) welcomes the opportunity to comment on MSRB Notice 2018-10. GFOA has commented in the past on Rule G-17 and subsequent interpretative guidance, as the MSRB's work in this area is very important to municipal securities issuers. Rule G-17, in particular, is representative of MSRB rulemaking that is done to fulfill its mission to protect issuers.

Below are our thoughts on the key issues raised in the Notice.

<u>Required Disclosures</u>

Receipt of Disclosures is Appropriate. Issuers receive G-17 disclosures from underwriters and must acknowledge receipt of those disclosures. As is common practice, the disclosures are sent at an appropriate time at the beginning of the debt issuance planning stage and prior to the release of the POS.

Disclosures Are Often Boilerplate and Cumbersome. In many cases the disclosures are voluminous and not focused on actual conflicts that may exist within the underwriting firm or the specific risks of a particular financing to the entity. Instead, the documents are full of non-material potential disclosures where key material disclosures are not highlighted nor flagged, and in many cases buried in the information provided. In these cases, the intent of the rulemaking – to ensure that issuers are aware of conflicts that exist with their underwriting team and risks associated with a financing – may be missing its mark.

Key Material Disclosures Should be Highlighted as Already Required. From a practical matter, while underwriters may wish to provide boilerplate disclosures to issuers of all types, sizes and levels of sophistication, it is imperative for the MSRB to advocate for the disclosures to be framed in a way that they can be well received and understood by the issuer. It would be helpful if large amounts of non-material disclosures are provided separately from key conflicts (including compensation and other fees earned on the transaction) and risk disclosures. Likewise, issuers would appreciate a notation that the underwriter does not have a fiduciary duty to the issuer. Given these conditions, the rulemaking may meet its intended expectations for underwriters to deal fairly with issuers, and protect issuers from deceptive,

dishonest or unfair practices. These disclosures should also be provided in a "plain English" manner versus legalese to maintain the spirit of the rulemaking to have the underwriter deal fairly with the issuer. The 2012 guidance already requires underwriters to "identify with sufficient clarity and ease of review the applicable portions of [boilerplate disclosures] to a particular transaction." Therefore, the MSRB should emphasize this duty which is already required.

Disclosures are Read and Reviewed by a Variety of Issuer Personnel. As GFOA noted in its December 1, 2011 letter to the SEC on Application of Rule G-17[1], there may be members of the financing team or the governing body who would like to be aware of and review underwriter disclosures. These issuer team members may hold differing levels of expertise about the financing than the "issuer personnel" for whom the underwriter is directed to provide the disclosures to under the Rule.

This reiterates the need for the underwriter to provide disclosures to the issuer, especially in "complex" transactions but also in routine transactions, in order to ensure that information is conveyed to those on the issuer's internal financing team who have various levels of expertise about the municipal securities market. The process would be enhanced by having the underwriter specifically highlight key and material disclosures and include additional disclosures separately within the document as required by the 2012 guidance.

Disclosure Obstacles for Large and Small issuers. Small and large governments are burdened by the disclosures in different ways. Larger issuers who may be frequently in the market have to tackle and acknowledge the paperwork many times, while smaller and infrequent issuers, especially, may find all of the information overwhelming to review and understand how it relates to their specific transaction. Again, a key way of managing this may be to have non-material or boilerplate disclosures be provided separately within same document (e.g., such as Appendix A) from key conflicts and risks and notation that the underwriter does not have a fiduciary duty to the issuer. This would also assist some issuers where the key issuer representative may not require in depth information about routine financings, but others on the financing team or the governing body may wish to have and review that information.

Variables to Determine Ways to Modify Requirements May Be Difficult. Because issuers of municipal securities vary widely and may use multiple underwriters, it would seem to be nearly impossible to develop ways to modify the rulemaking for some issuers over others, and ensure fair dealing is taking place. Even for frequent issuers if certain disclosures were only sent once a year, it would take away from the intent of the rule which is to ensure that the issuer is aware of the fair dealing process for each transaction. Issuer sophistication with financings does not fall neatly into buckets associated with either the size of the issuer or the frequency of their transactions.

A possible way to better manage the process and highlight the important disclosures that are of interest to members of the issuer's internal financing team for each transaction would be if boilerplate disclosures are provided separately but within the same document (e.g., such as Appendix A) or even routinely for frequent issuers (e.g., annual disclosures) while specific conflicts and risks associated with each transaction are sent and acknowledged by the issuer.

Opting Out of Disclosures Should NOT Be an Option. As many issuers learned with financings prior to the 2008 market crash, not getting their hands on or reading the fine print of their transaction documents, led to many problems with various types of financings, and created financial and administrative burdens for issuers. The MSRB should therefore not consider an opt-out provision since having the disclosures, and understanding them, is imperative for issuers. If these disclosures are not provided, it would also

[1] https://www.sec.gov/comments/sr-msrb-2011-09/msrb201109-22.pdf

seem to go against the main tenets of Rule G-17 to ensure that underwriters are not engaged in any deceptive, dishonest or unfair practices.

EMMA Should Not Be Used as a Repository for Underwriter Disclosure Documents. EMMA is a system to assist investors with their investment decisions. Information produced specifically for issuers, of which the issuer must acknowledge receipt, would not be well served to be placed on EMMA, as underwriters may be concerned about investor use of this information. This could cause even further boilerplating of information important to issuers and the decisions they make about their financings.

Further Consideration of Disclosures to Conduit Issuers and Borrowers is Needed. Regarding disclosures to conduit issuers and borrowers, the MSRB should make clear in its Interpretative Notice that the information would best be utilized if it was sent to the party who is making decisions about the issuance and is liable for the debt, which in most case is the borrower and not the issuer.

Underwriter Comments on the Use of Municipal Advisors. The current guidance instructs underwriters to avoid telling issuers not to hire a municipal advisor. In the past GFOA has commented on the need for the guidance to be strengthened to include a requirement that underwriters affirmatively state 1) that issuers may choose to hire a municipal advisor to represent their interests in a transaction and 2) to take no actions to discourage issuers from engaging a municipal advisor. We once again encourage the MSRB to do so (see GFOA's December 1, 2011 letter). Our members continue to observe significant numbers of large negotiated transactions sold by inexperienced debt issuers where no municipal advisor has been engaged.

We appreciate the MSRB's review of its Interpretative Notice on Rule G-17. As we commented many times in 2011, we believe that there should be greater focus and effort to have underwriters provide key and material disclosures about conflicts, risks regarding the transaction, and their non-fiduciary duty to issuer clients in a clear manner. Unfortunately, since 2012 the G-17 disclosures are overwhelming in volume which causes issuers to either ignore or not understand the important information that is being provided to the issuer in these disclosures.

We would be happy to discuss our comments with you in greater detail as well as coordinate conference calls with various types and sizes of issuers to help the MSRB understand the concerns issuers have with the implementation of G-17 disclosures.

Sincerely,

Emily S. Brock
Director, Federal Liaison Center

cc: Rebecca Olsen, Acting Director, Office of Municipal Securities, Securities and Exchange Commission

August 6, 2018

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

RE: MSRB Notice 2018-10

Dear Mr. Smith:

NAMA appreciates the opportunity to comment on MSRB's Retrospective Review of 2012 Interpretative Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Notice 2018-10).

NAMA strongly believes that issuers should receive certain key disclosures from underwriters and municipal advisors. These disclosures are important for issuers to gain a deeper understanding of the risks of any particular financing and of the various conflicts that may exist with parties that provide them professional services. Additionally, issuers should understand the different role professionals play in the transaction and of the various duties that these professionals owe to the issuer. Rule G-17 related to municipal advisors' and underwriters' responsibilities to deal fairly with issuers and avoid deceptive, unfair, and dishonest practice is an important and fundamental rule to protect issuers. Therefore, its significance in the suite of MSRB rulemaking should not be understated.

In its May 2012 Rule G-17 Interpretive Guidance, the MSRB mandated that underwriters provide certain disclosures to issuers. The disclosures relate to the underwriters' actual and potential material conflicts of interest, the nature and risks of the transactions recommended by the underwriter and of the nature of the underwriter's role. We do not believe that the standards established in the 2012 Interpretive Guidance should be diminished, although there are ways to make them more meaningful.

Below are some significant areas of the Notice that we wish to address. Our comments are based on previous NAMA (then NAIPFA - National Association of Independent Public Finance Advisors) comments related to the Interpretative Guidance and observations that our members have had over the past few years. More importantly, our comments reflect the significance of having the MSRB instill in its rulemaking and interpretative guidance the principal of protecting issuers, as that is a key piece of the MSRB's statutorily defined mandate with respect to the rules governing activity of broker-dealers and municipal advisors.

<u>Volume and Types of Disclosures</u>

<u>NAMA believes that the current types of disclosures that the underwriter provides to the issuer as currently stated in the Interpretive Guidance should remain intact</u>. However, for many issuers, these disclosures are buried within lengthy documents that contain hypothetical potential conflicts and risks.

NAMA believes that there are two potential fixes for this. First, syndicate members should not be allowed to provide long form boilerplate disclosure if that disclosure has already been provided by the syndicate manager. Syndicate members should only be allowed to provide conflict disclosures that are particular to them. Second, the MSRB should highlight its existing guidance about "omnibus disclosures" to ensure that underwriters provide material transaction risks and conflicts disclosures in a manner that is easily identifiable by the issuer (including various members of the issuing entity's internal finance team and governing body). This information should be presented in a straight forward manner, with other general disclosures presented separately from the statements and discussions of material transaction risks and conflicts disclosures (including statement that the underwriter does not have a fiduciary duty to the issuer). We understand that for practical purposes an underwriter may draft boilerplate language regarding various potential conflicts and transaction risks and include all of those in a form G-17 letter; however, the existing MSRB guidance on omnibus disclosures already requires them to make some sort of indication as to which of those omnibus risk disclosures or conflicts actually apply to the immediate transaction. Emphasizing this existing guidance as well as better enforcement would help to achieve the stated aim of making these disclosures more useful to issuers.

Issuer Acknowledgment of Disclosures

Issuers currently acknowledge receiving disclosures from underwriters. This practice should continue, and should allow for issuers to execute acknowledgements as they see fit.

Minimizing Content and Frequency of Disclosures for Different Classes of Issuers

The MSRB asks if they should consider alternative approaches to guidance implementation which may include different requirements for different classes of issuers. NAMA does not support lessening the responsibilities of underwriter disclosures to issuers due to different variables that may be at play (e.g., issuer size, frequency of issuances, dedicated staff). This includes not supporting the idea of annual disclosures. Since the disclosures must reflect conflicts of interest and risks associated with the transaction, it is difficult to understand how this could be done on an annual basis without the need for supplementary material throughout the year. Therefore, the easiest manner of disclosure delivery would be to have it remain as is.

Using EMMA for UW Enhancements to the Guidance

The MSRB asks if EMMA could or should be used to disseminate underwriter disclosures to issuers. Because these disclosures are from the underwriter and to the issuer about their relationship, they may be presented in a way that causes confusion to investors (who will be receiving many of the same disclosures in the context of the official statement where the information is presented in a manner material to investors). We do not think creating an additional public disclosure document separate from the official statement is an idea worth exploring. Furthermore, it is difficult to imagine how an underwriter would appropriately tailor such disclosures by issuer and transaction. Therefore, you would undermine the purpose of the rule by requiring issuers to have to seek out these even more boilerplate disclosures online instead of having them provided directly to the issuer.

If the MSRB is looking at ways to address "general" disclosures separately from those of client and deal specific disclosures, separating boilerplate disclosures from material and client/deal specific disclosures (and making the latter more easily identifiable) would be a better way to achieve this goal. In any event, EMMA should not be used for these disclosures.

Underwriter Statements that an Issuer Should Not Hire a Municipal Advisor

An area our members continue to be concerned with is when underwriters circumvent their duty noted in the statement in the Interpretive Guidance that "The underwriter also must not recommend that the issuer not retain a municipal advisor."

We would request that the statement be updated and strengthened to say that "The underwriter may not make direct or indirect statements to the issuer that the issuer not hire a municipal advisor or otherwise make statements to deter the use of a municipal advisor or blur the distinction between the underwriting and municipal advisor functions and/or duties."

Please let us know if we may answer any questions or provide other assistance related to the Interpretive Guidance. Thank you again for the opportunity to comment on this Notice.

Sincerely,

Susan Gaffney
Executive Director

August 6, 2018

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

Re: MSRB Notice 2018-10: Request for Comment: Retrospective Review of 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities

Dear Mr. Smith:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates this opportunity to respond to Notice 2018-10 (the "Notice")[2] issued by the Municipal Securities Rulemaking Board (the "MSRB") in which the MSRB is requesting comment in connection with its retrospective review of its Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities, which became effective on August 2, 2012 (the "2012 Guidance").[3] The

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

2 MSRB Notice 2018-10 (June 5, 2018).

3 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Aug. 2, 2012), available at http://msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-17.aspx?tab=2 and originally published in MSRB Notice 2012-25 (May 7, 2012). The 2012 Guidance was approved by the Securities and Exchange Commission (the "SEC") in Release No. 34-66927 (File No. SR-MSRB-2011-09) (May 4, 2012), 77 FR 27509 (May 10, 2012).

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
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2012 Guidance established a series of mostly new duties owed by underwriters[4] to issuers under MSRB Rule G-17 applicable solely to negotiated issues except where explicitly made applicable to competitive offerings.

The MSRB adopted the 2012 Guidance in the wake of the financial crisis and the significant changes brought to the regulatory landscape by the Dodd-Frank Wall Street Reform and Consumer Protection Act, which among other things introduced for the first time a federal fiduciary duty and a regulatory regime for the newly created category of municipal advisors.

In that context, the 2012 Guidance served to reinforce the fair dealing obligations of underwriters to issuers under MSRB Rule G-17, to expand upon those obligations by ensuring that issuers understood the financing structures that underwriters might recommend and any conflicts of interest that might exist on the part of underwriters, and to provide much needed clarity regarding the role of underwriters, as compared to municipal advisors, in connection with new issue offerings.[5]

SIFMA and its members believe that the 2012 Guidance served as an important and timely tool in the successful transformation to today's municipal marketplace. We offer below our comments on the 2012 Guidance as part of the MSRB's retrospective review process and in response to the specific questions posed by the MSRB with the goal of strengthening the effectiveness of the 2012 Guidance in light of today's more mature regulatory context.

I. Support for Retrospective Review

SIFMA and its members are pleased that the MSRB is engaged in this review of the 2012 Guidance as part of its broader commitment to engaging in retrospective review of its rules to assure that they are responsive to changes in the municipal

[4] The 2012 Guidance also applies to placement agents in private placements, subject to certain adjustments due to differences in the nature of the placement agent role as compared to the underwriter role, as described in the Implementation Guidance discussed below. Except as otherwise noted in this letter, our use of the term underwriter includes placement agent to the extent applicable under the 2012 Guidance. *See* footnote 11 *infra.*

[5] With regard to the role of underwriter as compared to municipal advisor, the MSRB also took the important step of amending Rule G-23 to more fully address the conflict that arises from serving in both roles on the same transaction and adopting its Guidance on the Prohibition on Underwriting Issues of Municipal Securities for Which a Financial Advisory Relationship Exists Under Rule G-23 (Nov. 27, 2011), available at http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-23.aspx?tab=2 and originally published in MSRB Notice 2011-29 (May 31, 2011) (the "Rule G-23 Interpretation").

securities market and in the policymaking, economic, stakeholder and technological environment.[6] A retrospective review process with the full participation of market participants is critical in understanding the intended and unintended effects of the MSRB's existing rules and should represent the beginning of a conversation about whether rulemaking or additional guidance is called for in order to make existing rules more effective and efficient in support of a free and open market and the protection of investors, municipal entities, obligated persons and the public interest. As such, SIFMA understands that the Notice does not represent a formal rulemaking proposal and that any rule proposals would be subject to an MSRB exposure draft seeking comment on specific rule or interpretative language prior to the formal submission of such proposal with the SEC.

The MSRB's Retrospective Review Process recognizes that there are many means to retrospective review, acknowledging that an effective review process should extend beyond formal written responses to also include meetings with relevant stakeholders. SIFMA urges the MSRB to engage in face-to-face discussions with SIFMA members and other market participants affected by the 2012 Guidance as a critical element of the retrospective review.

II. 2012 Guidance and Related MSRB Guidance

In recognition that much of the 2012 Guidance represented significant new requirements on underwriters and to assist them in implementing the 2012 Guidance, the MSRB published Guidance on Implementation of Interpretive Notice of Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (the "Implementation Guidance") shortly before the 2012 Guidance became effective[7] and Frequently Asked Questions (FAQs) Regarding an Underwriter's Disclosure Obligations to State and Local Government Issuers Under Rule G-17 (the "FAQs") a short time after the 2012 Guidance had become effective.[8] The Implementation Guidance provides a deeper understanding of the 2012 Guidance by including statements made by the MSRB in its filings with the SEC and its formal responses to comments that were included in the rulemaking record generated during the extended rulemaking process for the 2012 Guidance, as well as including additional "practical considerations" akin to staff guidance on how the 2012 Guidance was

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6 The MSRB's process for undertaking retrospective reviews is set out at http://www.msrb.org/About-MSRB/Programs/Market-Regulation/Retrospective-Rule-Review (the "Retrospective Review Process").

7 MSRB Notice 2012-38 (July 18, 2012).

8 MSRB Notice 2013-08 (Mar. 25, 2013).

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Corporate Secretary
Municipal Securities Rulemaking Board
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intended to be implemented.[9] The FAQs provided additional staff guidance responsive to questions raised by underwriters based on their experience with initial implementation of the 2012 Guidance.[10] If the MSRB were to ultimately make any changes through a formal rulemaking process to the 2012 Guidance, SIFMA and its members believe that it would be critical to incorporate or otherwise preserve the guidance included in the Implementation Guidance and FAQs, with any modifications appropriate in light of the changes to the 2012 Guidance.

III. Summary of SIFMA's Views on 2012 Guidance

As a general matter, SIFMA and its members believe that significant portions of the 2012 Guidance have been beneficial to the marketplace and to the protection of issuers. As noted in the Implementation Guidance, the 2012 Guidance can be divided into three broad categories: prohibitions on misrepresentations, fairness of financial aspects of an underwriting, and required disclosures to issuers. SIFMA and its members believe that the aspects of the 2012 Guidance relating to prohibitions on misrepresentations (including the prohibition on discouraging the use of a municipal advisor) and the fairness of financial aspects of an underwriting (including the prohibitions on excessive compensation, guidance on fairness of new issue pricing, guidance on profit sharing arrangements, and prohibition on treating excessive or lavish personal expenses as expenses of a new issue) should be preserved. Given that the 2012 Guidance may often be associated solely with its disclosure requirements, the marketplace would benefit from the MSRB ensuring that these other aspects of 2012 Guidance are well understood.

SIFMA and its members also support the appropriateness of providing the types of disclosures required under the 2012 Guidance. These disclosures consist of disclosure of the underwriter's role, disclosure of conflicts of interests, and transaction disclosure. Except with respect to potential refinement of the nature of conflicts required to be disclosed as described below, SIFMA and its members generally support the content of the disclosures required to be made under the 2012 Guidance. While we

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[9] SIFMA notes that the MSRB included in the Implementation Guidance extensive guidance regarding transitioning to the 2012 Guidance for financings in process on the effective date. SIFMA commends the inclusion of such formal transition guidance and believes that similar transition guidance should be provided as a standard practice in connection with the MSRB's future rulemaking.

[10] SIFMA commends the MSRB for having provided such additional guidance shortly after the effective date to respond to practical issues that arose as underwriters first implemented the 2012 Guidance. We believe that guidance responsive to implementation issues published shortly after the effective date of future rule changes, in instances where the MSRB is made aware of implementation issues, should also be included as a standard practice in connection with the MSRB's future rulemaking.

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
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support these disclosures, the MSRB should be cognizant of the substantial compliance burden on underwriters and complaints expressed by some issuers regarding excessive documentation resulting from the 2012 Guidance, and any efforts to more precisely define the content of and the process for providing the disclosures required by the 2012 Guidance would be highly beneficial to the marketplace. Thus, SIFMA and its members believe that certain changes with respect to the timing and manner of providing disclosures, as well as circumstances where certain disclosures may not be required, should be made, as described more fully below.

SIFMA provides below its specific comments and recommendations with regard to the 2012 Guidance, followed by answers to the specific questions posed by the MSRB in the Notice.

IV. Guidance on Prohibitions on Misrepresentations

The 2012 Guidance provides that an underwriter must not misrepresent or omit the facts, risks, potential benefits, or other material information about municipal securities activities undertaken with an issuer, and that an underwriter must not recommend that an issuer not retain a municipal advisor. The 2012 Guidance provides specific examples, including but not limited to with respect to representations in issue price certificates, information provided to an issuer for use in the official statement, information included in a response to a request for proposals, representations during negotiation of a new issue (such as representations regarding the price negotiated and the nature of orders or investor demand), and representations regarding investors (such as whether they meet the issuer's definition of retail or other representations relating to retail order periods). Further, the Implementation Guidance lays out certain practical considerations in implementing these prohibitions. SIFMA and its members believe that this portion of the 2012 Guidance has been beneficial to the marketplace and to the protection of issuers and therefore should be preserved.

V. Guidance on Fairness of Financial Aspects of an Underwriting

The 2012 Guidance prohibits underwriters from charging or collecting excessive compensation (including certain separate but related payments from the issuer or third parties), provides guidance on fairness of new issue pricing for both negotiated and competitive offerings,[11] notes that profit sharing arrangements between

[11] SIFMA observes that the MSRB recently adopted amendments to Rule G-34 relating to duties of municipal advisors to obtain CUSIP numbers for competitive sales. With respect to that rule change, the MSRB has been providing informal guidance to the marketplace regarding what constitutes a competitive sale for purposes of the new municipal advisor obligation that is not consistent with how the notion of competitive

underwriters and new issue investors may violate Rule G-17 depending on the facts and circumstances, and reminds underwriters of prior interpretive guidance prohibiting the treatment of excessive or lavish personal expenses as expenses of a new issue. SIFMA and its members believe that this portion of the 2012 Guidance has been beneficial to the marketplace and to the protection of issuers and therefore should be preserved.

VI. Required Disclosures

A. Content of Role Disclosure

The 2012 Guidance requires the underwriter in a negotiated offering to make a series of disclosures to the issuer about the role and duties of an underwriter, with the MSRB having provided a sample disclosure document in the FAQs.[12] We note that some or all of these role disclosures required under the 2012 Guidance are intertwined with other regulatory guidance provided by the MSRB in the Rule G-23 Interpretation[13] and guidance provided by SEC staff under SEC Rule 15Ba1-1.[14]

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sale has been defined and generally otherwise understood under MSRB rules, including Rules G-17, G-32 and G-37, as well as in Rule G-34 itself prior to such amendments. With respect to the 2012 Guidance, the Implementation Guidance (referring to MSRB statements in the rulemaking record) treats private placements as negotiated sales subject to the 2012 Guidance but with certain disclosure obligations not being applicable due to the agency status of the placement agent. SIFMA and its members agree that the treatment of placements in the 2012 Guidance is appropriate and that they should not, absent highly unusual circumstances, be characterized as competitive sales.

[12] The role disclosures relate to the fair dealing duty of underwriters, the arm's-length nature of the underwriter-issuer relationship, the lack of a fiduciary duty, the duty to balance pricing between the interests of the issuer and investors, and the underwriter's duty with respect to the official statement.

[13] The arm's-length nature of the underwriter-issuer relationship is a component of the Rule G-23 Interpretation. *See* footnote 5 *supra*.

[14] The arm's-length nature of the underwriter-issuer relationship is a component of the SEC staff's Question 1.2: Treatment of Business Promotional Materials Provided By Potential Underwriters Under the General Information Exclusion from Advice, Registration of Municipal Advisors, Frequently Asked Questions, Office of Municipal Securities (last updated Sept. 20, 2017), available at https://www.sec.gov/info/municipal/mun-advisors-faqs.shtml (the "SEC Staff FAQs"), while the full set of role disclosures is a component of Question 5.1: Engagement to Serve as Underwriter, SEC Staff FAQs. Note that the underwriter exclusion under Exchange Act Section 15B(e)(4)(C) does not require such disclosure; rather, SEC staff reads into the exclusion, as a basic component, the role disclosures required under Rule G-17, effectively viewing the underwriter's compliance with its obligations under Rule G-17 as an underwriter as evidence of the requisite relationship with the issuer with respect to a particular issue of municipal securities for purposes of the underwriter exclusion.

As noted above, SIFMA and its members believe that, during the early stages of the new municipal advisor regulatory structure being constructed at the time the 2012 Guidance was adopted, the role disclosures provided much needed clarity regarding the role of underwriters, as compared to municipal advisors, in connection with new issue offerings. In that context, even the most seasoned issuers benefited from being reminded of the distinction in the roles of underwriters and municipal advisors. It can fairly be argued that at this juncture, issuers generally have come to understand the different natures of these roles. Nonetheless, while repeated provision to issuers of these unchanging role disclosures is increasingly becoming less relevant given that the marketplace has adjusted to the new municipal advisor regulatory regime, we believe that, subject to the suggestions below in Section VI(F) of this letter, such disclosure requirement should not be changed, at least not without coordinated changes to the comparable requirements under the Rule G-23 Interpretation or the SEC Staff FAQs.

B. Content of Conflicts of Interest Disclosure

The 2012 Guidance requires the underwriter in a negotiated offering to make a series of disclosures to the issuer about potential or actual material conflicts of interest, including but not limited to those relating to contingent compensation, certain payments to or from third parties, third-party marketing arrangements, certain profit-sharing arrangements with investors, certain credit default swap activities, and incentives to recommend a complex municipal securities financing.

While SIFMA and its members believe that meaningful disclosures to issuers of conflicts of interest on the part of underwriters is appropriate, we also believes that issuers in many cases are receiving excessive amounts of disclosures of potential and often remote conflicts that are of little or no practical relevance to issuers or the particular issuances and would benefit from more focused disclosure on conflicts that actually matter to them. Thus, we believe that the disclosure requirement should be limited to actual, and not merely potential, material conflicts of interest on the part of the underwriter.[15] We believe this change could reduce substantially the volume of ordinary course or "boilerplate" conflicts disclosures received by issuers and therefore

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[15] We also note that, in some cases, it appears that regulators conflate conflicts of interest that might exist on the part of other parties to a financing, including in particular conflicts on the part of issuer personnel, with conflicts on the part of the underwriter, and therefore regulators appear to expect that the conflicts disclosure under the 2012 Guidance should include these conflicts of other parties. SIFMA and its members request that the MSRB clarify that the 2012 Guidance does not require the underwriter to disclose conflicts on the part of parties other than the underwriter.

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
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ensure that issuers do not inadvertently overlook meaningful disclosures of actual material conflicts.

Furthermore, we believe that certain categories of potential conflicts identified in the 2012 Guidance do not merit being specifically called out for disclosure. For example, given the effectively universal practice – and often the necessity – of underwriting compensation being contingent in nature, we see no benefit to issuers in receiving repeated disclosure of the conflict that can be presented by contingent compensation. Instead, the MSRB can instead provide educational materials emphasizing this and any other similar conflicts that make up the bulk of boilerplate conflicts disclosure through its Electronic Municipal Market Access (EMMA) website or its Education Center webpage. SIFMA believes such an approach would strengthen this aspect of the 2012 Guidance.

While issuers may want to be made aware of third-party marketing arrangements in connection with their new issues, we do not believe that the conflicts disclosure requirement under the 2012 Guidance is the appropriate mechanism for ensuring that issuers understand the participation of such third-parties. For example, the existence of selling group members is not typically disclosed in this way. Currently, such information is most effectively conveyed through the syndicate formation process,[16] or could be part of any changes to syndicate formation practices under new MSRB rulemaking, and market practice has evolved to include disclosure in the official statement of such distribution/marketing relationships. The use of retail distribution agreements is not an activity involving suspicious payments to a third party and does not increase costs to issuers; rather, it simply passes on a discounted rate to a motivated dealer, which is commonly available to dealers after the bonds have become free to trade in any event, notwithstanding any agreement. If the MSRB believes that it is important to continue to require disclosure of these agreements, we request that the MSRB explain why such arrangements are seen as a material conflict of interest and why the requirement does not apply to selling group arrangements. Eliminating this disclosure would greatly reduce the need for disclosure letters under the 2012 Guidance by co-managers in large syndicates because the existence of third party distribution agreements is typically the only catalyst for co-manager disclosure under the 2012 Guidance.

In addition, the required disclosure regarding credit default swaps was included in the 2012 Guidance based on limited pre-financial crisis and pre-Dodd-Frank Act activities affecting a vanishingly small number of municipal issuers. The level of credit

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[16] See, *e.g.*, MSRB Rule G-11(f); MSRB Rule G-14 RTRS Procedures Section (d)(vii) and (viii).

default swap activity in the marketplace today is significantly smaller, calling into question whether this provision focused on a single type of financial product will become increasingly archaic. We believe this specific reference to credit default swaps should be deleted from the 2012 Guidance, acknowledging that such deletion does not mean that practices in connection with credit default swaps could never constitute a disclosable conflict, such as where an actual material conflict may arise from serving as underwriter to an issuer while also engaging in credit default swap activities related to such issuer.

C. Content of Transaction Disclosure

The 2012 Guidance requires the underwriter in a negotiated offering that recommends to the issuer a so-called "complex municipal securities financing" to disclose the material financial characteristics of the financing, as well as the known or reasonably foreseeable material financial risks of the financing. The 2012 Guidance provides certain examples of complex municipal securities financings, such as variable rate demand obligation offerings or financings involving derivatives, and the types of matters disclosable with respect thereto. In addition, under certain circumstances, the 2012 Guidance also requires disclosure of the material aspects of the financing structure for financings that are routine and do not constitute complex municipal securities financings.

While SIFMA and its members would defer to the issuer community on the ultimate usefulness of the required transaction disclosures, we generally believe that the content of these transaction disclosures as described in the 2012 Guidance is appropriate and does not need to be changed, subject to the suggestions below in Section VI(F) of this letter. We note that the MSRB recently provided guidance on the meaning of recommendation under Rule G-42 with respect to municipal advisory activities, describing a two-prong analysis for determining whether advice is a recommendation for purposes of the rule.[17] SIFMA and its members request guidance as to whether this same two-prong analysis would apply for determining whether an underwriter has recommended a complex municipal securities financing.

D. Timing for Disclosures

The 2012 Guidance establishes three distinct timeframes for delivering different portions of the required disclosure: for disclosure of the arm's-length nature

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[17] FAQs Regarding MSRB Rule G-42 and Making Recommendations (June 2018); MSRB Notice 2018-12 (June 20, 2018).

of the underwriter-issuer relationship, the earliest stages of the relationship (*e.g.*, in a response to a request for proposals or in promotional materials provided to an issuer); for other role disclosures and conflicts disclosures, when the underwriter is engaged to perform underwriting services (*e.g.*, in an engagement letter, not solely in a bond purchase agreement); and for transaction disclosure, in sufficient time before the execution of a contract with the underwriter to allow the issuer to evaluate the recommendation.[18] In the context of the establishment of an initial underwriter-issuer relationship, SIFMA believes that, subject to the suggestions below in Section VI(F) of this letter, these timeframes are generally appropriate, with the understanding that the notion of a formal engagement to serve as underwriter for an offering does not match the normal process by which underwriters are brought on to underwrite most issuers' offerings and therefore underwriters often use the communication by issuer personnel that they will participate in an offering as indicative of the timing for such disclosures.

SIFMA and its members wish to note their appreciation for the MSRB's recognition in the Implementation Guidance that not all transactions proceed on the same timeline or pathway so that sometimes precise compliance with the timeframes may be infeasible, and the MSRB's statement that such timeframes are not intended to establish hair-trigger tripwires resulting in technical rule violations so long as underwriters act in substantial compliance with the timeframes and have met the key objectives for providing the disclosures. We urge the MSRB to reconfirm this guidance, as well as to provide further recognition of alternative timeframes for meeting these obligations as suggested below.

In connection with underwriters that engage in one or more negotiated underwritings with a particular issuer, we believe that repeated identical disclosures provided in each transaction by the same underwriter to the same issuer may often only serve to inundate the issuer with useless information. SIFMA and its members recommend that an underwriter engaged in a negotiated offering with an issuer be permitted by the MSRB to fulfill its disclosure requirements under the 2012 Guidance with respect to such offering by reference to, or by reconfirming to the issuer, its disclosures provided within the preceding twelve (12) month period (*e.g.*, disclosures provided in connection with a prior offering during such period or provided on an annual basis in anticipation of serving as underwriter on offerings during the next twelve (12) months). Such reference or reconfirmation must be provided by no later

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[18] While the timing requirements include three distinct deadlines, the MSRB should make clear that underwriters can collapse the fulfillment of these requirements without awaiting each applicable deadline. For example, the inclusion of role disclosures, conflicts disclosures and/or transaction disclosures in a response to a request for proposals should be viewed as satisfying the applicable disclosure requirements so long as the content is complete and no subsequent changes occur.

than execution of the bond purchase agreement and could be fulfilled in a representation contained in the bond purchase agreement. If during the course of such subsequent offering new or different disclosures become applicable (*e.g.*, if a new conflict of interest arises, or if the structure of a complex municipal securities transaction materially changes in a manner not previously disclosed), the underwriter would be required to provide such new or additional disclosures as contemplated by the 2012 Guidance – that is, in sufficient time before the execution of the bond purchase agreement to allow the issuer to evaluate the new disclosure. This or a similar alternative to transaction-by-transaction disclosure would be consistent with the more flexible approach permitted by the Commodity Futures Trading Commission (the "CFTC") in connection with disclosures required by a swap dealer to a counterparty in counterparty relationship documentation or in an otherwise agreed upon writing.[19] Of course, an underwriter could still choose to provide its disclosures on a transaction-by-transaction basis as currently required under the 2012 Guidance.

E. Trigger for Transaction Disclosures

Under the 2012 Guidance, transaction disclosure for a routine financing (*i.e.*, not a complex municipal securities financing) is required only if the underwriter reasonably believes that issuer personnel lack knowledge or experience with such routine financing structure that the underwriter has recommended. In contrast, transaction disclosure for a complex municipal securities financing recommended by the underwriter is always required regardless of issuer personnel's knowledge, expertise or experience in such complex municipal securities financing, although the level of 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, and financial ability to bear the risks of the recommended financing.

SIFMA and its members believe that all transaction disclosures should be triggered based on the standard for triggering disclosures regarding routine financings, subject to the suggestions below in Section VI(F) of this letter. Thus, disclosures regarding a recommended financing would be required if the underwriter believes that issuer personnel lack knowledge or experience with the financing structure recommended by the underwriter. The underwriter's belief would be based on the same factors described in the 2012 Guidance for determining the level of disclosure required, so that the trigger for providing transaction disclosure, and the level of disclosure required to be provided, would be based on personnel's knowledge or experience with

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19 *See* CFTC Rule 23.402(e) and (f). *See also* CFTC Rule 23.431.

the proposed financing structure or similar structures, capability of evaluating the risks of the recommended financing, and financial ability of the issuer to bear the risks of the recommended financing.

F. Disclosure Opt-In and Opt-Out

Except with respect to the more targeted disclosures of actual material conflicts we recommend in this letter, which we believe should be delivered in all transactions (subject to our recommendations in the last paragraph of Section VI(D) above), SIFMA and its members believe that the invocation by an underwriter of the exemption under SEC Rule 15Ba1-1(d)(3)(vi) for an independent registered municipal advisor ("IRMA") wherein the issuer would be relying on the advice of its IRMA in connection with the transaction should be deemed to satisfy any remaining disclosures under the 2012 Guidance due on or after the date the IRMA exemption is invoked. Thus, if an underwriter invokes the IRMA exemption in the earliest stages of a financing, such underwriter's role disclosures and any otherwise required transaction disclosure would not be required,[20] unless the issuer opts in to receiving such disclosures notwithstanding its engagement of an IRMA to advise it.[21]

Furthermore, we believe that an issuer should be able to opt out of receiving the disclosures required under the 2012 Guidance, other than the conflicts disclosures, in a written election based on its knowledge, expertise, experience and financial ability, upon which the underwriter should be permitted to conclusively rely. Alternatively, the issuer could elect to provide its written opt-out to such disclosures without affirmatively stating the basis for such opt-out, provided that if (i) the underwriter has reason to believe that issuer personnel lack knowledge or experience with the structure of a recommended financing[22] and (ii) the issuer does not employ a municipal advisor

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[20] To the extent the role disclosures are fulfilled by invocation of the IRMA exemption, the MSRB should deem such disclosures as having been provided for purposes of Rule G-23 Interpretation. *See* footnote 13 *supra*. The invocation of the IRMA exemption would obviate the need to address the disclosures described in Questions 1.2 and 5.1 of the SEC Staff FAQs. *See* footnote 14 *supra*.

[21] For example, an issuer that posts an IRMA notice on its website could include in such notice opt-in language stating that it wishes to receive role disclosures and/or transaction disclosures notwithstanding the issuer's engagement of an IRMA. The issuer's opt-in could also be provided in a separate writing.

[22] The underwriter should be permitted to rely on issuer personnel's prior experience with the same or similar financing structure in establishing that it does not have reason to believe that such personnel lacks the requisite knowledge or experience.

for such financing,[23] the underwriter must nonetheless provide the required transaction disclosure.

G. Manner of Providing Disclosures and Seeking Acknowledgement

SIFMA and its members find that the manner for providing required disclosures to the issuer under the 2012 Guidance is generally workable, even though the division of responsibility among syndicate members has contributed to the large amounts of disclosures issuers receive on new issues. We believe that our proposed modifications as described elsewhere in this letter will substantially reduce the volume of such disclosures overall and therefore also reduce the pressure to find additional means of consolidating disclosures by the various members of underwriting syndicates.

However, we believe the requirement for the underwriter to attempt to receive issuer acknowledgement and the efforts to document cases where the issuer does not provide such acknowledgement create a significant degree of non-productive work on the part of underwriter personnel and provide no value to the issuer, but often produce unwanted follow-up inquiries from the underwriter. The MSRB should eliminate the acknowledgement requirement and should instead rely on the same principles for delivery of notices otherwise applied to its other rules. More specifically, underwriters should be permitted to provide the disclosures in a manner consistent with the delivery of other documentation during the course of the transaction, and receipt of an e-mail return receipt should be conclusive proof of delivery if other transaction documentation has also been provided to the same e-mail address.

VII. Responses to Questions Posed in the Notice

SIFMA provides below its answers to the specific questions posed by the MSRB in the Notice.

(1) What is the typical process, as implemented as a practical matter, for a dealer to provide the disclosures to issuers as required by the 2012 Guidance?

In broad strokes, the disclosure aspects of the 2012 Guidance involve the making of disclosures at three stages, each of which triggers a series of activities relating to preparation of the required disclosures, identifying the appropriate issuer

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[23] For this purpose, the underwriter need not formally invoke the IRMA exemption so long as the issuer in fact is using a municipal advisor for the financing.

personnel to receive each disclosure, providing the disclosure to such personnel, obtaining (or seeking to obtain) such personnel's acknowledgement of receipt, monitoring and providing any supplemental disclosures that may be required during the course of the financing, and properly documenting all of these activities, in each case for financings that may present different circumstances and different groupings of syndicate members. As such, there is no single process followed by underwriters throughout the market that can reasonably be described as typical. In connection with the adoption of the 2012 Guidance, a SIFMA committee drafted model disclosure documents designed to serve as a starting point for underwriters in preparing their disclosures concerning the underwriter's role, compensation, and conflicts, as well as regarding the material financial characteristics and risks inherent in certain complex transactions commonly recommended by underwriters.[24] Any underwriter using the model documents makes such modifications as it deems appropriate, and other underwriters have produced their own versions of disclosure documents.

(2) The 2012 Guidance allows for syndicate managers to make the disclosures concerning the role of the underwriter and the underwriter's compensation on behalf of other syndicate members, as long as the other syndicate members make the other conflicts disclosures that are particular to them.

a. How often do syndicates utilize this option for making the disclosures? If it has been infrequent, please explain why.

We believe that there are many cases where the syndicate manager may make the disclosures concerning the role of the underwriter on behalf of other members of the syndicate, but there are also many cases where some or all syndicate members will also provide these disclosures to the issuer themselves. One reason this may be the case is that each syndicate member is obligated to provide its own disclosure of actual or potential conflicts of interest, and it is often procedurally easier to combine role disclosures and conflicts disclosures into a single document. Another reason may be that a particular underwriter has determined not to rely on another firm's actions to meet the underwriter's own regulatory obligations, or only permits such reliance upon confirmation that the syndicate manager has provided the required disclosure and has found that providing its own disclosure may be administratively easier than obtaining confirmation of the syndicate manager's disclosure.

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[24] SIFMA model documents for the municipal securities market, including model disclosure documents under the 2012 Guidance, are available at https://www.sifma.org/resources/general/municipal-securities-markets.

Note that, because the disclosure regarding the arm's-length nature of the issuer-underwriter relationship must be provided at the earliest stage of the relationship and serves purposes beyond just the 2012 Guidance, many underwriting firms have included this disclosure (and in many cases the other role disclosures) on a wide range of communications with potential issuers that might be viewed as constituting an initial contact with such potential issuers as a prophylactic approach to avoiding inadvertently violating the 2012 Guidance or inadvertently being deemed a municipal advisor. Thus, while this particular disclosure may also be included in the set of role disclosures provided by a syndicate manager or individual syndicate members, in many cases that wider set of disclosures will occur later than the deadline for providing the disclosure on the arm's-length relationship.

b. To the extent it has been used, has this option been effective? If not, how could it be improved?

While this option may, in a subset of offerings, be effective in partially reducing the amount of duplicative disclosures that would otherwise have been provided, it is unlikely that this option could result in significant further reduction in duplicative disclosures without instituting modifications of the type suggested above, including in particular the narrowing of the scope of conflicts disclosure as described in Section VI(B) above and the rationalization of the frequency of disclosures for multiple underwritings with a particular issuer as described in Section VI(D) above.

c. Does the senior manager or any other dealer explain the disclosures to the issuer client or are they simply provided without any further discussion?

Practices in regard to any explanation of role disclosures likely vary considerably depending on the particular underwriter, the particular issuer and the prior experience between the issuer and the underwriter. It should be noted that the statements that make up the role disclosures (as well as whether compensation is contingent) are not difficult to understand on their face and normally are well understood by issuer personnel without further explanation or were well understood before the 2012 Guidance became effective.

(3)[25] Do dealers typically provide disclosures to both conduit issuers and conduit borrowers?

The 2012 Guidance by its terms does not require disclosures to conduit borrowers. However, it is common (although perhaps not universal) for underwriters to provide to a conduit borrower a copy of the disclosures provided to the issuer.

(4) Has the 2012 Guidance, particularly relating to required disclosures, achieved its intended purpose of promoting fair dealing by underwriters with issuers? If no, what are the problems?

SIFMA and its members believe that the 2012 Guidance has been, for the most part, successful at achieving its purpose of promoting fair dealing by underwriters with issuers. Certain weaknesses undermining the effectiveness of the disclosure aspects of the 2012 Guidance and potential modifications that could achieve meaningful improvements to the 2012 are discussed above in this letter and in our further responses below.

a. Are the disclosures too boilerplate and/or too voluminous? If so, what are the consequences?

SIFMA and its members believe that some aspects of the required disclosures have become boilerplate and too voluminous, which creates additional burdens to underwriters with no countervailing benefit, serve to obscure particularized disclosures that are material and should be well understood, and create confusion, frustration and unnecessary administrative activities for underwriters and many issuers.

b. Are issuers overly burdened?

While we defer to issuers on the question of whether they are overly burdened by the disclosures required under the 2012 Guidance, we do believe that excessive meaningless disclosures could not reasonably be viewed as beneficial to issuers and, as noted above, creates confusion, frustration and unnecessary administrative activities for many issuers.

c. Are any problems with the 2012 Guidance the same or different for issuers of different sizes?

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[25] This and the following questions have been renumbered for continuity.

While size of issuer may have some indirect bearing on any problems with the 2012 Guidance, it is more appropriate to focus on the knowledge, expertise and experience of issuer personnel, as well as the issuer's access to the advice of a municipal advisor, as the basis for determining whether more or less disclosure is appropriate in regard to an offering with such issuer.

d. Are the disclosures required to be provided at appropriate points in time in the course of the transaction?

SIFMA and its members believe that the points in time during the course of a particular transaction for the delivery of disclosures as provided in the 2012 Guidance are generally appropriate, subject to the observations and suggestions described in Section VI(D) above.

e. Is the issuer's acknowledgment of receipt of the disclosures necessary and meaningful?

For the reasons described in Section VI(G) above, SIFMA and its members strongly believe that the issuer's acknowledgement of receipt of disclosures do not provide any benefit, create significant burdens and should be eliminated. Underwriters should be permitted to provide the disclosures in a manner consistent with the delivery of other documentation during the course of the transaction, and receipt of an e-mail return receipt should be conclusive proof of delivery if other transaction documentation has also been provided to the same e-mail address.

(5) Should the MSRB amend the 2012 Guidance? If so, what are alternative approaches that could better achieve the intended purpose?

SIFMA and its members outline above in this letter certain limited modifications to the 2012 Guidance that the MSRB should make that would greatly enhance the effectiveness of the disclosure aspects of the 2012 Guidance while significantly reducing the burden on compliance.

a. Should the requirements be reduced or otherwise modified for different classes of issuers?

i. If so, how should those classes be defined?

1. Based on size?

As noted above, while size of issuer may have some indirect bearing on any problems with the 2012 Guidance, it is more appropriate to focus on the knowledge,

expertise and experience of issuer personnel, as well as the issuer's access to the advice of a municipal advisor, as the basis for determining whether more or less disclosure is appropriate in regard to an offering with such issuer.

2. Based on frequency in the market?

As described in Section VI(D) above, we believe that frequent issuers would greatly benefit from the 2012 Guidance being modified to allow underwriters that participate in multiple offerings for such issuers to rationalize their disclosures by making an initial set of full disclosures and thereafter disclosing any material changes that may occur during the course of subsequent offerings.

3. Relative to whether the issuer has an independent registered municipal advisor that is advising the issuer on the transaction?

As described in Section VI(F) above, we believe that, the requirement to provide role and transaction disclosures should be deemed satisfied if the underwriter has invoked the IRMA exemption, with certain exceptions described above, and can otherwise be affected if the issuer engages a municipal advisor.

4. Based on the presence of dedicated issuer staff for debt management?

As described in Section VI(E) above, SIFMA and its members believe that the 2012 Guidance should focus on the knowledge, expertise and experience of such dedicated issuer staff for debt management as the basis for determining whether disclosure, and what level of such required disclosure, is appropriate in regard to an offering by such issuer.

ii. If so, how should the requirements be modified? Should issuers of any particularly defined class be able to opt out of receiving the disclosures?

As described in Section VI(F) above, we believe that an issuer should be able to opt out of receiving role disclosures and transaction disclosures, subject to certain conditions described therein.

b. Should all issuers be able to opt out of receiving the disclosures?

While SIFMA and its members believe that all issuers could presumably be able to opt out of receiving role disclosures and transaction disclosures, transaction disclosures may still be required under certain circumstances described in Section VI(F) above.[26] We further believe that issuers should not be able to opt out of receiving disclosures of the more targeted universe of actual material conflicts, as described in Sections VI(B) and VI(F) above.

c. Should the frequency of making the disclosures to issuers be reduced? If so, how (e.g., once per year unless there are material changes to any of the information provided and/or other new information requiring additional disclosure)?

As described in Section VI(D) above, where an underwriter engages in one or more negotiated underwritings with a particular issuer, the underwriter should be permitted to fulfill it disclosure requirements with respect to an offering by reference to, or by reconfirming to the issuer, its disclosures provided within the preceding twelve (12) month period (*e.g.*, disclosures provided in connection with a prior offering during such period or provided on an annual basis in anticipation of serving as underwriter on offerings during the next twelve (12) months). Such reference or reconfirmation must be provided by no later than execution of the bond purchase agreement and could be fulfilled in a representation contained in the bond purchase agreement. If during the course of such subsequent offering new or different disclosures become applicable (*e.g.*, if a new conflict of interest arises, or if the structure of a complex municipal securities transaction materially changes in a manner not previously disclosed), the underwriter would be required to provide such new or additional disclosures as contemplated by the 2012 Guidance – that is, in sufficient time before the execution of the bond purchase agreement to allow the issuer to evaluate the new disclosure.[27] An underwriter could, alternatively, still choose to provide its disclosures on a transaction-by-transaction basis as currently required under the 2012 Guidance.

d. Could or should EMMA be a tool to improve the utility of disclosures and the process for providing them to issuers (e.g., use EMMA to display

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[26] As described above in Section VI(F), role disclosures and transaction disclosures for any issuer, regardless of type or size, should be deemed satisfied if the IRMA exemption is invoked, unless the issuer has opted-in to receive such disclosures.

[27] This approach would be consistent with the more flexible approach permitted by the CFTC in connection with swap disclosures under CFTC Rule 23.402(e) and (f) and Rule 23.431. *See* footnote 19 *supra*.

more general disclosures but continue to require client- and deal-specific disclosures be provided directly to issuers by the dealers)?

As described in Section VI (B) above, we believe that certain categories of potential conflicts of interest do not merit being specifically called out for disclosure to issuers on a transaction-by-transaction basis. Since many potential conflicts (as opposed to actual conflicts) apply broadly to the marketplace, we believe that such information would most effectively and efficiently be made available to issuers through educational materials provided by the MSRB through the EMMA website or on the MSRB's Education Center webpage.

e. Has the level of detail provided by the MSRB in the disclosure requirements been useful in promoting compliance?
i. If so, would greater prescription for any of the requirements be beneficial?
ii. If not, should that prescription be modified? If so, how?

Subject to suggested changes described in this letter, we believe that the 2012 Guidance, together with the Implementation Guidance and the FAQs, generally provides the level of detail needed to promote compliance. As described in Section II above, if the MSRB were to ultimately make any changes through a formal rulemaking process to the 2012 Guidance, SIFMA and its members believe that it would be critical to incorporate or otherwise preserve the guidance included in the Implementation Guidance and FAQs, with any modifications appropriate in light of the changes to the 2012 Guidance.

f. Have the sample disclosures provided by the MSRB in Exhibit A to MSRB Notice 2013-08 been useful in facilitating compliance, and to what extent has the sample been adopted? Should it be revised?

We believe that the sample disclosure provided in Exhibit A to the FAQs has been useful in facilitating compliance and is used by many underwriters.

(6) What have been the costs or burdens, direct, indirect or inadvertent, of complying with the 2012 Guidance? Are there data or other evidence, including studies or research, that support commenters' cost or burden estimates?

SIFMA has not calculated the costs or burdens of complying with the 2012 Guidance, and is not aware of any such calculation by any other party. Nonetheless, it

is clear that such costs or burdens are substantial and reasonable efforts to curtail them, as described in this letter, would be appropriate.

(7) Aside from the disclosure requirements, are there any other requirements addressed in the 2012 Guidance that should be modified or removed or new requirements that should be added?

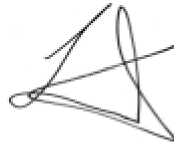
As described in Sections IV and V above, SIFMA and its members believe that the portions of the 2012 Guidance relating to prohibitions on misrepresentations and the fairness of financial aspects of an underwriting have been beneficial to the marketplace and to the protection of issuers and therefore should be preserved.

VIII. Conclusion

SIFMA and its members appreciate the MSRB's commitment to retrospective review of the 2012 Guidance. We believe that, as a general matter, significant portions of the 2012 Guidance have been beneficial to the marketplace and to the protection of issuers and that the disclosure aspects of the 2012 Guidance would be enhanced by focusing the range of required conflicts disclosures. We also believe that certain changes with respect to the timing and manner of providing disclosures, as well as circumstances where certain disclosures may not be required, would be appropriate and would improve the effectiveness of the 2012 Guidance. We would be pleased to discuss any of these comments in greater detail, or to provide any other assistance that

would be helpful. If you have any questions, please do not hesitate to contact the undersigned at (212) 313-1130.

Sincerely yours,



Leslie M. Norwood
Managing Director and Associate
General Counsel

cc: ***Municipal Securities Rulemaking Board***
Lynnette Kelly, President and Chief Executive Officer
Lanny Schwartz, Chief Regulatory Officer
Michael Post, General Counsel
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COMMISSIONER OF AGRICULTURE

August 8, 2018

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

Re: Comment on 2012 Interpretive Guidance on the Application of MSRB Rule G-17

Dear Mr. Smith:

This letter is in response to the request for comments on the 2012 Interpretive Guidance on the application of MSRB Rule G-17. As a frequent issuer and market participant, we believe that current market practices miss the mark on successfully fulfilling the purpose of the rule. Frequently, the required disclosures by underwriters function as a "check-the-box" item more than a meaningful communication with issuers.

Since the issuance of the interpretive guidance, underwriters have devoted substantial time and effort to craft the required disclosures and obtain issuer acknowledgment of receipt of the disclosures. From the issuer perspective, these efforts offer little value because they are too long and complicated. The disclosures provided to issuers are boilerplate, and may inadvertently bury disclosures of specific conflicts and risks within pages of nonmaterial information and legalese. Also, such disclosures are duplicative when multiple underwriters are involved in the same transaction. More sophisticated issuers do not need the boilerplate disclosures and infrequent or unsophisticated issuers may not understand their import, particularly as it relates to the nature of the underwriter's obligations to its issuer clients. A "one size fits all" approach to such disclosures is not effective, and instead issuers could benefit from underwriters tailoring such disclosures based on issuer size and sophistication.

We believe the interpretive guidance should be modified to encourage the use of plain language to clearly and concisely communicate with issuers the required disclosures, including the nature of the underwriter's relationship with the issuer, material conflicts of interest, and risks of the proposed transaction to the issuer. This will ensure that pertinent information is

meaningfully and clearly communicated to issuers, without creating unnecessary administrative compliance burdens for underwriters and confusion for unsophisticated issuers.

These are our thoughts based on our experiences. Thank you for your consideration.

Sincerely,

J. Ben Watkins III, Director
Division of Bond Finance

MSRB
Municipal Securities
Rulemaking Board

MSRB Notice

2018-29

Publication Date
November 16, 2018

Retrospective Rule Review

Stakeholders
Municipal Securities Dealers, Municipal Advisors, Issuers, Investors

Notice Type
Request for Comment

Comment Deadline
January 15, 2019

Category
Fair Practice

Affected Rules
Rule G-17

Request for Comment on Draft Amendments to 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities

Overview

As part of its ongoing retrospective review of its rules and published interpretations, the Municipal Securities Rulemaking Board (MSRB) is requesting comment on draft amendments to interpretive guidance it issued in 2012 on the application of MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities, to underwriters of municipal securities ("2012 Guidance").[1] This request for comment ("Request for Comment") is intended to elicit views and input from all interested parties on the benefits and burdens of, and possible alternatives to, the draft amendments. The comments will assist the MSRB in determining whether to adopt the draft amendments. The primary purpose of the draft amendments would be to clarify certain fair-dealing obligations of underwriters, improve market practices, better protect issuers and reduce the burdens on market participants.

Comments should be submitted no later than January 15, 2019, and may be submitted in electronic or paper form. Comments may be submitted electronically by clicking here. Comments submitted in paper form should be sent to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board, 1300 I Street NW, Suite 1000, Washington, DC 20005. All comments will be available for public inspection on the MSRB's website.[2]

[1] The 2012 Guidance is incorporated into the MSRB Rule Book under Rule G-17. Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Aug. 2, 2012).

[2] Comments generally are posted on the MSRB's website without change. For example, personal identifying information such as name, address, telephone number, or email address will not be edited from submissions. Therefore, commenters should only submit information that they wish to make available publicly.

Receive emails about MSRB Notices.

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Questions about this notice should be directed to Lanny A. Schwartz, Chief Regulatory Officer, or Carl E. Tugberk, Assistant General Counsel, at 202-838-1500.

Background

Rule G-17 requires that, in the conduct of municipal securities activities, brokers, dealers and municipal securities dealers (collectively, "dealers") deal fairly with all persons, including issuers, and shall not engage in any deceptive, dishonest or unfair practice. The 2012 Guidance describes certain fair-dealing obligations to issuers when acting as an underwriter. The MSRB supplemented the 2012 Guidance with implementation guidance (the "Implementation Guidance")[3] and answers to frequently-asked questions (the "FAQs")[4] to assist dealers in revising their written supervisory procedures, to clarify certain aspects of the 2012 Guidance and to address certain operational concerns.

The 2012 Guidance was adopted to promote fair dealing by underwriters with issuers, in part, by requiring disclosures to issuers related to underwriters' relationships with them, and the nature and risks of the transactions recommended by the underwriters. In response to feedback from some market participants regarding their experience with these requirements and the effectiveness of the required disclosures, the MSRB initiated a retrospective review of the 2012 Guidance and published a request for comment (the "Initial Request for Comment") to determine whether amendments to the 2012 Guidance should be considered to help ensure that it continues to achieve the intended purpose and reflects the current state of the municipal securities market.[5]

The MSRB received five comment letters in response to the Initial Request for Comment,[6] all of which supported the retrospective review and

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[3] MSRB Notice 2012-38 (July 18, 2012).

[4] MSRB Notice 2013-08 (Mar. 25, 2013).

[5] MSRB Notice 2018-10 (June 6, 2018).

[6] *See* Letters from: Mike Nicholas, Chief Executive Officer, Bond Dealers of America (BDA), dated August 6, 2018; Emily S. Brock, Director, Federal Liaison Center, Government Finance Officers Association (GFOA), dated August 6, 2018; Susan Gaffney, Executive Director, National Association of Municipal Advisors (NAMA), dated August 6, 2018; Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (SIFMA), dated August 6, 2018; and J. Ben Watkins III, Director,

suggested modifications to the 2012 Guidance. The comments received, in addition to continuing dialogue with industry stakeholders, formed the foundation for this Request for Comment.

Draft Amendments[7]

This section describes draft amendments to the 2012 Guidance, including the MSRB's analysis of the relevant comments. Each subsection includes questions relevant to the draft amendments addressed specifically therein, and more general questions are included at the end of this Request for Comment. If adopted by the MSRB and approved by the Securities and Exchange Commission (SEC), the 2012 Guidance, as modified by the draft amendments (the "Amended Guidance"), would incorporate the practical considerations contained in the Implementation Guidance and the content of the FAQs that remain applicable, and would supersede the 2012 Guidance, the Implementation Guidance and the FAQs. If the MSRB were to propose amending the 2012 Guidance formally with the SEC, the MSRB would propose that the 2012 Guidance remain in effect with respect to underwriting engagements commenced prior to the date that is three months after the date of publication of an MSRB notice, announcing the adoption of the Amended Guidance, at which time, underwriters would then be required to comply with the new requirements for all of their underwriting engagements beginning on or after that date.[8]

I. Nature, Timing and Manner of Disclosures of Conflicts of Interest

In general, the 2012 Guidance requires disclosures concerning the following: (1) the role of the underwriter; (2) the underwriter's compensation (collectively, with the disclosures concerning the role of the underwriter, as described below, the "standard disclosures"); (3) other actual and potential material conflicts disclosures (the "dealer-specific disclosures"); and (4) the material aspects of such structures that the underwriter recommends (the "transaction-specific disclosures"). The Amended Guidance would use these defined terms to clarify the requirements for the various types of disclosures.

State of Florida, Division of Bond Finance of the State Board of Administration ("Florida Division of Bond Finance"), dated August 8, 2018.

[7] The costs and benefits of each of the draft amendments are considered in the Economic Analysis, *infra*.

[8] For purposes of the Amended Guidance, an underwriting engagement would begin at the time the first disclosure requirement is triggered (*i.e.*, the earliest stages of the underwriter's relationship with the issuer with respect to an issue).

A. Disclosures Concerning the Underwriter's Compensation

The 2012 Guidance requires underwriters to disclose whether their compensation is contingent on the closing or size of their recommended transactions. SIFMA suggested eliminating this requirement because contingent underwriting compensation effectively is a universal practice. The MSRB does not believe it is appropriate to eliminate the requirement, as the contingent nature of underwriting compensation continues to present an inherent conflict of interest. Instead, in recognition of the fact that contingent compensation applies to virtually all underwriting engagements, the MSRB is proposing that it be included with the disclosures concerning the role of the underwriter in the standard disclosures. However, if a dealer underwrites an issuer's offering with an alternative compensation structure that is not contingent on the closing or size of the transaction, the dealer would need to indicate that the standard disclosure on underwriter compensation does not apply and explain the alternative structure as part of the transaction-specific disclosures to the extent that such alternative structure also presents a conflict of interest.

Question(s)

1. Are there variations to contingent underwriting compensation that would make it burdensome for underwriters to disclose them as part of the standard disclosures?

2. Are there alternatives to contingent underwriting compensation that are in common use in the municipal securities market? If so, what are they, how often and why are they used, and do they present material conflicts of interest?

B. Potential Material Conflicts of Interest

As noted above, the dealer-specific disclosures include actual and potential material conflicts of interest. SIFMA believes the dealer-specific disclosures should be limited to actual material conflicts of interest to reduce the volume of disclosures, particularly those that SIFMA considers to be "boilerplate," and to ensure that issuers do not inadvertently overlook meaningful disclosures. GFOA noted that the 2012 Guidance may not be achieving its

intended purpose because, in GFOA's view, underwriters currently provide voluminous general disclosures that are not focused on the actual conflicts.[9]

SIFMA's and GFOA's concerns appear to be based on the belief that lengthy disclosure of remote conflicts of interest unlikely to occur dilute from more important disclosures required by the 2012 Guidance. The MSRB concurs that a long list of generic boilerplate disclosures may provide little actionable information and potentially could distract issuers' attention from conflicts of interest that are more concrete in relation to the specific transaction and the specific parties, facts and circumstances at hand. The MSRB believes the 2012 Guidance can be refined to avoid the unnecessary disclosure of such boilerplate conflicts of interest and still capture potential material conflicts of interest that likely could have an impact on the issuer. Accordingly, the Amended Guidance would clarify that a potential material conflict of interest must be disclosed if, but only if, it is reasonably foreseeable that it will mature into an actual material conflict of interest during the course of the transaction between the issuer and the underwriter.

Question(s)

1. Is limiting what constitutes a potential material conflict of interest to only those material conflicts of interest that are reasonably foreseeable to mature into actual material conflicts of interest during the course of the transaction an appropriate standard, and is it sufficiently clear to be implemented by underwriters?

2. Should the standard require a greater likelihood than "reasonable foreseeability" that a potential material conflict of interest will mature into an actual material conflict of interest (*e.g.*, "high probability")?

3. Are there alternative standards that would better avoid or limit the unnecessary disclosure of boilerplate conflicts of interest and still capture potential material conflicts of interest that likely could have an impact on the issuer?

4. Does the ongoing obligation requiring underwriters to provide disclosures of actual material conflicts of interest discovered or arising after the underwriter has been engaged eliminate or reduce

[9] For example, Section III of the SIFMA Model Underwriter Disclosures Pursuant to MSRB Rule G-17 includes a long, non-exhaustive list of potential material conflicts of interest, such as possible conflicts associated with distribution agreements, profit-sharing agreements with investors, credit default swaps, and other issuer securities or loans held by the underwriter.

the need to disclose potential material conflicts of interest? What if such a material conflict of interest is not discovered or does not arise until after the execution of a contract with the underwriter or otherwise does not allow an issuer official sufficient time to evaluate the underwriter's recommendation?

C. Syndicate Manager Disclosure of Standard and Transaction-Specific Disclosures on Behalf of Syndicate Members

Under the 2012 Guidance, a syndicate manager may make the standard disclosures on behalf of other syndicate members. BDA commented that large, frequent issuers receive so many disclosures because co-managers of a syndicate do not exercise their ability to make the required disclosures collectively in this manner and recommends that the MSRB amend the 2012 Guidance to clarify that underwriters are only required to provide dealer-specific disclosures. The Florida Division of Bond Finance also recognized the issue of duplication when there is a syndicate, and NAMA believes syndicate members should not be allowed to provide boilerplate disclosures when they are provided by the syndicate manager. Finally, SIFMA noted that dealers do not consistently utilize the option of having a syndicate manager make the standard disclosures on behalf of other syndicate members and suggested that may be because it is procedurally easier for them to provide these disclosures with their dealer-specific disclosures or because it may be more difficult or risky to rely on the syndicate manager.

Given the position of most of the commenters that disclosures provided by a syndicate often are duplicative and, therefore, voluminous, the MSRB believes that requiring, rather than permitting, the standard disclosures to be made by a syndicate manager on behalf of the other syndicate members would promote consistent and complete disclosure to issuers, while reducing the likelihood of issuers receiving multiple duplicative standard disclosures in potentially inconsistent manners. The MSRB believes these same benefits would accrue if such a requirement also were extended to the transaction-specific disclosures, which should not vary, as all the syndicate members are party to the same transaction with the issuer. Ultimately, the MSRB believes such a requirement would simplify issuers' review of transaction-specific disclosures and allow them to focus more closely on any dealer-specific disclosures, which would continue to be required for each underwriter in the syndicate. Accordingly, the MSRB is proposing to require the senior manager to provide the standard and transaction-specific disclosures on behalf of the other members of the syndicate.

The MSRB also believes that this mandate in the Amended Guidance would make the process procedurally easier for dealers participating in an

underwriting syndicate because they would be able to uniformly rely on syndicate managers for all disclosures but their dealer-specific disclosures. Under the Amended Guidance, syndicate managers would have sole responsibility for providing the standard 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.[10]

Question(s)

1. If the 2012 Guidance is amended to require a syndicate manager to provide the standard and transaction-specific disclosures on behalf of the syndicate, should the syndicate manager be solely responsible for the content of those disclosures or failing to deliver them, or should the other syndicate members have regulatory liability for any non-compliance? If yes, what would be an effective mechanism or process to help ensure that syndicate members will agree on the content of the standard and transaction-specific disclosures?

2. If the 2012 Guidance is amended to require a syndicate manager to provide the standard and transaction-specific disclosures on behalf of a syndicate, should the other syndicate members continue to be required to obtain acknowledgement of receipt from the issuer? Should the other syndicate members be required to make and preserve records of the standard and transaction-specific disclosures provided to, and the acknowledgement of receipt of those disclosures received from, the issuer?

3. If the 2012 Guidance is amended to require a syndicate manager to provide the standard and transaction-specific disclosures on behalf of a syndicate, should the MSRB require the syndicate manager to bifurcate its disclosures to provide the standard and transaction-specific disclosures on behalf of the entire syndicate separately from its own dealer-specific disclosures?

D. Optional Alternative Manner of Providing Standard Disclosures

[10] As the dealer delivering the standard and transaction-specific disclosures to the issuer, only the syndicate manager would be required to obtain the required acknowledgement of issuer receipt, and to maintain and preserve records of the disclosures made on behalf of the syndicate in accordance with MSRB rules.

Currently, underwriters are required to provide issuers all of the disclosures on a transaction-by-transaction basis. SIFMA suggested an alternative manner of providing the required disclosures to address the issues of volume and duplication, and to reduce the burdens on both dealers and issuers. Specifically, SIFMA proposed that, when an underwriter engages in one or more negotiated underwritings with a particular issuer, the underwriter should be able to fulfill its disclosure requirements with respect to an offering by reference to, or by reconfirming to the issuer, its disclosures provided in the previous 12 months (*e.g.*, disclosures provided in connection with a prior offering during such period or provided on an annual basis in anticipation of serving as underwriter on offerings during the next 12 months). Under this construct, SIFMA explained that the underwriter would be required to provide any new disclosures or changes to previously disclosed information when they arise. SIFMA recommended that this manner of providing disclosures would be an alternative and that an underwriter could continue to provide its disclosures on a transaction-by-transaction basis. GFOA indicated that providing non-material or boilerplate disclosures annually might improve the disclosure process, but NAMA believes it would be difficult to make disclosures on an annual basis without the need for supplementary material throughout the year and, therefore, commented that the easiest manner of disclosure delivery is to leave the relevant portions of the 2012 Guidance unchanged.

The MSRB believes there is merit to SIFMA's suggestion and proposes amending the 2012 Guidance to allow for an optional alternative to transaction-by-transaction standard disclosures. Specifically, the MSRB is proposing to permit sole underwriters or syndicate managers (when there is a syndicate) to provide standard disclosures to an issuer one time and then to provide them subsequently by reference to and reconfirmation of those initial standard disclosures, in writing, unless the issuer requests that the standard disclosures be made on a transaction-by-transaction basis. If the initial standard disclosures needed to be amended, the syndicate manager would be required to deliver such amended standard disclosures on behalf of the syndicate. In cases where syndicate members were, themselves, subsequently sole underwriters or syndicate managers for the same issuer, they could refer to and reconfirm the initial or amended standard disclosures provided by the syndicate manager of the prior offering in the manner provided below. The initial standard disclosures and amended standard disclosures (as described in note 12 below) would need to comply with the various timing requirements currently established in the 2012 Guidance (e.g., disclosure concerning the underwriter's relationship with the issuer must be made in the earliest stages of the underwriter's relationship with the issuer with respect to an issue), and then the timing of the reference back to and

reconfirmation of those disclosures also would need to be consistent with those same requirements vis-à-vis the subsequent offerings.[11]

To be effective and compliant with the proposed alternative, the reference back and reconfirmation would need to identify clearly when the standard disclosures were made previously and make them readily accessible to the issuer in a hard copy or electronic format (*e.g.*, including a functional hyperlink to the original disclosure).[12] Additionally, a sole underwriter or syndicate manager (when there is a syndicate) must retain an original of the standard disclosures for the period of time required by MSRB Rule G-9, on preservation of records,[13] but that retention period would reset each time the letter is referenced and reconfirmed.[14]

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[11] SIFMA urged the MSRB to reconfirm language included in the Implementation Guidance that acknowledged that not all transactions proceed on the same timeline or pathway so that sometimes precise compliance with the timeframes may be infeasible, and additional language that such timeframes are not intended to establish hair-trigger tripwires resulting in technical rule violations so long as underwriters act in substantial compliance with the timeframes and have met the key objectives for providing the disclosures. The MSRB continues to acknowledge that not all transactions proceed along the same timeline or pathway; however, the Implementation Guidance was never intended to diminish the obligations established by the timing requirements or to suggest non-compliance with those requirements was acceptable as an ordinary course of business. Accordingly, the incorporation of the Implementation Guidance on this point modifies the relevant language to clarify the requirements accordingly.

[12] A dealer acting as a sole underwriter or syndicate manager that previously participated as a syndicate member in an offering for which the previous syndicate manager provided the standard disclosures on behalf of the other syndicate members would be able to reference back to and reconfirm the standard disclosures provided by the previous syndicate manager, as long as that dealer otherwise satisfies any applicable requirements, including to make those standard disclosures readily accessible to the issuer. In this scenario, the standard disclosures from a prior offering with the issuer referenced and reconfirmed by the syndicate manager would be provided on behalf of, and operative for, all of the syndicate members, even if they were not a part of the syndicate for the prior offering. Alternatively, the dealer could supply the standard disclosures to the issuer on behalf of the new syndicate as further discussed herein.

[13] Rule G-9(b)(viii)(C) requires "all written and electronic communications received and sent, including inter-office memoranda, relating to the conduct of the activities of such municipal securities broker or municipal securities dealer with respect to municipal securities" to be retained for not less than four years (or three years for each dealer that is a bank or subsidiary or department or division of a bank).

[14] For example, if a sole underwriter, which is not a bank or subsidiary or department or division of a bank, provided an issuer with initial standard disclosures in a letter on June 14, 2020, Rule G-9 would require the underwriter to retain that original letter until June 14, 2024. However, if the underwriter engages with the same issuer in a subsequent

By allowing underwriters to use this alternative manner of providing issuers the standard disclosures (unless an issuer requests otherwise), the volume and frequency of disclosures should decrease significantly, and the ongoing disclosure process between underwriters and issuers that work together repeatedly should be more streamlined and efficient, reducing the current burdens on both issuers and underwriters. As noted above, this is an optional, alternative manner of providing the disclosures; underwriters could continue to provide standard disclosures on a transaction-by-transaction basis. Additionally, the use of this alternative would not alter the obligations to deliver dealer-specific disclosures and transaction-specific disclosures on a transaction-by-transaction basis.

The following chart is intended to illustrate how the alternative to provide standard disclosures would work in practice, including in conjunction with the proposed requirement that syndicate managers make the standard and transaction-specific disclosures on behalf of the other syndicate members.

ISSUANCE #1 FOR ISSUER X			
Dealer	**Standard Disclosures**	**Transaction-Specific Disclosures**	**Dealer-specific disclosures**
A Syndicate Manager (SM)	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer A, on behalf of itself
B	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer B, on behalf of itself
C	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer C, on behalf of itself
ISSUANCE #2 FOR ISSUER X			
Dealer	**Standard Disclosures**	**Transaction-Specific Disclosures**	**Dealer-specific disclosures**
B Syndicate Manager (SM)	Reference back to and reconfirmation of the standard disclosures provided by Dealer A in Issuance #1 permitted	Provided by Dealer B, as SM, on behalf of the syndicate	Provided by Dealer B, on behalf of itself
C	Provided by Dealer B, as SM, on behalf of the syndicate	Provided by Dealer B, as SM, on behalf of the syndicate	Provided by Dealer C, on behalf of itself
D	Provided by Dealer B, as SM, on behalf of the syndicate	Provided by Dealer B, as SM, on behalf of the syndicate	Provided by Dealer D, on behalf of itself
ISSUANCE #3 FOR ISSUER X			
Dealer	**Standard Disclosures**	**Transaction-Specific Disclosures**	**Dealer-specific disclosures**

underwriting, and refers back to and reconfirms that June 14, 2020, letter on February 21, 2024, a new retention obligation would be triggered and the underwriter would need to retain the original letter until February 21, 2028. *See* note 10 *supra*.

D **Syndicate Manager (SM)**	Reference back to and reconfirmation of the standard disclosures provided by Dealer B in Issuance #2 permitted	Provided by Dealer D, as SM, on behalf of the syndicate	Provided by Dealer D, on behalf of itself
E	Provided by Dealer D, as SM, on behalf of the syndicate	Provided by Dealer D, as SM, on behalf of the syndicate	Provided by Dealer E, on behalf of itself
ISSUANCE #1 FOR ISSUER Y			
Dealer	**Standard Disclosures**	**Transaction-Specific Disclosures**	**Dealer-specific disclosures**
A **Syndicate Manager (SM)**	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer A, on behalf of itself
E	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer E, on behalf of itself

Question(s)

1. Would the alternative manner of providing the standard disclosures, as described above, reduce the volume and frequency of disclosures and make the disclosure process more streamlined and efficient as anticipated by the MSRB?

2. Would there be any unintended consequences to utilizing this alternative to provide the standard disclosures?

3. Should an underwriter acting as a sole underwriter or syndicate manager be able to provide the standard disclosures to an issuer by referring back to and reconfirming disclosures made in a previous underwriting with the same issuer when that underwriter was a member of the syndicate but not the syndicate manager that actually provided the disclosures for the previous issuance?

4. Should an underwriter acting as a sole underwriter or syndicate manager be able to provide the standard disclosures to an issuer by referring back to and reconfirming disclosures made in a previous underwriting with the same issuer when that underwriter was a member of a syndicate for which the syndicate manager satisfied the standard disclosure requirement by referring back to and reconfirming the standard disclosures provided to the issuer for an even earlier issuance, in which the underwriter at issue was not involved?

5. Should the optional alternative manner of providing the standard disclosures also apply to dealer-specific disclosures or transaction-specific disclosures or both?

E. Clear and Separate Identification of Disclosures

The 2012 Guidance does not prescribe the format in which the required disclosures must be provided. All of the commenters generally agree that the disclosures currently being provided under the 2012 Guidance, in what are commonly known as "G-17 letters," have become too long, voluminous, boilerplate and duplicative. The Florida Division of Bond Finance believes that these issues may cause disclosures of specific conflicts and risks to be buried inadvertently within non-material information. Similarly, GFOA believes some issuers either ignore or do not understand the important information being provided. GFOA further explained that small and large issuers are burdened in different ways by the disclosures. Larger issuers, which may be in the market frequently, have to receive and acknowledge the paperwork many times, while smaller and infrequent issuers may find the information overwhelming to review and understand.

GFOA suggested that underwriters should provide non-material or boilerplate disclosures separately from key conflicts and risks within the same document (*e.g.*, in an appendix). NAMA also believes that the information provided in the disclosures should be presented in a straight forward manner with general disclosures separated from the statements and discussions of material transaction risks and conflicts of interest. After consideration of the comments, the MSRB believes that simple changes to the formatting of the disclosures in the G-17 letters would have a meaningful positive impact on issuers' ability to review the disclosures. Accordingly, the MSRB is proposing to require underwriters, when providing the various disclosures in the same document, to clearly identify each category of disclosures and separate them (*e.g.*, by placing the standard disclosures in an appendix or attachment), which should allow issuers to discern the disclosures that are specific to a certain dealer or the transaction more easily and quickly.

Question(s)

1. Is there any reason why underwriters cannot separate the standard, dealer-specific and transaction-specific disclosures when they are provided within the same document?

2. Would the separation of the standard, dealer-specific and transaction-specific disclosures, when they are provided within the same document, create any challenges for issuers' review of them?

F. Disclosure on the Part of Parties Other than the Underwriter

As noted above, the 2012 Guidance requires underwriters to provide issuers with the standard, dealer-specific and transaction-specific disclosures. SIFMA requested clarification that conflicts of interest that might exist on the part of other parties to a financing, including, in particular, conflicts of issuer personnel, are not required by the 2012 Guidance.

The standard disclosures cover generic conflicts of interest that could apply to any underwriter in any underwriting, the dealer-specific disclosures are the actual and potential material conflicts of interest on the part of the underwriter, and the transaction-specific disclosures relate to the specific financing structure recommended by the underwriter. None of the requirements in the 2012 Guidance prescribes that the underwriter provide the issuer with disclosures on the part of any transaction participants other than syndicate members (when and if applicable, as described above), including issuer personnel, and it was not the MSRB's intent to create such a requirement. Accordingly, the MSRB is proposing to amend the 2012 Guidance to clarify that underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction, except for a syndicate manager making disclosures on behalf of other syndicate members as described above.

Question(s)

1. What, if any, types of conflicts of interest of issuer personnel have underwriters been disclosing pursuant to the 2012 Guidance?

2. Are there examples of conflicts of interest of issuer personnel that should be required to be disclosed with the dealer-specific disclosures, even if such conflicts are not themselves conflicts of an underwriter?

3. Are there conflicts of interest of any persons other than issuer personnel and the underwriter which should be required to be disclosed (for example, affiliates of the underwriter or swap counterparties or service providers recommended by the underwriter)? If so, should the requirement be limited to actual or potential material conflicts of interests that are actually known to the underwriter?

G. Plain English

Under the 2012 Guidance, the disclosures required must be made in a

manner designed to make clear to an issuer official the subject matter of such disclosures and their implications for the issuer. GFOA commented that the disclosures should be provided in a "plain English" manner, and NAMA indicated that the disclosures should be presented in a straight forward manner. The MSRB believes that the standard for the manner of the disclosures noted above is consistent with and substantially equivalent to plain English. As such, the MSRB is proposing that the Amended Guidance explicitly clarify that plain English is required.

Question(s)

1. What types of disclosures have underwriters not provided to issuers in a manner designed to make clear the subject matter of such disclosures and their implications?

2. Are there any disclosures that are of such a complex nature that, even when designed by an underwriter to make their subject matter and implications clear, cannot be reduced adequately into plain English?

3. Would any simplification of disclosures to satisfy the plain English standard increase the risk that underwriters imprecisely draft the disclosures that could make it difficult for issuers to fully appreciate the nature of material conflicts of interest and risks of transactions, thereby increasing risk to issuers and/or underwriters?

II. Issuer Acknowledgement of Receipt of Underwriter Disclosures

The 2012 Guidance requires underwriters to attempt to receive written acknowledgement of receipt of the disclosures by the official of the issuer (other than by automatic e-mail receipt). 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 may proceed with the engagement after documenting with specificity why it was unable to obtain such written acknowledgement during the course of the engagement. SIFMA commented that this requirement creates a significant burden for underwriters with no corresponding benefit to issuers. To address this issue, SIFMA recommended that receipt of an e-mail return receipt should be conclusive proof of delivery if other transaction documentation also has been provided to the same e-mail address. GFOA did not comment on this issue, but NAMA believes the acknowledgement requirement should remain in place.

The MSRB believes the acknowledgement requirement continues to have value to ensure that issuers receive the disclosures. However, the MSRB does

not believe underwriters should have to seek a particularized acknowledgement, which an issuer may not provide. Accordingly, the MSRB is proposing to retain the acknowledgement requirement but allow for e-mail delivery of the disclosures to the official of the issuer identified as the primary contact for the issuer and provide that an automatic e-mail return receipt from that individual's e-mail address may be a means to satisfy the acknowledgement requirement.[15]

Question(s)

1. Should the Amended Guidance require that the underwriter receive a read receipt, or should an automated confirmation of delivery of the e-mail constitute acknowledgement?

2. How should issuers designate their primary contacts? Should the MSRB specify how this designation should be made?

III. Underwriter Recommendations

Under the 2012 Guidance, the type of financing structure that an underwriter recommends to the issuer determines what transaction-specific disclosures it must provide. SIFMA requested clarification as to whether the MSRB's guidance on the meaning of "recommendation" under MSRB Rule G-42, on duties of non-solicitor municipal advisors, describing a two-prong analysis for determining whether advice is a recommendation for purposes of that rule applies when determining whether an underwriter has recommended a municipal securities financing.[16] The MSRB believes that the same two-prong analysis, generally consisting of a call to action to proceed with a specific recommended financing structure, is applicable and is proposing to provide that requested clarification in the Amended Guidance.

Question(s)

1. Is there any reason why the MSRB's guidance on the meaning of "recommendation" under Rule G-42 should not apply to this aspect of underwriters' fair-dealing obligations to issuers?

[15] As noted above, when there is an underwriting syndicate, only the syndicate manager would be required to obtain the required acknowledgement of issuer receipt. *See* note 10 *supra*.

[16] *See* FAQs Regarding MSRB Rule G-42 and Making Recommendations.

IV. Underwriter Discouragement of the Use of a Municipal Advisor

The 2012 Guidance currently states that "[t]he underwriter must not recommend that the issuer not retain a municipal advisor." Both GFOA and NAMA commented that this language should be strengthened by requiring the underwriter to affirmatively state that the issuer may hire a municipal advisor and by stating that the underwriter take no action to discourage or deter the use of a municipal advisor. The MSRB believes the commenters' request can be satisfied, as a practical matter, by amending the 2012 Guidance to incorporate language already included in the Implementation Guidance. Specifically, the Amended Guidance would further state that "an underwriter may not discourage an issuer from using a municipal advisor or otherwise imply that the hiring of a municipal advisor would be redundant because the underwriter can provide the same services that a municipal advisor would." The MSRB believes that this amendment would clarify that the scope of the prohibition covers communications beyond the underwriter's specific recommendations and would adequately address the commenters' concerns regarding other actions intended to discourage the use of municipal advisors.

Question(s)

1. Do underwriters discourage issuers from engaging municipal advisors? If so, how?

2. Do other market participants involved in the issuance of municipal securities discourage issuers from engaging municipal advisors? If so, how?

3. Would the draft amendment sufficiently address the issue or would it allow for certain dealer communications regarding issuer retention of municipal advisors that should be prohibited?

4. Should the MSRB require that the standard disclosures include an affirmative statement that the issuer may retain a municipal advisor?

Discussion of Other Comments

This section describes the MSRB's analysis of other comments received, for which no corresponding amendments are proposed in this Request for Comment.

I. Disclosures to Conduit Borrowers

The 2012 Guidance specifies underwriters' fair-dealing obligations to issuers but does not apply the requirements to underwriters dealing with conduit borrowers. The Implementation Guidance, however, acknowledges that underwriters must deal fairly with all persons, including conduit borrowers, and that dealers' obligations to conduit borrowers depend upon the dealers' relationship with them and other facts and circumstances. In response to a specific question contained in the Initial Request for Comment on whether underwriters provided the disclosures required by the 2012 Guidance to conduit borrowers, SIFMA indicated that it is common but not universal for underwriters to provide a conduit borrower with a copy of the disclosures provided to the conduit issuer. SIFMA did not comment on whether that common practice should be required, but GFOA stated that the MSRB should make clear that the information in the disclosures would best be utilized if it was sent to the party making decisions about the issuance and liable for the debt, which it indicated is the conduit borrower in most cases.

Although it may be common practice by some underwriters, the MSRB, at this time, does not believe the 2012 Guidance should be amended to extend the obligations contained therein to underwriters' dealings with conduit borrowers.[17]

Question(s)

1. Should the MSRB extend the application of the 2012 Guidance to require underwriters to provide the required disclosures to conduit borrowers? If so, should that application extend to all conduit borrowers or only those with whom the underwriter(s) have engaged directly?

2. Should the MSRB extend the application of the 2012 Guidance to any other obligated persons beyond conduit borrowers? If so, please specify to whom it should be extended and why.

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[17] The MSRB understands that the level of engagement between underwriters and conduit borrowers is not universal, such that, in some circumstances, the underwriter(s) works directly with the conduit borrower to build the deal team and structure a financing prior to enlisting a conduit issuer to facilitate the transaction, while, in others, the underwriter(s) are engaged by the conduit issuer and subsequently find a conduit borrower with which to partner.

II. Classification of Issuers to Create Tiered Disclosure Requirements

The 2012 Guidance applies to underwriters in their dealings with all issuers in the same manner. The Initial Request for Comment posed the question of whether there should be different disclosure obligations for different classes of issuers. The Florida Division of Bond Finance stated that a "one size fits all" approach is not effective and that issuers could benefit from underwriters tailoring such disclosures based on issuer size and sophistication. Similarly, SIFMA noted that the size of the issuer may have some bearing on issuer sophistication but that it is most appropriate to focus on the knowledge, expertise and experience of the issuer personnel, as well as access to the advice of a municipal advisor (*e.g.*, if the issuer is relying on the advice of an independent registered municipal advisor (IRMA)[18] and the underwriter invokes the IRMA exemption to the SEC's registration rule for municipal advisors). While BDA also believes the disclosure obligations of the 2012 Guidance should not apply if an issuer has an IRMA with respect to the same aspects of an issuance of municipal securities, it does not believe there should be different obligations for different types of issuers because the personnel in large issuers that frequently issue municipal securities change regularly and continue to need the disclosures, and because the uniform requirement allows for a consistent, standard process for dealers. NAMA also does not support the varying of underwriters' responsibilities for different issuers, and GFOA believes that the wide variety of issuers would make it nearly impossible to develop ways to modify the 2012 Guidance for some issuers but not others.

The MSRB does not believe there is an obvious, appropriate methodology for classifying issuers in a manner that would advance the policies underlying the 2012 Guidance or that would materially relieve burdens for underwriters or issuers, and requiring different disclosure standards for different issuers may have unintended consequences that cause more harm than good. In light of these considerations, the MSRB is not proposing any classification of, and varied disclosure requirements for, issuers.

The MSRB further believes that the issuer's retention of an IRMA and the underwriter's corresponding invocation of the IRMA exemption should not relieve the underwriter from the obligations to provide disclosures. First, the MSRB believes that the standard disclosures are so fundamental that they should always be provided and that, even if an IRMA could assist an issuer in

[18] An IRMA is "a municipal advisor registered pursuant to Section 15B of the [Securities Exchange Act of 1934] . . . and the rules and regulations thereunder and that is not, and within at least the past two years was not, associated . . . with the [dealer] seeking to rely on [the IRMA exemption]. 17 CFR 240.15Ba1-1(d)(3)(vi)(A); *see also* note 19 *infra*.

understanding the role and responsibilities of the underwriter, the underwriter should be required to make the representations regarding its role in the transaction.

Additionally, the IRMA exemption was crafted with a specific purpose in mind—to allow unregistered persons to provide advice to or on behalf of municipal entities or obligated persons with respect to municipal financial products or the issuance of municipal securities, without themselves having to register as municipal advisors, provided that the municipal entities and obligated persons are represented by and rely on IRMAs who are subject to fiduciary or other duties.[19] When the conditions of the exemption are satisfied as provided by the SEC, the exemption effectively provides that the presence of IRMAs eliminates the need for issuers to have the protections of requiring the unregistered persons to register as municipal advisors and comply with all of the duties associated with being municipal advisors. This is a different purpose and construct than the protections afforded by the 2012 Guidance under Rule G-17. Dealers acting as underwriters need to deal fairly with all persons, which, in some cases, means disclosing details about their own conflicts of interest, the details of transactions that they recommend and having a reasonable basis for making those recommendations. The presence and independence of an IRMA would not necessarily provide any safeguards from the underwriter's material conflicts of interest and, therefore, should not relieve an underwriter from having to provide those dealer-specific disclosures.

For transaction-specific disclosures, the MSRB notes that, among other factors, an underwriter (including a syndicate manager, when there is a syndicate) may consider the issuer's retention of an IRMA, who can help the issuer evaluate underwriter recommendations and identify potential conflicts of interest, when assessing the issuer's level of knowledge and experience with the financing structure the underwriter recommends, which may support a determination by the underwriter that a more limited disclosure would satisfy the obligation for that transaction.[20] As discussed more below, the MSRB does not believe that any such assessment should eliminate the requirement to provide transaction-specific disclosures entirely, and the MSRB believes that certain complex municipal securities financings could be so complex that, even when all parties to the transaction are sophisticated with knowledge and experience with those financing structures, the

[19] *See* 17 CFR 240.15Ba1-1(d)(2)(vi); Registration of Municipal Advisors, 78 FR 67468, 67471 (Nov. 12, 2013); Registration of Municipal Advisors Frequently Asked Questions, Section 3 (Sept. 20, 2017).

[20] *See* note 10 *supra* and corresponding text.

transaction-specific disclosures would continue to serve the crucial purpose of highlighting important issues for the parties to discuss.

III. Issuer Opt-Out

Under the 2012 Guidance, all issuers receive the disclosures required to be provided by underwriters, and they may not opt out. In response to a specific inquiry in the Initial Request for Comment, GFOA opposed the concept of an issuer opt-out, while SIFMA argued that issuers should have the choice to not receive the standard disclosures in a written election based on their knowledge, expertise, experience and financial ability, upon which underwriters should be permitted to conclusively rely. The MSRB believes that it is important for issuers to receive or have access to the disclosures for all of their negotiated transactions, and, given that the key concerns of commenters would be addressed by the draft amendments to the 2012 Guidance, and the benefits to dealers of a uniform process and to issuers with changing personnel, the MSRB is not proposing to allow any issuer to opt out of receiving the required disclosures.

IV. Trigger for Transaction-Specific Disclosures

The 2012 Guidance provides that, absent unusual circumstances or features, the typical fixed rate offering may be presumed to be well understood by issuer personnel that have the lead responsibilities in connection with the issuance of municipal securities, which may obviate the need for an underwriter to provide a disclosure on the material aspects of a fixed rate financing when the underwriter recommends such a structure. Conversely, the 2012 Guidance allows for a variance in the level of disclosure required for unique, atypical or otherwise complex offerings ("complex municipal securities financings") depending, based on the reasonable belief of the underwriter, on the issuer's knowledge or experience with the proposed financing structure or similar structures, capability of evaluating the risks of the recommended financing and financial ability to bear the risks of the recommended financing.

SIFMA believes that all transaction-specific disclosures, for fixed rate and complex municipal securities financings, should be triggered by the same standard, which would create the possibility that an underwriter (including a syndicate manager, when there is a syndicate)need not provide disclosures about the material aspects of a complex municipal securities financing if it reasonably believes that the issuer has sufficient knowledge or experience with the proposed financing structure. The MSRB acknowledges that the rationale espoused by SIFMA is conceptually consistent with the 2012 Guidance and that it is possible for certain issuers to develop a level of

knowledge and experience with certain complex municipal securities financings that would diminish the need for the disclosures related to the structure of such financings. However, the MSRB believes that the inherent nature of such unique and atypical financings requires a higher standard for the protection of issuers. Specifically, the MSRB believes that the risk of an underwriter inaccurately determining that such transaction-specific disclosures are not necessary is too great. The possible harms of an issuer's inability to understand the structure of a complex municipal securities financing and corresponding risks are very difficult to remedy after the transaction. The MSRB believes the potential resulting harm to the issuer outweighs the potential benefit of reduced transaction-specific disclosures. Accordingly, the MSRB is not proposing to change the 2012 Guidance as suggested by SIFMA.

V. Third-Party Marketing Arrangements

Under the 2012 Guidance, an underwriter is required to disclose to the issuer whether it has entered into any third-party arrangements for the marketing of the issuer's securities. SIFMA suggested eliminating this requirement because, in SIFMA's view, while issuers may want to be made aware of third-party marketing arrangements in connection with their new issues, the disclosures required by the 2012 Guidance are not the appropriate mechanism to do so, as this information often is conveyed during the syndicate formation process and market practices have evolved to include disclosure of these arrangements in the official statement in many instances. Additionally, SIFMA noted that these arrangements, also known as retail distribution agreements, are not an activity involving suspicious payments to a third party and do not increase costs to issuers. Rather, SIFMA stated that those arrangements simply pass on a discounted rate to a motivated dealer, which is commonly available to dealers after the bonds have become free to trade in any event. SIFMA alternatively requested an explanation for why selling group arrangements are not required to be disclosed in the same manner, if the MSRB does not amend the 2012 Guidance as it suggested.

The MSRB agrees that the nature of third-party marketing arrangements is not "suspicious" activity. However, the MSRB believes that such arrangements could create material conflicts of interest and that there may be circumstances in which an issuer would not or could not have certain dealers participate in the underwriting in such capacity. For example, an issuer may be subject to jurisdictional requirements that could dictate the participation or non-participation of certain dealers, or an issuer may have a preference to not involve certain dealers in their offering due to reputational concerns. As a result, it remains important for underwriters to disclose that information to issuers and the MSRB is not proposing any change to this

aspect of the 2012 Guidance. In response to SIFMA's alternative request, the MSRB notes that a key distinction between selling group arrangements and third-party marketing arrangements is that the issuer knows who is in the selling group, as it actively participates in determining whether there should be one and who is in it, whereas the existence of third-party marketing arrangements consummated by syndicate and selling group members with other dealers might not be known to the issuer but for the requirement to disclose those relationships in the 2012 Guidance.

VI. Credit Default Swaps

The 2012 Guidance specifically references an underwriter's engagement in credit default swap activities as a potential material conflict of interest that would require disclosure to the issuer. SIFMA noted that dealer use of, and participation in, credit default swaps has significantly decreased since the financial crisis and the adoption of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and, as a result, in SIFMA's view, the reference is no longer as relevant. Despite this, SIFMA noted that material conflicts of interest related to credit default swaps still could arise and should continue to be disclosed. The MSRB believes that, even if credit default swaps are less prevalent in the municipal securities market, the possibility for underwriters to issue or purchase credit default swaps for which the reference is the issuer remains. Accordingly, the MSRB is not proposing to remove the specific reference from the 2012 Guidance.

VII. EMMA as a Tool for Disclosures

Underwriters directly provide issuers with the disclosures required by the 2012 Guidance. In response to a question in the Initial Request for Comment on whether EMMA could or should be used as a tool to improve the utility of disclosures and the process for providing them to issuers, there was agreement among the commenters that responded to this question that EMMA was not an appropriate vehicle for the disclosures. Specifically, GFOA indicated that the use of EMMA could cause underwriters to provide even more boilerplate disclosures and that underwriters may be concerned about investor use of the information. SIFMA also opined that using EMMA would not be appropriate in light of the information disclosed, and NAMA stated that it would undermine the purpose of the 2012 Guidance by requiring issuers to have to seek out the disclosures instead of receiving them directly. The MSRB acknowledges commenters' views and is not proposing to amend the guidance to incorporate the use of EMMA for providing disclosures at this time.

Economic Analysis

As discussed above, the MSRB is soliciting comments on the Amended Guidance, which would affect the 2012 Guidance in the following areas: (1) the nature, timing and manner of disclosures of conflicts of interest; (2) issuer acknowledgement of receipt of underwriter disclosures; (3) underwriter recommendations; and (4) the prohibition on discouraging the use of a municipal advisor.

1. **The need for the Amended Guidance and how the Amended Guidance would meet that need.**

The primary purpose of amending the 2012 Guidance would be to clarify certain fair-dealing obligations of underwriters, improve market practices, better protect issuers and reduce the burdens on market participants. Some market participants indicated that the 2012 Guidance resulted in unintended consequences, including, but not limited to, the provision of voluminous disclosures to issuers, which placed a burden on underwriters and made it difficult for issuers to comprehensively evaluate the material information in the disclosures.

Market participants also have expressed concern about the production of duplicative disclosures to issuers from multiple underwriters as another unintended consequence due to the potential for the identical disclosures to be made in inconsistent manners and as a contributing factor to the issue of voluminous disclosures. Overall, the MSRB's primary concern is the unnecessary burden the guidance has placed on market participants, as well as the diminished efficiency of market practices, such as the ability of issuers to properly assess the risks of engaging underwriters and executing the transactions they recommend.

As described fully above, the MSRB intends for the Amended Guidance to clarify certain aspects of the 2012 Guidance, including what constitutes a potential material conflict of interest, whether disclosure on the part of parties other than the underwriter is required, the requirement to make the disclosures in plain English, what constitutes a recommendation by an underwriter, and the scope of the prohibition on underwriter discouragement of the use of a municipal advisor. Providing these clarifications would be critical to informing issuers on the risks of municipal securities financings and the various conflicts of interest which may arise from requesting the professional services of underwriters, as well as to reducing the costs of uncertainty and non-compliance. Overall, the MSRB believes that the Amended Guidance would reduce the amount of disclosures required, reduce duplication and require that the disclosures be

organized and written more clearly, with the overall benefit of streamlining the process for the benefit of all parties involved.

2. Relevant baselines against which the likely economic impact of elements of the Amended Guidance can be considered.

To evaluate the potential economic impact of the Amended Guidance, a baseline must be established as a point of reference in comparison to the expected state with the amendments in effect. The economic impact of the draft amendments is generally viewed as the difference between the baseline state and the expected state. This section describes the baseline state used to evaluate the economic impact of the draft amendments. A reasonable baseline for the Amended Guidance is the 2012 Guidance. The draft amendments relate to the following aspects of the 2012 Guidance:

Nature, Timing and Manner of Disclosures of Conflicts of Interest

- requires underwriters to disclose whether their compensation is contingent on the closing or size of their recommended transaction
- requires an underwriter to disclose actual and potential material conflicts of interest
- allows a syndicate manager to make the standard disclosures on behalf of other syndicate members
- requires an underwriter to provide issuers with all of the disclosures on a transaction-by-transaction basis
- does not prescribe the format of the disclosures
- does not articulate that underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction
- requires disclosures to be made in a manner designed to make clear to an issuer official the subject matter of such disclosures and their implications for the issuer

Issuer Acknowledgement of Receipt of Dealer Disclosures

- requires underwriters to attempt to receive written acknowledgement of receipt (other than by automatic e-mail receipt) of the foregoing disclosures by the official of an issuer

Underwriter Recommendations

- requires an underwriter to provide transaction-specific disclosures, the scope of which is determined by the financing structure that the underwriter recommends to the issuer

Underwriter Discouraging the Use of a Municipal Advisor

- states that "[t]he underwriter must not recommend that the issuer not retain a municipal advisor"

3. Identifying and evaluating reasonable alternative regulatory approaches.

The MSRB policy on economic analysis in rulemaking addresses the need to consider reasonable alternative regulatory approaches. A reasonable regulatory alternative is to preserve the 2012 Guidance without any amendments. However, the MSRB believes that this would not reduce the burdens cited by market participants, and, therefore, it would be less preferable since the draft amendments would be intended to increase the effectiveness of the 2012 Guidance.

To clarify the nature, timing and manner of disclosures of conflicts of interest, the MSRB also could strictly limit the dealer-specific disclosures to actual material conflicts of interest only. This would remove the obligation to disclose potential material conflicts of interest and therefore reduce the volume of disclosures; however, it also would increase the potential that issuers do not become aware of potential material conflicts of interest that likely would mature into an actual material conflict of interest during the course of their transactions with underwriters and is thus an inferior alternative. To address this shortcoming of that alternative, the Amended Guidance would further clarify that a potential material conflict of interest requires disclosure if, but only if, it is reasonably foreseeable that it will mature into an actual material conflict of interest during the course of the transaction between the issuer and the underwriter. This would provide a reasonable balance between reducing the volume of disclosures as well as ensuring issuers that they have received or have access to the dealer-specific disclosures that are relevant to the time-period of the transaction.

Additionally, the MSRB also could amend the 2012 Guidance to permit issuers the option of opting out of receiving the required disclosures. Currently, all issuers receive the disclosures required to be provided by underwriters, and they may not opt out. Nevertheless, the MSRB believes that reducing the risk of issuers not knowing and/or appreciating information about material conflicts of interest and the recommended transactions disclosed by underwriters outweighs the burden of reviewing all of the disclosures provided by the underwriters. It is important for issuers to receive or have access to the disclosures for all of their negotiated transactions. Therefore, at this time, the MSRB does not believe issuers should have the choice to opt out of receiving them.

Other possible alternatives include classifying issuers to establish tiered disclosure requirements. Instead of having a "one size fits all" approach, underwriters could tailor disclosures based on, for example, issuer size, knowledge, expertise, experience of the issuer personnel or sophistication. This alternative regulatory approach would be costly since, for one thing, the personnel in large issuers that frequently issue municipal securities change regularly; therefore, the quality of issuer personnel could change over time and would be difficult to categorize. In addition, the wide variety of issuers would make it nearly impossible to develop ways to modify the 2012 Guidance for some issuers but not others. The MSRB does not believe there is a suitable and consistent methodology for classifying issuers in a manner that would advance the policies underlying the 2012 Guidance and reduce the burdens for underwriters or issuers.

4. **Assessing the benefits and costs of the Amended Guidance and the main alternative regulatory approaches.**

The MSRB's regulation of the municipal securities market is designed to protect investors, issuers and the public interest by promoting a fair and efficient municipal securities market. The MSRB policy on economic analysis in rulemaking requires consideration of the likely costs and benefits of a proposed rule amendment with the rule amendment proposal fully implemented against the context of the economic baselines as specified in Section 2 above.

The MSRB is seeking, as part of this Request for Comment, additional data or studies relevant to the costs and benefits of the draft amendments to the 2012 Guidance. In addition, the MSRB requests market participants to provide quantitative estimates of both the upfront and ongoing costs in relation to complying with the Amended Guidance.

The main purpose of amending the 2012 Guidance is to reduce burdens on underwriters while not decreasing benefits to issuers. The MSRB's analysis below shows that the draft amendments not only would accomplish this objective, but that they may further benefit issuers by easing their document review load and enhance their ability to evaluate the required disclosures.

I. Benefits and Costs – Nature, Timing and Manner of Disclosures of Conflicts of Interest

a. Clarifications: Potential Material Conflicts of Interest, Disclosure on the Part of Parties Other than the Underwriter and Plain English Requirement

The Amended Guidance would clarify: (1) when a potential material conflict of interest must be disclosed; (2) that underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction, except for a syndicate manager making disclosures on behalf of other syndicate members; and (3) that plain English is already required for disclosures.

The dealer-specific disclosures include both actual and potential material conflicts of interest. The amount of disclosures would be reduced by the Amended Guidance if underwriters are currently including potential material conflicts of interest which are not likely to mature into an actual material conflict of interest during the course of the transaction between the issuer and the underwriter. The Amended Guidance would clarify that these types of material conflicts of interest are not required. Similarly, the clarification that underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction, except for a syndicate manager making disclosures on behalf of other syndicate members, should decrease the volume of disclosures.

A secondary benefit of the reduction in the volume of disclosures would be that issuers would not have to sift through conflicts of interest which would not relate to the risk environment associated with the underwriter during the course of the transaction. When there are too many disclosures, it is possible that an issuer's ability to make a comprehensive and efficient assessment of the disclosures is constrained. With the Amended Guidance, issuers should be able to discern more easily which conflicts of interest are "real," which should improve issuers' ability to assess the material conflicts of interest and transaction risks, therefore reducing asymmetric information[21] between the underwriters and issuers. Clarification of disclosures with the plain English requirement would also reduce asymmetric information. Asymmetric information may cause market price distortion and/or transaction volume

[21] In economics, information asymmetry refers to transactions where one party has more or better information than the other.

depression. Therefore, reducing information asymmetry would have a beneficial impact on the municipal securities market.

Assuming underwriters are already compliant with the requirements under the 2012 Guidance, there are no implicit or explicit economic costs associated with clarifying that plain English is already required. However, clarifying when a potential material conflict of interest requires disclosure would create initial/upfront costs to each underwriter since underwriters would have to amend their policies and procedures to specify what constitutes a reasonably foreseeable potential material conflict of interest, though the MSRB believes that such costs would be minor. As for the clarification that underwriters are not required to make any disclosures on the part of other parties to the transaction, the costs should either be reduced or remain the same, depending on how often underwriters are actually making those disclosures currently. However, in both cases, the MSRB believes that the benefits would outweigh the costs.

b. *Include the Disclosures Concerning the Underwriter's Compensation in the Standard Disclosures*

The Amended Guidance would continue to require a disclosure concerning the contingent nature of underwriter's compensation along with the disclosures concerning the role of the underwriter in the standard disclosures. The MSRB continues to believe that the contingent nature of underwriting compensation presents an inherent conflict of interest and disclosure of the underwriter's compensation is beneficial for issuers. For example, an underwriter may recommend a transaction that is not necessary or size of a transaction that is larger than necessary, both of which may not be in the best interest of the issuer. By including the disclosure that the underwriter's compensation is contingent on the closing or size of the transaction in the standard disclosures, both dealers and issuers should benefit from the consolidation of disclosure requirements.

The MSRB expects initial/upfront costs to sole underwriters and syndicate managers since they might have to change the manner in which they disclose the contingent nature of their underwriting compensation to include that information as part of the standard disclosures. The MSRB expects that these initial setup costs would be minor and that the benefits of consolidation of the disclosures concerning the role of the underwriter and the underwriter's compensation should outweigh the costs.

c. Require Syndicate Manager Disclosure of Standard and Transaction-Specific Disclosures on Behalf of Syndicate Members

At present, the 2012 Guidance allows, but does not require, a syndicate manager to make standard and transaction-specific disclosures on behalf of the other syndicate members. Amending the 2012 Guidance to require, rather than permit, the standard and transaction-specific disclosures to be made by a syndicate manager on behalf of the other syndicate members would resolve the issue of duplication when there is a syndicate. Additionally, it would promote the dissemination of complete and consistent disclosures to issuers and improve the process for dealers since they would be able to uniformly rely on syndicate managers for compliance.

While the MSRB believes that, under the 2012 Guidance, syndicate managers often provide the standard and transaction-specific disclosures to the issuer on behalf of the syndicate, the draft amendment, however, would create a new burden for syndicate managers that currently are not but would be required to do so under the Amended Guidance. Although those syndicate managers would incur costs associated with the additional disclosures on behalf of other syndicate members, greater benefits should accrue to issuers and syndicate members as a whole as a result of an improved process of standard and transaction-specific disclosures. The reduced likelihood of inconsistency between duplicative disclosures on the same matters and the reduced burden placed on syndicate members to provide standard and transaction-specific disclosures to the issuer should be a benefit to both dealers and issuers.

d. Optional Alternative Manner of Providing Standard Disclosures

Unless requested otherwise by issuers, the Amended Guidance would allow for an alternative to transaction-by-transaction standard disclosures and permit underwriters (including a syndicate manager, when there is a syndicate) to provide standard disclosures to an issuer one time and then subsequently provide them by reference to and reconfirmation of those initial standard disclosures. This alternative manner of providing disclosures would be more streamlined and efficient and should reduce the burdens on both issuers, who review the disclosures, and underwriters, who submit the disclosures.

The MSRB believes underwriters, who choose to take advantage of the optional alternative manner of providing standard disclosures, would incur costs when subsequently reconfirming and referring to past disclosures associated with specifically and clearly identifying the G-17 letter in which the standard disclosures were made previously. However, those

underwriters choosing this option presumably would save costs overall when compared to the transaction-by-transaction disclosure method. In aggregate, the benefits to underwriters and issuers should outweigh the costs because of the decrease in volume and frequency of disclosure. There would be no costs incurred by underwriters who do not provide disclosures through this alternative method.

e. Clear and Separate Identification of Disclosures

The Amended Guidance would create a new requirement for underwriters; when providing the various disclosures in the same document, an underwriter would have to clearly identify each category of disclosure. This would prevent material conflicts of interest and risks of the transaction or financing structure from being buried inadvertently within boilerplate information. The MSRB believes that the benefits of this requirement would be to provide clarity to issuers, reduce information asymmetry and make it easier for issuers to assess the conflicts of interest and risks associated with transactions or financing structures recommended by underwriters. The costs to dealers for clearly identifying and separating the standard, dealer-specific and transaction-specific disclosures should be minor, and the MSRB believes that the benefits would outweigh the costs.

II. Benefits and Costs – Issuer Acknowledgement of Receipt of Underwriter Disclosures

Currently, the 2012 Guidance requires underwriters to attempt to receive written acknowledgement of receipt of the disclosures by an official of the issuer. The Amended Guidance would allow for automatic e-mail return receipt to constitute issuer acknowledgement of receipt of the disclosures. The acknowledgment requirement continues to have value to ensure that issuers receive the disclosures. Allowing for an automatic e-mail return receipt from an individual's e-mail address to constitute acknowledgment should reduce burdens on underwriters (including syndicate managers, when there is a syndicate) and issuers from spending time to follow up with written acknowledgement without any corresponding reduction in benefits to issuers.

The MSRB expects minor initial/upfront costs (which are optional) to the underwriter associated with the implementation of the use of automatic e-mail return receipts, and related compliance, supervisory and record-retention procedures. However, the benefits associated with the reduced burden of spending time to obtain written acknowledgment would accrue over time and should exceed the initial costs.

III. Benefits and Costs – Underwriter Recommendations

The 2012 Guidance requires an underwriter to make transaction-specific disclosures to the issuer based on the transaction or financing structure it recommends and the level of knowledge and experience of the issuer with that type of transaction or financing structure. The Amended Guidance would clarify that a recommendation constitutes a two-prong analysis, generally consisting of a call to action to proceed with a specific recommended transaction or financing structure. One benefit of this clarification would be the reduction of the costs of uncertainty and non-compliance for underwriters, since underwriters would be able to determine whether advice concerning a complex municipal securities financing is considered a recommendation and is applicable for purposes of the Amended Guidance. Assuming underwriters are already compliant with these requirements under the 2012 Guidance, there would be no implicit or explicit economic costs associated with clarifying that a recommendation constitutes a two-prong analysis.

IV. Benefits and Costs – Underwriter Discouragement of the Use of a Municipal Advisor

The 2012 Guidance prohibits an underwriter from recommending that an issuer not retain a municipal advisor, but it does not emphasize or explicitly state that an underwriter is prohibited from discouraging an issuer from using a municipal advisor or implying that the services of a municipal advisor are not warranted or redundant. Clarifying that the scope of the prohibition on making such a recommendation includes an underwriter discouraging the use of a municipal advisor would reduce the likelihood that underwriters may directly and indirectly discourage the use of municipal advisors. This would increase the potential benefits an issuer may receive from engaging with a municipal advisor during the process of bond issuance, if an issuer decides to retain a municipal advisor.

A study from 2006 has shown that using a financial advisor in the municipal bond issuance process reduces underwriter gross spreads, provides statistically significant borrowing costs savings and lower reoffering yields.[22] The results of the study are consistent with the interpretation that the

[22] Vijayakumar Jayaraman and Kenneth N. Daniels, "The Role and Impact of Financial Advisors in the Market for Municipal Bonds," *Journal of Financial Services Research*, 2006. After investigating how using a financial advisor affects the interest costs of issuers, Vijayakumar and Daniels, find that a financial advisor significantly reduces municipal bond interest rates, reoffering yields, and underwriters' gross spreads.

monitoring and information asymmetry reduction roles of financial advisors potentially reduces the perceived risk for issues. Another study from 2010 found lower interest costs with municipal issues using financial advisors, and the interest cost savings were significantly large especially for more opaque and complex issues.[23] Given that an underwriter does not have the same fiduciary responsibility of a municipal advisor and that issuers obtain real economic benefits from using municipal advisors, the MSRB believes that clarifying the scope of this prohibition should continue to improve market practices and prevent outside influence on an issuer's decision to engage municipal advisory services that may lead to lowered net costs. As to the potential costs of compliance, assuming underwriters are already compliant with the 2012 Guidance, there would be no implicit or explicit economic costs associated with clarifying this already-existing obligation in the 2012 Guidance.

V. Effect on Competition, Efficiency and Capital Formation

The MSRB believes that the draft amendments to the 2012 Guidance should improve the municipal securities market's operational efficiency by promoting consistency in underwriter's disclosures to issuers and ensuring transparency. At present, the MSRB is unable to quantitatively evaluate the magnitude of the efficiency gains or losses, but believes the benefits outweigh the costs. Additionally, the MSRB believes that the draft amendments should also reduce confusion and risk to both underwriters and issuers and allow issuers to make more informed financing decisions and risk assessments. Therefore, the draft amendments to the 2012 Guidance should improve capital formation.

Additionally, since the Amended Guidance would be applicable to all underwriters, it should not have any impact on market competition.

Request for Comment

The MSRB seeks public comment on the foregoing and following questions, as well as on any other topic relevant to the 2012 Guidance or this request. The MSRB particularly welcomes statistical, empirical and other data from commenters that may support their views and/or support or refute the views, assumptions or issues raised in this Request for Comment.

1) Would any of the draft amendments have a negative impact on issuers?

[23] Allen, Arthur and Donna Dudney, "Does the Quality of Financial Advice Affect Prices?" *The Financial Review* 45, 2010.

2) Are there other relevant baselines the MSRB should consider when evaluating the economic impact of the draft amendments?

3) What, if any, would be the costs or burdens, direct, indirect, or inadvertent, of complying with the Amended Guidance? Are there data or other evidence, including studies or research, that support commenters' cost or burden estimates?

4) If the draft amendments were adopted, what would be the likely effects on competition, efficiency and capital formation?

5) Would three months from the date of publication of the Amended Guidance be sufficient time for dealers to implement any changes to policies, procedures and/or systems to comply with the new requirements?

November 16, 2018

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Text of Draft Amendments*

INTERPRETIVE NOTICE CONCERNING THE APPLICATION OF MSRB RULE G-17 TO UNDERWRITERS OF MUNICIPAL SECURITIES – [August 2, 2012]<u>Date of Issuance to Be Specified</u>

Under Rule G-17 of the Municipal Securities Rulemaking Board ([the "]MSRB["]), brokers, dealers, and municipal securities dealers (<u>collectively, </u>"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").

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* Underlining indicates new language; strikethrough denotes deletions.

[1] The term "municipal entity" is defined by Section 15B(e)(8) of the Securities Exchange Act <u>of 1934 </u>(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."

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 [is]provided[ing] additional interpretive guidance that addressed[s] how Rule G-17 applies to dealers acting in the capacity of underwriters in the municipal securities transactions described below.[4]

This interpretive notice supersedes the MSRB's interpretive guidance, dated August 2, 2012, concerning the application of Rule G-17 to underwriters of municipal securities, as well the related implementation guidance, dated July 18, 2012, and frequently-asked questions (FAQs), dated March 25, 2013 (collectively, the "prior guidance").[5] The prior guidance will remain in effect with respect to underwriting engagements commencing prior to the date which is three months after the date of publication of this notice. Underwriters will be required to comply with the amended requirements for all of their underwriting engagements beginning on or after that date. For purposes of this notice, an underwriting engagement is considered to have begun at the time the first disclosure requirement is triggered (*i.e.*, the earliest stages of the underwriter's relationship with the issuer with respect to an issue).

Applicability of the Notice

Except where a competitive underwriting is specifically mentioned, this notice applies to negotiated underwritings only.[6] Furthermore, it does not apply to selling group members.

This notice applies not only to primary offerings of municipal bonds and notes 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. This notice also applies to a primary offering 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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[2] *See* Reminder Notice on Fair Practice Duties to Issuers of Municipal Securities, MSRB Notice 2009-54 (Sept.[ember] 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).

[4] *See* Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Aug. 2, 2012).

[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 its 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. 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 they meet such fair-practice obligations, in light of their 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[4][7] of dealers, they are subject to the same protections under MSRB rules, including Rule G-17, that apply to other customers.[5][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. 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 the Underwriter/Conflicts of Interest

In a negotiated underwriting, the underwriter'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 an issuance

[7] MSRB Rule D-9 defines the term "customer" as follows: "Except as otherwise specifically provided by rule of the [Board][MSRB], 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 (Sept.[ember] 20, 2010).

of municipal securities and to identify, with respect to that specific issuance, all of its actual material conflicts of interest and [or]potential material conflicts of interest[with respect to such issuance].[9]

Disclosures Concerning the Underwriter's Role. The underwriter 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;[10]

(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;[11]

(iv) 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

(v) 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.[12]

The underwriter also must not recommend that the issuer not retain a municipal advisor. In addition, the underwriter may not discourage the issuer from using a municipal advisor or otherwise imply that the

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[9] Except for a syndicate manager making disclosures on behalf of other syndicate members (as described herein), underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction.

[10] In a private placement where a dealer acting as placement agent takes on a true agency role with the issuer and does not take a principal position (including not taking a "riskless principal" position) in the securities being placed, the disclosure relating to an "arm's length" relationship would be inapplicable and may be omitted due to the agent-principal relationship between the dealer and issuer that normally gives rise to state law obligations – whether termed as a fiduciary or other obligation of trust. *See* Exchange Act Rel. 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, a fiduciary relationship with the issuer. In such cases, it would also be appropriate for the underwriter to omit disclosures inapplicable as a result of such relationship. Dealers exercising an option to omit such disclosure should understand that they are effectively acknowledging the existence of a fiduciary responsibility on behalf of the issuer.

[11] *Id.*

[12] 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, the dealer would not be required to disclose its role with regard to the review of an official statement.

hiring of a municipal advisor would be redundant because the underwriter can provide the same services that a municipal advisor would.

Disclosure Concerning the Underwriter's Compensation. The underwriter must disclose to the issuer whether its underwriting compensation will be contingent on the closing of a transaction. It 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 underwriter to recommend a transaction that [it] is unnecessary or to recommend that the size of the transaction be larger than is necessary. This disclosure and the disclosures concerning the underwriter's role, noted above, constitute standard disclosures that all underwriters must make to their issuer clients (the "standard disclosures"). If a dealer underwrites an issuer's offering with an alternative compensation structure that is not contingent on the transaction closing or the size of the transaction, the dealer would need to indicate that the standard disclosure on underwriter compensation does not apply and explain the alternative structure to the extent that such alternative structure also presents a conflict of interest.

Other Conflicts Disclosures. The underwriter must also disclose, when and if applicable, other dealer-specific [potential or]actual and potential material conflicts of interest ("dealer-specific disclosures"),[13] including, but not limited to, the following:

(i) any payments described below under "Conflicts of Interest/[ ]Payments to or from Third Parties";[14]

(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 Issuer").[15]

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

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[13] A potential material conflict of interest exists and is required to be disclosed if, but only if, it is reasonably foreseeable to mature into an actual material conflict of interest during the course of the transaction between the issuer and the underwriter.

[14] The third-party payments to which the disclosure requirement would apply are those that give rise to actual or potential material conflicts of interest and typically would not apply to third-party arrangements for products and services of the type that are routinely entered into in the normal course of business, so long as any specific routine arrangement does not give rise to an actual or potential conflict of interest.

[15] The specific requirement with respect to complex financings does not obviate the requirement 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.

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 of disclosures.

To promote consistent and complete disclosure to issuers when there is an underwriting syndicate, while reducing the likelihood of issuers receiving multiple duplicative disclosures on the same matters in potentially inconsistent manners, [D]the standard disclosures [concerning the role of the underwriter]and [the underwriter's compensation] transaction-specific disclosures (as defined herein) [may]must be made by a syndicate manager on behalf of other syndicate members.[16] The standard and transaction-specific disclosures will not vary from dealer to dealer with respect to a particular transaction.

[Other]Notwithstanding the foregoing, each underwriter in the syndicate has a duty to [disclose]provide all of its dealer-specific [conflicts of interest]disclosures to the issuer[disclosures must be made by the particular underwriters subject to such conflicts]. 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, underwriters are reminded that 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 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. If provided within the same document as the dealer-specific disclosures, the standard disclosures must be identified clearly as such and provided apart from dealer-specific disclosures (*e.g.*, in an appendix).

Disclosures must be made in plain English (*i.e.*, in a manner designed to make clear to such official the subject matter of such disclosures and their implications for the issuer). The standard 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). The [O]other standard 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]Dealer-specific [conflicts] disclosures must be made at the

[16] When there is an underwriting syndicate, the syndicate manager would have sole responsibility for providing the standard 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 light of, and consistent with, the obligations placed on the syndicate manager when there is an underwriting syndicate, only the syndicate manager must maintain and preserve records of the standard and transaction-specific disclosures made on behalf of the syndicate in accordance with MSRB rules.

same time, except with regard to conflicts discovered or arising after the underwriter has been engaged. For example, an actual or potential material conflict of interest 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 (including a syndicate manager, when there is an underwriting syndicate) 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.[17]

As an alternative to providing the standard disclosures on a transaction-by-transaction basis, underwriters (including a syndicate manager, when there is an underwriting syndicate) may provide the standard disclosures to an issuer one time and then subsequently provide them by referring to and reconfirming those initial standard disclosures, unless the issuer requests that the standard disclosures be made on a transaction-by-transaction basis and subject to the obligations to amend existing, or provide new, standard disclosures.[18] Specifically, when an underwriter engages in multiple negotiated underwritings with a particular issuer, the underwriter may provide the standard disclosures in accordance with the foregoing timing requirements as part of the first underwriting. The underwriter must then refer to and reconfirm the standard disclosures for any subsequent underwritings, also consistent with those same requirements vis-à-vis the subsequent offerings. The reference back and reconfirmation must clearly identify when the initial standard disclosures were made previously and make them readily accessible to the issuer in a hard copy or electronic format (*e.g.*, including a functional hyperlink to the original standard disclosures).[19] Additionally, the sole underwriter or syndicate manager (when there is an underwriting syndicate) must retain an original copy of the standard disclosures for the period of time required by MSRB Rule G-9, on preservation of records,[20] but that retention period would reset each time the original

[17] Not all transactions proceed along the same timeline or pathway. The timeframes should be viewed in light of the overarching goals of Rule G-17 and the purposes that required disclosures are intended to serve as described herein. That is, the issuer (i) has clarity throughout all substantive stages of a financing regarding the roles of its professionals, (ii) is aware of conflicts of interest promptly after they arise and well before it effectively becomes fully committed (either formally or due to having already expended substantial time and effort) to completing the transaction with the underwriter, and (iii) has the information required to be disclosed with sufficient time to take such information into consideration before making certain key decisions on the financing.

[18] If the initial standard disclosures need to be amended when there is an underwriting syndicate, the syndicate manager may deliver such amended standard disclosures and all syndicate members may subsequently reference and reconfirm the amended standard disclosures.

[19] An underwriter that previously engaged an issuer as part of a syndicate, for which a syndicate manager provided the standard disclosures on behalf of the other syndicate members, would be able to reference back to and reconfirm the standard disclosures provided by the syndicate manager, as long as that underwriter otherwise satisfies any applicable requirements, including to make the initial standard disclosures readily accessible to the issuer. In this scenario, the standard disclosures from a prior offering with the issuer referenced and reconfirmed by the syndicate manager would be provided on behalf of, and operative for, all of the syndicate members, even if they were not a part of the syndicate for the prior offering.

[20] Rule G-9(b)(viii)(C) requires "all written and electronic communications received and sent, including inter-office memoranda, relating to the conduct of the activities of such municipal securities broker or municipal securities dealer with respect to

standard disclosures are referenced and reconfirmed.[21] Underwriters may always choose to provide the standard disclosures on a transaction-by-transaction basis. As indicated above, when there is an underwriting syndicate, the syndicate manager must provide the standard and transaction-specific disclosures on behalf of the syndicate.

Acknowledgement of Disclosures. The sole underwriter or syndicate manager (when there is an underwriting syndicate) must attempt to receive written acknowledgement, ([other than]including, for example, by automatic e-mail receipt) by the official of the issuer identified by the issuer as the primary contact for the issuer, of receipt of the foregoing disclosures.[22] This notice does not specify the particular form of acknowledgement. Accordingly, an underwriter may proceed with a receipt of acknowledgment 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 may proceed with the engagement after documenting with specificity why it was unable to obtain such written acknowledgement. Additionally, the sole underwriter or syndicate manager must be able to produce evidence that the required disclosures were delivered with sufficient time for evaluation by the issuer before proceeding with the transaction. An issuer's written acknowledgment 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

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municipal securities" to be retained for not less than four years (or three years for each dealer that is a bank or subsidiary or department or division of a bank).

[21] For example, if an underwriter, which is not a bank or subsidiary or department or division of a bank, provided an issuer with its original standard disclosures in a letter on June 14, 2020, Rule G-9 would require the underwriter to retain that original letter until June 14, 2024. However, if the underwriter engages with the same issuer in a subsequent underwriting, and refers back to and reconfirms that June 14, 2020, letter on February 21, 2024, a new retention obligation would be triggered and the underwriter would need to retain the original letter until February 21, 2028. *See* note 16 *supra*.

[22] When there is an underwriting syndicate, only the syndicate manager, as the dealer delivering the standard and transaction-specific disclosures to the issuer, would be required to obtain the acknowledgment of the issuer on behalf of the syndicate. Absent red flags, and subject to the 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 (including the syndicate manager, on behalf of the entire syndicate, as applicable) 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 the required disclosures.

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.

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. The less certain an underwriter is of the validity of underlying assumptions, the more cautious it should be in using such assumptions and the more important it will be that the underwriter disclose to the issuer the degree and nature of any uncertainties arising from the potential for such assumptions not being valid. 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.

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.[23] 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 knowledge or experience with such structures, the underwriter (including a syndicate manager, when there is an underwriting syndicate) must provide disclosures on the material aspects of such structures that it recommends (the "transaction-specific disclosures").[24]

[23] 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.

[24] For purposes of determining when an underwriter recommends a financing structure, the MSRB's guidance on the meaning of "recommendation" under MSRB Rule G-42, on duties of non-solicitor municipal advisors is applicable. *See* FAQs Regarding MSRB Rule G-42 and Making Recommendations.

However, 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 financing in its totality, because the financing is structured in a unique, atypical, or otherwise complex manner (a “complex municipal securities financing”).[6]25 Examples of complex municipal securities financings include variable rate demand obligations ([”]VRDOs[”]) and financings involving derivatives (such as swaps). An underwriter (including a syndicate manager, when there is an underwriting syndicate) 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 transaction-specific disclosures than those that may be required in the case of routine financing structures.[26] The sole underwriter or syndicate manager must 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.[7]27 It must also disclose any incentives for the underwriter to recommend the

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[25] If a complex municipal securities financing consists of an otherwise routine financing structure that incorporates a unique, atypical or complex element 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.

[26] Sole underwriters and syndicate managers (when there is an underwriting syndicate) must make reasonable judgments regarding 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. 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* note 16 *supra*.

[27] For example, an underwriter (including a syndicate manager, when there is an underwriting syndicate) that 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]a sole underwriter recommends that the issuer swap the floating rate interest payments on the VRDOs to fixed rate payments under a 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 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 affiliated 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 the 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. The MSRB notes that dealers that recommend swaps or security-based swaps to municipal entities may also be subject to rules of the Commodity Futures Trading Commission or those of the Securities and Exchange Commission ([”]SEC[”]).

complex municipal securities financing and other associated material conflicts of interest.[8][28] 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, and financial ability to bear the risks of the recommended financing, in each case based on the reasonable belief of the underwriter (including a syndicate manager, when there is an underwriting syndicate).[9][29] Among other factors, a sole underwriter or syndicate manager (when there is an underwriting syndicate) may consider the issuer's retention of an IRMA, who can help the issuer evaluate underwriter recommendations and identify potential conflicts of interest, when assessing the issuer's level of knowledge and experience with the recommended financing structure, which may support a determination by the sole underwriter or syndicate manager that a more limited disclosure would satisfy the obligation for that transaction. The level of transaction-specific disclosure to be provided to a particular issuer also can vary over time. To the extent that an issuer gains experience with a complex financing structure or product over the course of multiple new issues utilizing that structure or product, the level of transaction-specific disclosure required to be provided to the issuer with respect to such complex financing structure or product would likely be reduced over time. If an issuer that previously employed a seasoned professional in connection with its complex financings who has been replaced by personnel with little experience, knowledge or training serving in the relevant responsible position or in undertaking such complex financings, the level of transaction-specific disclosure required to be provided to the issuer with respect to such complex financing structure or product would likely increase. In all events, the sole underwriter or syndicate manager must disclose any incentives for the sole underwriter or the syndicate to recommend the complex municipal securities financing and other associated conflicts of interest.

The transaction-specific disclosures [described in this section of this notice]must be made in writing to an official of the issuer whom the underwriter (including a syndicate manager, when there is an underwriting syndicate) reasonably believes has the authority to bind the issuer by contract with the underwriter(s) (i) in sufficient time before the execution of a contract with the underwriter(s) to allow the official to evaluate the recommendation and (ii) in a manner designed to make clear to such official the subject matter of such disclosures and their implications for the issuer.[30] Unless directed otherwise by an issuer, an underwriter (including a syndicate manager, when there is an underwriting syndicate) may use an omnibus set of disclosures containing detailed descriptions of the material elements of a routine financing or the material

[28] For example, a conflict of interest may exist when [the]a sole underwriter is also the provider of a swap used by an issuer to hedge a municipal securities offering or when the 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.

[29] 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.

[30] Absent red flags, an underwriter or syndicate manager (when there is an underwriting syndicate) may reasonably rely on a written representation from an issuer official in, among other things, the issuer's request for proposals that he or she has the ability to bind the issuer by contract with the underwriter(s). Moreover, the underwriter or syndicate manager may reasonably rely on a written statement from such person that he or she is not a party to a disclosed conflict.

financial characteristics and risks for various complex municipal securities financing structures or products; however, the underwriter or syndicate manager must identify with sufficient clarity and ease of review the applicable portions of such omnibus document to a particular transaction. The underwriter or syndicate manager also must make an independent assessment that such disclosures are appropriately tailored to the issuer's level of sophistication.

The disclosures concerning a complex municipal securities financing must address the specific elements of the financing, rather than being general in nature. An underwriter (including a syndicate manager, when there is an underwriting syndicate) cannot satisfy this requirement by providing an issuer a single document setting out general descriptions of the various complex municipal securities financing structures 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. An underwriter can create, in advance, individualized descriptions, with appropriate levels of detail, of the material financial characteristics and risks for each of the various complex municipal securities financing structures or products (including any typical variations) it may recommend from time to time to its various issuer clients, with such standardized descriptions serving as the base for more particularized disclosure for the specific complex financing the underwriter is recommending to a particular issuer.[31] The 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.[32]

If the underwriter (including a syndicate manager, when there is an underwriting syndicate) does not reasonably believe that the official to whom the disclosures are addressed is capable of independently evaluating the disclosures, the underwriter or syndicate manager must make additional efforts reasonably designed to inform the official or its employees or agent.

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.[10][33] These documents are critical to the

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[31] Page after page of complex legal jargon in small print would not satisfy this requirement.

[32] Underwriters should be able to leverage such materials for purposes of assisting issuers to more efficiently prepare disclosures to the public included in official statements in a manner that promotes more consistent marketplace disclosure of a particular financing type from issue to issue, and also should be able to leverage the materials for internal training and risk management purposes.

[33] 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 Rel. No. [34-]26100 (Sept. 22, 1988) (proposing Exchange Act Rule 15c2-12) at text following note 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 [SEC]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

municipal securities transaction, 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 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.[[11]34] 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)[[12]35] 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,

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market disclosure and has a reasonable basis for relying on the accuracy of the issuer's ongoing disclosure representations. [SEC]Exchange Act Rel. No. [34-]34961 (Nov. 10, 1994) (adopting continuing disclosure provisions of Exchange Act Rule 15c2-12) at text following note 52.

[34] 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. *See also* "Retail Order Periods" herein.

[35] 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."

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.[13][36]

Conflicts of Interest

Payments to or from Third Parties. In certain cases, compensation received by the underwriter from third parties, such as the providers of derivatives and investments (including affiliates of the 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 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 the underwriter's obligation to the issuer under Rule G-17.[14][37] 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.[38] Such arrangements could also constitute a violation of Rule G25(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.

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[36] *See* 1997 Interpretation.

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

[38] 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 without the existence of a formal written agreement.

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, 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.[15][39] 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[16][40] 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,

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[39] *See* MSRB Interpretation on Priority of Orders for Securities in a Primary Offering under Rule G17, 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).

[40] 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).

issuer personnel during the municipal bond issuance process.[17]41 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.[18]42

[August 2, 2012]Date of Issuance to Be Specified

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41 *See* MSRB Rule G-20 Interpretation — Dealer Payments in Connection With the Municipal Securities Issuance Process, MSRB interpretation of January 29, 2007, reprinted in MSRB Rule Book.

42 *See* In the Matter of RBC Capital Markets Corporation, [SEC]Exchange Act 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 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).

ALPHABETICAL LIST OF COMMENT LETTERS ON NOTICE 2018-29 (NOVEMBER 16, 2018)

1. Bond Dealers of America: Letter from Mike Nicholas, Chief Executive Officer, dated January 15, 2019

2. City of San Diego: Letter

3. Government Finance Officers Association: Letter from Emily S. Brock, Director, Federal Liaison Center, dated January 15, 2019

4. National Association of Municipal Advisors: Letter from Susan Gaffney, Executive Director, dated January 15, 2019

5. Securities Industry and Financial Markets Association: Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, and Bernard V. Canepa, Vice President and Assistant General Counsel, dated January 15, 2019

EXHIBIT 2f

1909 K Street NW • Suite 510
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January 15, 2019

Submitted Electronically

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

RE: Request for Comment on Draft Amendments to 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities

Dear Mr. Smith:

On behalf of the Bond Dealers of America ("BDA"), I am pleased to submit this letter in response to the MSRB's Notice 2018-29 (the "Notice"): Request for Comment on Draft Amendments (the "Draft Amendments") to 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities. BDA is the only DC-based group representing the interests of securities dealers and banks exclusively focused on the U.S. fixed income markets. We welcome this opportunity to present our comments.

The BDA believes that the Draft Amendments contain several unnecessary inclusions, which can make compliance with the Draft Amendments more burdensome.

The Draft Amendments include some unnecessary additions to existing statements that were clear on their own. Our members are concerned that, in the context of an examination, those unnecessary additions will be construed as imposing new compliance expectations as opposed to clarifications of existing requirements, which we believe is the MSRB's intent. Here are three examples:

- In the new paragraph at the top of page 35 of the Notice[1], the BDA believes that this new language is not necessary, is fully encompassed in existing

[1] The following is the new paragraph: "The fair practice duties outlined in this notice are those duties that a dealer owes to a municipal entity when the dealer underwrites its 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. What actions are considered fair will, of necessity, be dependent on the nature of the relationship

application of Rule G-17, is outside of the scope of the disclosures and the MSRB should not include it.

- In the last paragraph on page 36 of the Notice[2], the Draft Amendments add additional sentence to the effect that an underwriter may not discourage the issuer from retaining a municipal advisor. The BDA believes that the additional sentence is entirely covered by the existing sentence that precedes the new sentence. Any underwriter who discourages an issuer from retaining a municipal advisor for any reasons would be making already a prohibited recommendation to do so.

- In the new paragraph at the top of page 41 of the Notice[3], the BDA believes that all of this is already covered in the existing language. A dealer who does not make reasonable assumptions in its representations cannot have a reasonable basis for its representations.

While the BDA believes this text is unnecessary, dealers will still need to determine how to establish that they comply with the new statements. Our members are concerned that these additions will look differently in the context of an examination than what the MSRB intends. Accordingly, the BDA believes that the existing language sufficed and the additions in the Draft Amendments should be deleted.

The BDA believes that the MSRB should re-phrase new language on page 43 of the Notice.

On page 43 of the Notice, the Draft Amendments state that if less-sophisticated personnel of an issuer replaces more sophisticated personnel, then the "level of transaction-specific disclosure…would likely increase." The BDA believes that the language should state that an underwriter should take into consideration changes in sophistication of an issuer when determining the level of transaction-specific disclosures. In the abstract, there is no way to determine whether the level should increase or not because it will depend on many factors.

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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 they meet such fair practice obligations, in light of their relationship with such other participants and their particular roles."

2 The following is the new language: "In addition, the underwriter may not discourage the issuer from using a municipal advisor or otherwise imply that the hiring of a municipal advisor would be redundant because the underwriter can provide the same services that a municipal advisor would."

3 The following is the new language: "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. The less certain an underwriter is of the validity of underlying assumptions, the more cautious it should be in using such assumptions and the more important it will be that the underwriter disclose to the issuer the degree and nature of any uncertainties arising from the potential for such assumptions not being valid. 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."

The BDA does not believe that the MSRB's approach to disclosures by co-managers will materially reduce the number of disclosures.

The Draft Amendments continue to require dealers who serve as co-managers to provide "dealer-specific" conflicts of interest. As a practical matter, conflicts of interest tend to be specific to dealers in that each dealer has specific arrangements that create the conflict. As a practical matter, though, the role of co-manager does not entail the kind of active discussions with an issuer to merit disclosure by all co-managers of their specific conflicts. The BDA believes that the disclosures from the senior manager are sufficient to inform issuers of the various matters they discuss, including conflicts. In the end, the if co-managers are required to deliver these disclosures, it will result in a roughly the same number of disclosures to issuers as currently is the case.

The BDA believes that the MSRB should clarify the timing of a syndicate manager's delivery of disclosures.

The Draft Amendments clarify that only a syndicate manager is required to deliver the standard disclosures and transaction-specific disclosures, but the Draft Amendments do not clarify that that those disclosures can be delivered earlier than the time when a syndicate is formed. Frequently, an underwriter that later becomes a syndicate manager begins its discussions with an issuer either as a sole manager or as an underwriter without clarity of whether a syndicate will be formed. In these instances, the underwriter may deliver the standard disclosures and transaction-specific disclosures well before a syndicate is formed. The Draft Amendments should clarify that standard disclosures and transaction-specific disclosures delivered by a syndicate manager can be delivered before a syndicate is formed and that the syndicate manager is not required to deliver new disclosures after a syndicate is formed or new syndicate members are added.

* * *

Thank you for the opportunity to provide these comments.

Sincerely,

Mike Nicholas
Chief Executive Officer

City of San Diego Response to:

Request for Comment on Draft Amendments to 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Notice 2018-29)

I - Nature, Timing and Manner of Disclosures of Conflicts of Interest

B. Potential Material Conflicts of Interest

It is reasonable to limit what constitutes a potential material conflict of interest to that which is reasonably foreseeable to mature into an actual conflict of interest. Inclusion of all potential conflicts without regard to likelihood of occurrence could make it difficult to discern real areas of concern.

A greater likelihood than "reasonable foreseeability" should not be set. Such a standard could eliminate the disclosure of some potential conflicts of interest that have a reasonable chance of occurring, even if they are not highly likely to occur.

The obligation requiring underwriters to provide disclosures of actual material conflicts of interest discovered or arising after the underwriter is engaged does not eliminate or reduce the need to disclose potential material conflicts of interest. It is important for an issuer to be apprised of potential material conflicts of interest up front, so the issuer can properly evaluate the potential conflicts and determine if it is prudent to move forward.

C. Syndicate Manager Disclosure of Standard and Transaction-Specific Disclosures on Behalf of Syndicate Members

Each syndicate member should be responsible for delivering the standard and transaction specific disclosures. Even for a frequent issuer, receipt of disclosures from each syndicate member is manageable. As such, all syndicate members should continue to be required to obtain acknowledgement of receipt from the issuer. The ability to handle this electronically should minimize any burdens. The standard and transaction specific disclosures should be bifurcated from the dealer specific disclosures to aide in the review of information.

D. Optional Alternative Manner of Providing Standard Disclosures

While the alternative manner could reduce the volume of disclosures, it may be confusing, particularly when a syndicate member in one transaction becomes a syndicate manager in a subsequent transaction and refers back to the disclosure provided by the syndicate manager in the prior transaction. It is most straight forward to require disclosures on a transaction by transaction basis. Even for a frequent issuer, receipt of disclosures from each syndicate member, and by transaction, is manageable.

E. Clear and Separate Identification of Disclosures

Many underwriters already separate dealer and transaction specific disclosures in the same document. The separation of the standard, dealer-specific and transaction specific disclosures, when they are provided within the same document, would not create challenges when the issuer reviews them. Conversely, the separation would aide in the review of the information.

G. Plain English

Many underwriters present disclosures in a clear manner when they are engaged for non-complex municipal securities financings. In these cases, some underwriters explicitly state in the disclosures that they are not recommending a complex municipal securities financing to the issuer. Such a statement should be required under these circumstances. Similarly, if the subject matter is so complex that it cannot be explained in plain English, that should be explicitly stated within the disclosures about the financing. Such a statement would alert an issuer that it needs to ask more questions, allows the issuer to consult with its municipal advisor or counsel, and may be important in the issuer's determination of whether it should recommend the transaction to its legislative body and proceed with execution.

II – Issuer Acknowledgement of Receipt of Underwriter Disclosures

The issuer should designate its primary contact for receipt of the underwriter disclosures. The primary contact should be someone with financial decision-making authority who leads the issuer's financing efforts. Delivery of disclosures by e-mail and confirmation via a read receipt should be permitted so long as the underwriter has delivered the disclosures to the issuer designated primary contact.

IV – Underwriter Discouragement of the Use of a Municipal Advisor

Since an issuer (particularly one that is not in the market often) could experience a situation where an underwriter discourages the issuer from engaging a municipal advisor, the strengthened language under the Amended Guidance is important. The draft amendment, by explicitly stating that an underwriter may not discourage an issuer from using a municipal advisor or otherwise imply that the hiring of a municipal advisor would be redundant because the underwriter can provide the same services that a municipal advisor would, should address the issue. In addition, the standard disclosures should include an affirmative statement that the issuer may retain a municipal advisor.

Government Finance Officers Association
660 North Capitol Street, Suite 410
Washington, D.C. 20001 202.393.8467

January 15, 2019

Mr. Ronald Smith
Corporate Secretary
Municipal Securities Rulemaking Board 1300 I Street, N.W.
Washington, D.C. 20005

Re: MSRB Regulatory Notice 2018-29

Dear Mr. Smith:

The Government Finance Officers Associations ("GFOA") appreciates the opportunity to comment on the Municipal Securities Rulemaking Board's (MSRB) proposal to address interpretive guidance, advisories and compliance resources. The GFOA represents nearly 20,000 state and local government finance professionals across the United States, many of whom issue municipal securities, and therefore is very interested in this rulemaking.

The GFOA welcomes the opportunity to comment on MSRB Notice 2018-29. GFOA has commented in the past on Rule G-17[1][2] and subsequent interpretative guidance, as the MSRB's work in this area is very important to municipal securities issuers. Rule G-17, in particular, is representative of MSRB rulemaking that is done to fulfill its mission to protect issuers.

As GFOA stated in its August 6, 2018 letter, the intent of the rulemaking must be to ensure that issuers are aware of conflicts that exist with their underwriting team, (and in particular, the representative underwriter) and risks associated with a financing. While the revised proposed guidance is a step forward in many areas – including separating standard from specific disclosures, eliminating the issuer opt out provision, and requiring plain English standards – other parts of the guidance are not as strong as they should be in order to equip issuers with proper awareness and adequate disclosures about transactions and their underwriter(s). Our comments primarily focus on sections that reference underwriter disclosures to issuers. Responses to specific questions are noted below.

<u>Clarity and communication of disclosures:</u> When determining clarity and communication of disclosures, standard disclosures should be discussed separately from specific transaction and underwriter disclosures.

<u>Timing and frequency of disclosures:</u> The MSRB's suggestion that disclosures be provided once and then referenced thereafter (see Section "D" page 7) is problematic. GFOA stated previously

[1] GFOA G-17 2018 Comment Letter referenced throughout: http://msrb.org/RFC/2018-10/GFOA.pdf

[2] GFOA G-17 2011 Comment Letter referenced throughout: https://www.sec.gov/comments/sr-msrb-2011-09/msrb201109-22.pdf

that some boilerplate/standard disclosures could be provided annually for some frequent issuers; however, we believe that this practice may diminish the import of the actual matter being disclosed. The revised guidance should be changed to mandate that disclosures are provided to issuers for each transaction, to ensure that the issuers are aware of the fair dealing requirement for each issuance of securities. There may be some instances where annual boilerplate disclosures for frequent issuers may make sense, but that should not be applied across the board nor as the MSRB suggests that disclosures may be provided once and then referenced in future transactions. Transaction specific and material underwriter conflicts of interest should be provided for each issuance of securities.

Types of transaction-specific disclosures: The types of transaction specific disclosures provided to issuers should include key information about the risks of a transaction. The MSRB should not formulate rulemaking that could dilute the information that an underwriter provides to an issuer about the material risks within a transaction. This calls into question whether the revised G-42 standard cited in the Notice is the most appropriate when underwriters recommend a financing structure to issuers. The "two-prong analysis, generally consisting of a call to action to proceed with a specific recommended financing structure" standard could prevent some issuers from receiving the right information they need to determine what financing structures are best for their government.

Conflicts of interest and "reasonably foreseeable" conflicts of interest: The material conflicts of interest and "reasonably foreseeable" conflicts of interest standard should be used by the underwriter. Including "all potential" risks could not only increase the disclosures in magnitude but also it could diminish the meaningful inclusions that issuers need to know. To restate, it is important for the key conflicts to be reported in a separate document from standard disclosures. Underwriters should also continue to have an "ongoing obligation" to provide material disclosures after the execution of the contract and continuing through the underwriting period.

Underwriter discouragement of the use of a Municipal Advisor: The proposed language helps to make sure that underwriters avoid telling issuers not to hire a municipal advisor. However, per our comments in 2018 and 2011, we suggest that MSRB also include a requirement that underwriters affirmatively state that issuers may choose to hire a municipal advisor to represent their interests in a transaction.

Thank you again for the opportunity to comment. Please feel free to contact me at ebrock@gfoa.org or (202) 393-8467 if you have any questions on or would like to discuss any of the information provided in this letter.

Sincerely,

Emily Swenson Brock
Director, Federal Liaison Center

January 15, 2019

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1300 I Street, NW Suite 1100
Washington, DC 20005

RE: MSRB Notice 2018-29

Dear Mr. Smith:

The National Association of Municipal Advisors ("NAMA") appreciates the opportunity to comment on amendments to the 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities ("Notice"). NAMA represents independent municipal advisory firms, and individual municipal advisors ("MA") from around the country, and our members are interested in the guidance that the MSRB develops for regulated entities.

We appreciate the work that the MSRB has done in seeking a balance between curtailing the length of MSRB Rule G-17 underwriter disclosures to better meet the underpinning objectives and be provided in plain English, while attempting to enhance the effectiveness of those disclosures. The tenet for these changes should be what can be done to continue to "protect issuers" and ensuring that key information about a transaction is clearly and promptly provided so that the issuer can make fully informed decision(s) about key aspects of a transaction.

As discussed below there are many proposed changes in the Notice that are helpful to the marketplace as a whole. However, a key area of concern continues to be related to the types of underwriter disclosures that must be provided. In the Notice the MSRB has proposed setting a standard for underwriter disclosures based on a municipal advisor standard which does not adequately balance the differing duties of the underwriter. We oppose such action, and would note that the basis for which the G-42 recommendation standard for municipal advisors (professionals with a fiduciary duty to the issuer) is not an appropriate basis for the types of G-17 transaction specific disclosures that an underwriter should be providing to an issuer. The MSRB should work to ensure that transaction specific and actual conflicts of interest are provided clearly to issuers, without sacrificing delivery of key information to issuers about the risks of various aspects of a transaction and actual conflicts related to the underwriter.

Underwriter Disclosures

A major concern we have with the Notice, is that it could lead to important disclosures about transaction risks not being made to issuers. The revised Notice sets the standard of what underwriters must disclose regarding underwriter recommendations and sets that threshold as the same as a municipal advisor's MSRB Rule G-42 recommendation standard.

We have two main concerns with the revised Notice:

1. Issuers may not receive key information. It appears as though the MSRB is recommending new language be included in the Interpretative Notice that could lead to key aspects of complex financing structures not being provided to an issuer even when recommended by an underwriter. Under Rule G-42, the recommendation standard for municipal advisors is set at whether the client should engage in a municipal securities transaction. If that threshold was applied to underwriter recommendations, key pieces of a transaction (e.g. interest rate modes, various types of credit enhancement, redemption provisions) would not result in disclosures from the underwriter, yet may be a significant enough of a term of a transaction that an issuer should be made aware of the risks. This new standard for disclosures regarding underwriter recommendations appears to be in opposition to MSRB's statutory mandate to protect issuers. We would oppose such action, and ask that the MSRB have underwriters disclose appropriate transaction information and risks for the client.

Although there are positive changes in the Notice that bifurcate standard disclosures from transaction specific disclosures, limiting the types of transition specific disclosures received by the issuer severely undercuts any positive advances made to make these disclosures more understandable to issuers.

2. The standard developed by the MSRB for a G-42 Recommendation by a municipal advisor is not the right standard for a G-17 disclosure standard for a broker-dealer. Amongst other things, it is important to note that making a G-42 Recommendation triggers the requirement for an MA to make a suitability determination as well as other requirements in the context of the already higher duties they owe to municipal entities and obligated persons. This same recommendation standard is inappropriate for a mere disclosure requirement by an underwriter with only a fair dealing obligation. Applying the G-42 recommendations standard to underwriter G-17 disclosures creates a false regulatory parity that is not appropriate given the MSRB's mission to protect issuers and the very different roles and duties that municipal advisors and underwriters have to issuers. The MSRB has already determined that, despite the higher duty they owe to their clients, if a municipal advisor goes so far as to make a G-42 Recommendation they must also determine that the transaction or product is suitable. But, for advice and recommendations that do not rise to the level of a G-42 Recommendation, a municipal advisor still must put the interests of the municipal advisor client ahead of its own and is still subject to a duty of care that requires it to, amongst other things, "make a reasonable inquiry as to the facts that are relevant to a client's determination as to whether to proceed with a course of action or that form the basis for any advice provided to the client." The MSRB imposed all of these requirements citing its statutory mandate to protect issuers. Now, the MSRB appears to be saying that an issuer is equally well-protected, including in cases where not represented by an MA (of note - 28% of transactions in 2018 were done without a municipal advisor[1]) if an underwriter merely discloses risks associated with a G-42 recommendation. The underwriter does not have to determine that the transaction is suitable. The infrequent issuer receives no disclosures at all with respect to interest rate modes, credit enhancement or various other complex aspects of a transaction that an underwriter might recommend as long as the underwriter did not recommend the actual transaction. The MSRB comes to the illogical view that issuers need more protection from regulated persons that already owe them a fiduciary duty than they do from regulated persons with lesser obligations.

Bifurcating Standard Disclosures From Underwriter and Transaction Specific Disclosures

The MSRB is proposing to permit sole underwriters or syndicate managers (when there is a syndicate) to provide standard disclosures to an issuer one time and then to provide them subsequently by reference to and reconfirmation of those initial standard disclosures, in writing, unless the issuer requests that the standard disclosures be made on a transaction-by-transaction basis.

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[1] Bloomberg data

NAMA supports separating standard disclosures from transaction specific disclosures as a way to highlight key items to clients. However, as noted above we are concerned with using the G-42 recommendation threshold as the determining factor as to what information would have to be disclosed. The transaction specific disclosures should be provided up-front and ahead of standard disclosures so that they are not diluted and receive the attention of the issuer.

Providing Disclosures to Issuers

Regarding the frequency of underwriter disclosures, NAMA opposes action that would not provide the disclosures for each transaction, and believes that the Notice should not allow underwriters to provide disclosures and then in future transactions reference those disclosures. There could be any number of changes both with the underwriter and with the issuer that warrant disclosures for each transaction, the least of which is to provide information to issuers to ensure their protection in every transaction.

Underwriters Deterring Use of Municipal Advisors

The Notice updates the language to help ensure that underwriters do not deter the use of MAs by issuers. Our members are aware of instances where both underwriters and bond counsel directly deter the use of a municipal advisor or bond counsel dictates who the municipal advisor should be.

Other Items

NAMA is pleased that the Notice: does not permit the posting of disclosures on EMMA as satisfying the G-17 requirement; does not permit issuers to opt-out of receiving disclosures; would continue to mandate a form of acknowledgement from issuers that the disclosures are received, even through an e-mail return receipt; and that underwriter disclosures are to be provided in “plain English.”

Thank you for the opportunity to comment on these issues.

Sincerely,

Susan Gaffney
Executive Director

January 15, 2019

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

Re: MSRB Notice 2018-29: Request for Comment on Draft Amendments to 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities

Dear Mr. Smith,

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates this opportunity to respond to Notice 2018-29 (the "Request for Comment")[2] issued by the Municipal Securities Rulemaking Board (the "MSRB"), in which the MSRB seeks comment on draft amendments to the Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Aug. 2, 2012) (the "2012 Guidance")[3]. We refer in this letter to the 2012 Guidance, as amended, as the "Amended Guidance."

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[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] MSRB Notice 2018-29 (Nov. 16, 2018), http://www.msrb.org/~/media/Files/Regulatory-Notices/RFCs/2018-29.ashx??n=1.

[3] Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Aug. 2, 2012), http://msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-17.aspx?tab=2, and originally published in MSRB Notice 2012-25 (May 7, 2012). The 2012 Guidance was approved by the Securities and Exchange Commission (the "SEC") in Release No. 34-66927 (File No. SR-MSRB-2011-09) (May 4, 2012), 77 FR 27509 (May 10, 2012).

We support the MSRB's retrospective review[4] of the 2012 Guidance, and our comments below seek to ensure that the purpose of the review is fully realized. We appreciate that the MSRB has proposed adopting some of the suggestions we made in our comment letter[5] to the MSRB's Initial Request for Comment, including: 1) incorporating the practical considerations of MSRB Notice 2012-38 (July 18, 2012) (the "Implementation Guidance")[6] and MSRB Notice 2013-08 (Mar. 25, 2013) (the "FAQs")[7] into the Amended Guidance; 2) clarifying the applicability of MSRB Rule G-42's two-prong analysis to a recommendation for complex municipal financings; and 3) allowing for an automatic email return receipt as a means to evidence receipt of the underwriter disclosures.[8] These proposed amendments – along with a requirement that syndicate managers provide the standard disclosures on behalf of syndicate participants as well as the clarification that underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction – provide greater clarity and reduce unnecessary burdens.

SIFMA, however, believes that certain proposed amendments do not satisfy the goal of the retrospective review, that is to move the needle toward more efficient and effective disclosures that benefit issuers and underwriters alike. Any changes to the 2012 Guidance should address the perceived problem of the diminishing utility of increasingly duplicative and lengthy disclosures, not contribute to it. The 2012 Guidance should be amended in a way that reflects a more mature municipal securities market; recognizes that different business models exist, and a one-sized-fits-all approach does not work; reduces costs without impacting the benefits; and results ultimately in more efficient and effective disclosures for the benefit of all market participants.

Our comments below first focus on amendments proposed by the MSRB that we believe are beneficial or would be more beneficial with additional clarifications. We

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[4] As announced in MSRB Notice 2018-10, Request for Comment: Retrospective Review of 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (June 5, 2018), http://www.msrb.org/~/media/Files/Regulatory-Notices/RFCs/2018-10.ashx?la=en (the "Initial Request for Comment").

[5] Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, SIFMA, to Ronald W. Smith, Corporate Secretary, MSRB (Aug. 6, 2018), http://msrb.org/RFC/2018-10/SIFMA.pdf (the "Prior SIFMA Letter").

[6] MSRB Notice 2012-38 (July 18, 2012), http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2012/2012-38.aspx.

[7] MSRB Notice 2013-08 (Mar. 25, 2013), http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2013/2013-08.aspx.

[8] *Supra* note 2.

then turn to amendments proposed by the MSRB that we find problematic. We attach an appendix with answers to select questions posed by the MSRB.

Given the substantial operational changes that would need to be implemented from any amendments, SIFMA respectfully requests that underwriters be given, at a minimum, six (6) months from the date of SEC approval of the Amended Guidance to implement any changes. This would allow our members enough time to review and revise their policies and procedures and disclosure documents, communicate to and train their employees on the changes, and operationalize the requirements of the Amended Guidance.

1. Proposed Amendments or Clarifications that, if Adopted, would be Beneficial

a. Timing of the required disclosures

Although the MSRB has not requested comment on this particular point, we note that footnote 8 of the Request for Comment creates some confusion, as it states that an underwriting engagement would begin at the time the "first disclosure requirements" are triggered (i.e., at the earliest stages of the relationship between the underwriter and issuer with respect to an issue). In the 2012 Guidance itself, request for proposal ("RFP") responses and promotional materials are stated to be examples of the earliest stages of the relationship between issuer and underwriter. It is certainly contrary to the common understanding of the word "engagement" to state that the underwriter is engaged when it submits an RFP response or a pitch book. An underwriter is engaged when an issuer makes the decision to engage and so engages the underwriter. While the G-17 "arm's-length" disclosures are required to be made "at the earliest stages," as are the virtually identical G-23 disclosures,[9] the other G-17 disclosures are made no earlier than the point of engagement.[10] Footnote 8 is inconsistent with the text of the 2012 Guidance itself. This point should be clarified, as the proposed effective date of the changes turns on it.

b. Clear and Separate Identification of Disclosures

The MSRB proposed that underwriters would be required to clearly identify each category of disclosures and separate them (e.g., by placing the standard disclosures in an appendix or attachment). If the MSRB does not eliminate the need to disclose

[9] Guidance on the Prohibition of Underwriting Issues of Municipal Securities for which a Financial Advisory Relationship Exists Under Rule G-23 (Nov. 27, 2011), http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-23.aspx?tab=2.

[10] See paragraph 2 under "Timing and Manner of Disclosures" in the August 2, 2012 G-17 notice, *supra* note 3.

potential material conflicts of interest as we strongly believe it should, this separation of actual and non-standard disclosures is a reasonable proposal.

c. Disclosure on the Part of Parties Other than the Underwriter

SIFMA welcomes the MSRB's clarification that would not require underwriters to make any disclosures on the part of issuer personnel or any other parties to the transaction, except possibly for a syndicate manager to make certain disclosures on behalf of other syndicate members. We would find it particularly useful for the MSRB to provide examples of conflicts of other parties that would not need to be disclosed. For example, if a potential underwriter of a school district bond issue contributed to a separate school foundation at the suggestion of a school district official, or contributed to a nonprofit in which an elected official has expressed an interest, would a G-17 conflicts disclosure of the contribution be required?

2. Proposed Amendments that, if adopted, Defeat the Purpose of the Retrospective Review of the 2012 Guidance

a. Potential Material Conflicts of Interest

Recognizing SIFMA's and the Government Finance Officers Association's ("GFOA's") prior statements that certain disclosures have become too complex and lengthy, which may distract from the focus on actual material conflicts, the MSRB proposes to amend the 2012 Guidance to clarify that a potential material conflict of interest must be disclosed if, but only if, it is *reasonably foreseeable* that it will mature into an actual material conflict of interest during the transaction.

SIFMA does not believe a *reasonably foreseeable* standard adequately addresses the recognized problem that, in the intervening six years since the 2012 Guidance was issued, the 2012 Guidance has resulted in some voluminous, generic disclosures with diminishing utility. We again suggest that the disclosure requirement be limited to actual, and not merely potential, material conflicts of interest, or in the very least, a *highly likely*[11] standard.

It is unnecessary, distracting, and does not advance the goal of the retrospective review to require disclosure of merely potential material conflicts.[12] First, it is unnecessary to

[11] *See* attached appendix for a fuller discussion.

[12] Although the MSRB declined our suggestions to eliminate the disclosure requirements for third-party marketing arrangements and credit default swaps, we still believe that they should be eliminated. Given

require disclosure of potential conflicts. If such potential conflicts become actual material conflicts prior to execution of a bond purchase agreement ("BPA"), they must be disclosed under the 2012 Guidance. It is exceedingly rare for potential conflicts of interest to arise after the BPA is signed, and arguably conflicts arising between BPA and closing are not relevant to the issuer's decision to contract with the underwriter. In any event, such conflicts would be disclosed in the Official Statement, if appropriate. Second, it is not clear that it would demonstrably reduce the volume of disclosures, allowing issuers to focus on ones more closely related to their transaction. In addition to doing little to make disclosures more effective, the proposed standard would be exceedingly difficult to implement and monitor from a compliance standpoint. It is too difficult to ascertain and carries too great a risk of misjudging whether and when a potential conflict becomes material. Consequently, it would not reduce disclosures demonstrably because it is not clear that underwriters would be inclined to reduce their potential conflicts disclosures. In fact, it may result, depending on an underwriter's view, in more disclosures.

Should the MSRB again reject our suggestion, we alternatively suggest that a potential conflict of interest should be disclosed if, but only if, it is *highly likely* that it will mature into an actual material conflict of interest during the transaction. We believe this higher standard may accomplish more than the Request for Comment's proposed standard to reduce disclosures. We also request that the MSRB provide guidance in the form of examples of disclosures that should or should not be made under whatever standard is ultimately adopted.

b. Removal of the "No Hair Trigger" Language

Related to the timing of the required disclosures, SIFMA strongly objects to the MSRB modifying the language in the Implementation Guidance to eliminate the "no hair trigger" language.[13] This language has been an important reassurance to our members who have acted in substantial compliance with the prescribed timeframes despite transactions that have proceeded along unforeseen timelines and pathways. It has prevented hair-trigger tripwires resulting in mere technical rule violations that consume not only firm resources, but also valuable regulator resources. While we understand the MSRB's concerns that the inclusion of such language suggests noncompliance is acceptable as an ordinary course of business, we do not believe that the industry has taken that to mean that routine noncompliance is acceptable. Unless the MSRB can point to prevalent abuses, the current language should be left as-is.

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the MSRB's concerns, though, we suggest that these conflicts be disclosed only if they meet the "material conflicts" standard.

[13] *Supra* note 2 at p. 9 n.11.

c. Plain English

The MSRB proposes to explicitly require plain English in the Amended Guidance. SIFMA also strongly disagrees with this proposal. The words "plain English" are susceptible to different interpretations. For example, the plain English standard articulated by the SEC is very different from how underwriters draft their disclosures currently.[14] Even SEC commissioners have commented that it is difficult to understand and apply in practice.[15] Adopting such a standard would require underwriters to completely redo all manner of their G-17 disclosures, especially those pertaining to complex financings, an expensive and time-consuming effort with increased risk that the meaning of certain disclosures would be lost in the translation to plain English. Rather, we suggest that the MSRB adopt a *"clear and concise"* standard that is more universally understood, results in well-drafted disclosures, and is in line with the MSRB's disclosure principles as well as the goals of the retrospective review of the 2012 Guidance.

d. Underwriter Discouragement of the Use of a Municipal Advisor

The MSRB proposes to amend the 2012 Guidance to state that an underwriter may not discourage an issuer from using a municipal advisor ("MA") or otherwise imply that the hiring of an MA would be redundant of the underwriter's services.

SIFMA does not believe this proposal is necessary and would have unintended consequences. We are concerned that the proposal will limit otherwise permissible advice, such as describing what services can and cannot be provided, between underwriters and their clients for fear of implying that an MA may be redundant. The SEC has made clear in granting the underwriter's exclusion from the MA rule that the services essential to complete an underwriting, including advice on the timing and the terms and structure of an underwriting can be performed by the underwriter without a MA.[16] We fear this proposal implies or creates a bias against underwriter-only transactions that could confuse issuers and discourage an issuer's flexibility to control the cost and scope of its financings in cases where it chooses not to use a MA.

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[14] SEC, *A Plain English Handbook*, https://www.sec.gov/pdf/handbook.pdf.

[15] *See, e.g.,* Robert Jackson, Commissioner, SEC, Remarks at the Municipal Securities Disclosure Conference (Dec. 6, 2018).

[16] In the adopting release to the definition of a municipal advisor, the SEC made clear that "the underwriter exclusion would include advice provided by the underwriter within the scope of the underwriting and would generally include advice with respect to the structure, timing, terms, and other similar matters concerning that issuance of municipal securities." Securities Exchange Act Release No. 34-70462, 78 FR 67468, 67511 (Nov. 12, 2013).

Although MAs are permitted to provide advice beyond essential services to complete an underwriting, such as assisting with political advocacy to help an issuer pass an election or advising on the method of sale (services that underwriters may not provide if acting under the underwriter's exclusion), issuers may not need or want to pay for these services and may prefer to make budget-driven decisions that exclude MAs. The fact that the duties of an MA and an underwriter are meaningfully different is already clearly articulated in the current 2012 Guidance, which requires an underwriter to explicitly explain to issuers and draw the line between its duties of fair dealing and the fiduciary duties owned by an MA.

In lieu of the current proposal, we suggest the MSRB clarify the 2012 Guidance to eliminate any implication of a bias or creation of a competitive advantage of one group over another. SIFMA suggests that the MSRB make it clear in the Amended Guidance that neither MAs nor underwriters may misrepresent the services and duties that the other is permitted to provide, and that MAs may not state or imply that there is a regulatory requirement for an issuer to hire an MA. We believe these clarifications to be a better alternative to Request for Comment's proposal.

e. Optional Alternative Manner of Providing Disclosures

In the Prior SIFMA Letter, we essentially proposed a simplified, annual process of providing original and amended disclosures to repeat issuer clients, aiming to alleviate the burdens on both issuers and underwriters of duplicative and, in some cases, voluminous disclosures.[17] Recognizing the merit of a part of our suggestion, the MRSB proposed an alternative manner of providing the standard disclosures. The Amended Guidance would permit sole underwriters or syndicate manager to "…provide the standard disclosures to an issuer one time and then to provide them subsequently by reference to and reconfirmation of those initial standard disclosures, in writing, unless the issuer requests the disclosures on a transaction-by-transaction basis."[18] To utilize this option, underwriters would have to comply with several additional requirements if the standard disclosures needed to be amended. Those additional requirements would include delivering the amended disclosures, making a reference to when the initial disclosures were made, and making the initial and amended disclosures readily accessible in hard copy or electronic format. Further, a sole underwriter or syndicate manager would be required to maintain originals for the retention period prescribed in MSRB Rule G-9, but the retention period would reset each time this option is utilized.[19] The timing requirements for initial and amended disclosures would remain the same as in the 2012 Guidance.[20]

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[17] *Supra* note 5 at pp. 9-11.

[18] *Supra* note 2 at p. 8.
[19] *Id.* at pp. 8-9.

While we appreciate the MSRB's consideration of our proposal, we believe that the MSRB's proposal complicates matters even further. The requirement to make the original disclosures readily accessible would involve a significant infrastructure build for firms, and the varying record retention requirements are likely to create confusion among underwriters and issuers. Simply put, it would be operationally burdensome for underwriters and do little to reduce the volume and nature of paperwork. Given that the alternative means of providing the standard disclosures are more complex and burdensome, we do not believe our members would avail themselves of this particular alternative method. We believe there are better alternatives, and we reiterate our original suggestion for an annual process, with bring-downs as necessary during the succeeding year, which simplifies recordkeeping.[21]

f. Disclosures Concerning the Underwriter's Compensation

Rather than eliminating this disclosure requirement altogether as SIFMA suggested in our the Prior SIFMA Letter,[22] the MSRB proposes that it be included in the standard disclosures; however, for alternative compensation structures, a dealer must indicate that the standard disclosure does not apply and explain the alternative structure as part of the transaction-specific disclosures to the extent that the alternate structure presents a conflict of interest.

SIFMA believes this proposal is contrary to the goals of this retrospective review because it would invariably result in more standardized and generic disclosures that may distract from more specific ones. Underwriters would, for instance, be required to add additional language to note that the compensation is not contingent. Should the MSRB not reconsider our original proposal, SIFMA would prefer retaining the current method of providing the disclosure, as it would not lead to more standardized and generic disclosures.

g. Syndicate Manager Disclosure of Standard and Transaction-Specific Disclosures on Behalf of Syndicate Members

The MSRB proposal would require, rather than permit, the standard disclosures to be made by a syndicate manager on behalf of syndicate participants. While SIFMA welcomes this proposal to reduce oftentimes duplicative disclosures provided to

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[20] *Id.*

[21] *Supra* note 5 at pp. 9-11.

[22] *Id.* at p. 8.

issuers, it appears that the proposal may require the syndicate manager to affirmatively state the standard disclosures are being provided on behalf of the other syndicate members. If this is the case, it may be problematic because an underwriter may not know if there will be co-managers at the time the Rule G-17 disclosures are sent. For instance, in some cases, Rule G-17 disclosures are made when the underwriter is engaged in order to establish the underwriter exclusion from the municipal advisor rules. The SEC permits that to be done via a preliminary engagement letter, which oftentimes is executed before it is known whether there will be co-managers. Underwriters should not be required to suggest that the issuer might consider appointing co-managers. It should suffice that the senior manager has made the disclosures, without requiring the affirmative statement that the disclosures are being made on behalf of co-managers. This should apply to all disclosures except conflicts disclosures.[23]

h. Classification of Issuers to Create Tiered Disclosure Requirements

As noted in the Prior SIFMA Letter, we believe that tiered disclosure requirements may be beneficial to issuers and underwriters.[24] We also believe that for a tiered disclosure regime to work effectively, clear and objective standards are necessary. We would welcome further discussion on this issue.

i. Trigger for Transaction-specific Disclosures

Finally, in the Prior SIFMA Letter, we suggested that the MSRB adopt one standard based on the standard for routine financings,[25] which the MSRB declined to adopt, arguing that the risk is too great of an underwriter inaccurately determining that complex municipal securities financings disclosures are unnecessary. This is another area where we believe clear, objective standards in the Amended Guidance would be beneficial to issuers and underwriters. We also welcome further discussion on this issue.

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[23] Under the 2012 Guidance, transaction-specific disclosures are only required to be made when the underwriter has recommended the transaction. In many cases, the recommendation is only made by the senior manager, not the co-managers. As such, senior managers should be required to provide copies of its G-17 disclosures to the co-managers once they have been selected.

[24] *See supra* note 5 at p. 17.

[25] *Id.* at pp. 11-12.

Mr. Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
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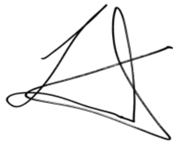
SIFMA appreciates this additional opportunity to comment on the proposed amendments to the 2012 Guidance. We would be pleased to discuss any of these comments in greater detail, or to provide any other assistance that would be helpful. If you have any questions, please do not hesitate to contact Leslie Norwood at (212) 313-1130.

Sincerely yours,



Leslie M. Norwood
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cc: Lynnette Kelly, President and Chief Executive Officer
Lanny Schwartz, Chief Regulatory Officer
Michael Post, General Counsel
Carl Tugberk, Assistant General Counsel

Appendix A:
SIFMA Answers to Select Questions Posed in MSRB Notice 2018-29

I.B. Potential Material Conflicts of Interest

1. *Is limiting what constitutes a potential material conflict of interest to only those material conflicts of interest that are reasonably foreseeable to mature into actual material conflicts of interest during the course of the transaction an appropriate standard, and is it sufficiently clear to be implemented by underwriters?*

   No, it is not an appropriate standard, and for the reasons discussed above, is not sufficiently clear to be implemented by underwriters.

2. *Should the standard require a greater likelihood than "reasonable foreseeability" that a potential material conflict of interest will mature into an actual material conflict of interest (e.g., "high probability")?*

   Yes, a higher standard, such as "highly likely," would create a more workable standard to consider whether a potential material conflict will mature into an actual one. This is more likely to reduce the volume of unnecessary disclosures.

4. *Does the ongoing obligation requiring underwriters to provide disclosures of actual material conflicts of interest discovered or arising after the underwriter has been engaged eliminate or reduce the need to disclose potential material conflicts of interest? What if such a material conflict of interest is not discovered or does not arise until after the execution of a contract with the underwriter or otherwise does not allow an issuer official sufficient time to evaluate the underwriter's recommendation?*

   Yes, this would, in the very least, reduce the need to disclose potential conflicts of interest. If a potential conflict materializes into an actual conflict, it would be disclosed, but we believe that the likelihood this will happen after a BPA has been executed and before closing, depriving the issuer enough time to consider the conflict, is de minimis. Furthermore, if the BPA is executed before the conflict arises, the issuer's decision to contract will not have been affected by the after-arising conflict.

I.C. Syndicate Manager Disclosure of Standard and Transaction-specific Disclosures on Behalf of Syndicate Members

1. *If the 2012 Guidance is amended to require a syndicate manager to provide the standard and transaction-specific disclosures on behalf of the syndicate, should the syndicate manager be solely responsible for the content of those disclosures or failing to deliver them, or should the other syndicate members have regulatory liability for any non-compliance? If yes, what would be an effective mechanism or process to help ensure that syndicate members will agree on the content of the standard and transaction-specific disclosures?*

Appendix A:
SIFMA Answers to Select Questions Posed in MSRB Notice 2018-29

The liability and determination of content should be attributable to the syndicate manager. We do not believe there would be an effective mechanism or process to obtain agreement on the disclosures given how most syndicates are put together over time.

2. *If the 2012 Guidance is amended to require a syndicate manager to provide the standard and transaction-specific disclosures on behalf of a syndicate, should the other syndicate members continue to be required to obtain acknowledgment of receipt from the issuer? Should the other syndicate members be required to make and preserve records of the standard and transaction-specific disclosures provided to, and the acknowledgement of receipt of those disclosures received from, the issuer?*

   This question suggests that there currently is a requirement for other syndicate members to obtain acknowledgment of receipt from the issuer. That would only be the case if other syndicate members were required to send their own disclosures (e.g., the senior manager has made other disclosures on its behalf and syndicate members had their own conflicts). Regarding the MSRB's proposal, the other syndicate members should not be required to retain the issuer's acknowledgment. Most likely, they will keep a record that the syndicate manager provided the disclosures to the issuer or the issuer's acknowledgement of the disclosures.

3. *If the 2012 Guidance is amended to require a syndicate manager to provide the standard and transaction-specific disclosures on behalf of a syndicate, should the MSRB require the syndicate manager to bifurcate its disclosure to provide the standard and transaction-specific disclosures on behalf of the entire syndicate separately from its own dealer-specific disclosures?*

   Bifurcation should be voluntary and according to the recordkeeping processes of the syndicate manager.

I.D. Optional Alternative Manner of Providing Disclosures

1. *Would the alternative manner of providing the standard disclosures…reduce the volume and frequency of disclosures and make the disclosure process more streamlined and efficient as anticipated by the MSRB?*

   Given the complicated nature of the proposal and the expense to operationalize it, we do not believe it would reduce the volume and frequency of disclosures because underwriters would not effectively or economically be able to utilize the approach.

2. *Would there be any unintended consequences to utilizing this alternative to provide the standard disclosures?*

   As we stated in the letter, utilizing this alternative would require a significant infrastructure build for firms and operational concerns with the various requirements that must be met in order to utilize this alternative.

Appendix A:
SIFMA Answers to Select Questions Posed in MSRB Notice 2018-29

3. *Should the underwriter acting as a sole underwriter or syndicate manager be able to provide the standard disclosures to an issuer by referring back to and reconfirming disclosures made in a previous underwriting with the same issuer when that underwriter was a member of the syndicate for which the syndicate manager that actually provided the disclosures for the previous issuance?*

   Yes, as a general matter, but the approach may be confusing and not particularly practical or operationally workable.

5. *Should the optional alternative manner of providing the standard disclosures also apply to dealer-specific disclosures or transaction-specific disclosures or both?*

   We reiterate our original suggestion that any new or different disclosures, whether they be standard, dealer-specific, or transaction-specific be provided on an annual basis with bring-downs as necessary throughout the year.

I.E. Clear and Separate Identification of Disclosures

1. *Is there any reason why underwriters cannot separate the standard, dealer-specific and transaction-specific disclosures when they are provided within the same document?*

   If the MSRB does not eliminate the need to disclose potential conflicts of interest as SIFMA has suggested, we believe the separation of different types of disclosures is a good proposal, and we do not see any reason why the disclosures cannot be separated within the same document. This may be helpful to issuers.

2. *Would the separation of the standard, dealer-specific and transaction-specific disclosures, when they are provided within the same document, create any challenges for issuer's review of them?*

   No. On the contrary, we believe the separation of disclosures may be beneficial for an issuer's review.

I.F. Disclosure on the Part of Parties Other than the Underwriter

2. *Are there examples of conflicts of interest of issuer personnel that should be required to be disclosed with the dealer-specific disclosures, even if such conflicts are not themselves conflicts of an underwriter?*

   No, we are not aware of any examples of issuer personnel conflicts that should be disclosed with the dealer-specific disclosures.

3. *Are there conflicts of interest of any persons other than issuer personnel and the underwriter (for example, affiliates of the underwriter or swap counterparties or service providers recommended by the underwriter)? If so, should the requirement be limited to*

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actual or potential material conflicts of interests that are actually known to the underwriter?

No, we are not aware of any such conflicts of interest.

I.G. Plain English

1. *What types of disclosures have underwriters not provided to issuers in a manner designed to make clear the subject matter of such disclosures and their implications?*

   Any implication that the subject matter of the disclosures and their implications that we provide to issuers were designed to be unclear is untrue. Though certain standard disclosures could be lengthy and contain a significant amount of generic language, they were are made in a manner to address the 2012 Guidance. Addressing our comments above on the standard disclosures and adopting a "clear and concise" standard should address any perceived issuer concerns.

2. *Are there any disclosures that are of such a complex nature that, even when designed by an underwriter to make their subject matter and implications clear, cannot be reduced adequately into plain English?*

   Yes. For example, swaps disclosures and Variable Rate Demand Obligations ("VRDO") disclosures required by MSRB Rule G-17 would be difficult to simplify in a manner required by a plain English standard.

3. *Would any simplification of disclosures to satisfy the plain English standard increase the risk that underwriters imprecisely draft the disclosures that could make it difficult for issuers to fully appreciate the nature of material conflicts of interest and risks of transactions, thereby increasing risk to issuers and/or underwriters?*

   Yes. Given that plain English is susceptible to different approaches, there may be an increased risk that underwriters imprecisely draft the disclosures to address a plain English standard.

II. Issuer Acknowledgment of Receipt of Underwriter Disclosures

2. *How should issuers designate their primary contacts? Should the MSRB specify how this designation should be made?*

   Under the current guidance, underwriters are required to obtain acknowledgment from an official of an issuer who has the authority to bind that issuer by contract. The process generally works well currently and contacts are generally obtainable. We would note however, in certain instances, an issuer may designate a lawyer or other contact that may not have been given the authority to bind the issuer by contract. In these situations, underwriters may need to request another designee or confirm that the designee has the

authority to bind the issuer by contract. Ideally, underwriters should be able to send G-17 letters to the individual designated to receive and acknowledge such letters by the issuer whether or not such individual has such authority.

It is not clear that there should be a formal process for designation by issuers or that the MSRB should specify how this designation should be made.

IV. Underwriter Discouragement of the Use of a Municipal Advisor

1. *Do underwriters discourage issuers from engaging municipal advisors? If so, how?*

   We are not aware of any discouragement.

2. *Do other market participants involved in the issuance of municipal securities discourage issuers from engaging municipal advisors? If so, how?*

   We are not aware of any discouragement.

3. *Would the draft amendments sufficiently address the issue or would it allow for certain dealer communications regarding issuer retention of municipal advisors that should be prohibited?*

   As discussed in our letter, the proposed language would have the unintended effect of limiting otherwise permissible communications. We believe our suggestions would sufficiently addresses any concerns while at the same time providing a level playing field for underwriters and municipal advisors.

4. *Should the MSRB require that the standard disclosures include an affirmative statement that the issuer may retain a municipal advisor?*

   No. Inclusion of the affirmative statement would be contrary to the purpose of this retrospective review, increasing standard disclosures. In any case, in the absence of a perfected independent registered municipal advisor exemption, underwriters are limited under the municipal advisor rules from providing advice outside the scope of the underwriter exclusion.

I. Disclosures to Conduit Borrowers

1. *Should the MSRB extend the application of the 2012 Guidance to require underwriters to provide the required disclosures to conduit borrowers? If so, should that application extend to all conduit borrowers or only those with whom the underwriter(s) have engaged directly?*

   SIFMA does not believe the Amended Guidance should require disclosures to conduit borrowers. In some cases – e.g., in engagement letters or letters of intent with conduit

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borrowers entered into to establish an exclusion from the municipal advisor rules – underwriters provide a conduit borrower with a copy of the disclosures provided to the conduit issuer, but we do not see the benefit of another requirement layered on top of what is already required.[1]

2. *Should the MSRB extend the application of the 2012 Guidance to any other obligated persons beyond conduit borrowers? If so, please specify to whom it should be extended and why?*

   No, there is no reason to extend the 2012 Guidance in this regard.

[1] Note that such disclosures sent pursuant to the SEC's FAQs for the municipal advisor rules do not comprise a G-17 letter under the 2012 Guidance.

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

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* 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).

[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).

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 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] Furthermore, it does not apply to selling group members.

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 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.

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

[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.

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 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

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.]

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[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).

[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

- 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 by the sole underwriter or syndicate manager to the issuer as described below.[11]

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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 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 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 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.

- 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.

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

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

(ii) the underwriters'['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;[12]

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[12] In a private placement where a dealer acting as placement agent takes on a true agency role with the issuer and does not take a principal position (including not taking a "riskless principal" position) in the securities being placed, the disclosure relating to an "arm's length" relationship would be inapplicable and 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 cases, it would also be appropriate for an underwriter to omit those disclosures 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 [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).

(iii) unlike [a]municipal advisors, [the]underwriters do[es] 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 [its]their own financial or other interests;[13]

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

(vi) the underwriters 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.[14]

[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,[15] including, but not limited to, the following:

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[13] *Id.*

[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.

[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.

(i) any payments described below under "Conflicts of Interest/ Payments to or from Third Parties";[16]

(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").[17]

[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 that the underwriter reasonably believes has the authority to

[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.

[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.

bind the issuer by contract with the underwriter and that, to the knowledge of the underwriter, is not a party to a disclosed conflict.[18] 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).

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).

- 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.[19] 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

[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.

[19] 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.

with sufficient time for the issuer to fully evaluate any such conflict and its implications.[20]

- A sole underwriter or syndicate manager must make the transaction-specific disclosures in sufficient time before the execution of 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.

[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.[21]

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[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."

[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

Acknowledgement of Disclosures. When delivering a disclosure, [T]the underwriter must attempt to receive written acknowledgement[22] [(other than by automatic e-mail receipt)] by the official of the issuer identified by the issuer as the primary contact for the issuer of receipt of the foregoing disclosures.[23] 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. This notice does not specify the particular form of acknowledgement, but may include, for example, an e-mail read receipt.[24] 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 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.

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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.

[22] When there is an underwriting syndicate, only the syndicate manager, as the dealer delivering the standard disclosures and transaction-specific disclosures to the issuer, must obtain (or attempt to obtain) the acknowledgement 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.

[23] 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.

[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.

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.[25] 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.[26] 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 knowledge or experience with such financing structures, the

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[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, 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.

[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.

underwriter or syndicate manager must provide disclosures on the material aspects of such financing structures that [it]are recommended[s] (*i.e.*, the "transaction-specific disclosures").[27]

However, 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 financing structure in its totality, because the financing is structured in a unique, atypical, or otherwise complex manner (a "complex municipal securities financing").[6][28] 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).[29] [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 regarding a complex municipal financing structure has been made in a negotiated offering,[30] the

[27] In the circumstance where a dealer proposing to act as an underwriter in a negotiated offering recommends a financing structure prior to the time at which an underwriting syndicate is formed, such dealer shall have the same obligations as if it were a sole underwriter or syndicate manager for purposes of their obligations described under "Required Disclosure to the Investor."

[28] [6] If a complex municipal securities financing consists of an otherwise routine financing structure that incorporates a unique, atypical, or complex element 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.

[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.

[30] For purposes of determining when an underwriter recommends a complex municipal financing structure in a negotiated offering (a "Complex Municipal 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, whether an underwriter has made a Complex Municipal 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 Financing Recommendation has been made is whether – given its content, context, and manner of presentation— a particular communication from an underwriter to an issuer reasonably would be viewed as a call to action or reasonably would influence an issuer to engage in a complex municipal securities financing structure. In general, the more individually tailored

sole underwriter or syndicate manager has an obligation under Rule G-17 to communicate more particularized transaction-specific disclosures than those that may be required in the case of routine financing structures.[31] The sole underwriter or syndicate manager must 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.[32[7]] It must also disclose any

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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 Financing Recommendation.

[31] Sole underwriters and syndicate managers 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. 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.

[32[7]] For example, when a Complex Municipal Financing Recommendation for a VRDO is made, the sole [an]underwriter [that recommends a VRDO] or syndicate manager 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 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 sole underwriter's or syndicate manager's affiliated swap dealer is proposed to be the executing swap dealer, [the]such 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]such 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 under this notice. The MSRB notes that dealers that recommend swaps or security-based swaps to municipal entities may also be subject to rules of the Commodity Futures Trading Commission or those of the Securities and Exchange Commission ("SEC").

incentives for the [underwriter to recommend the] recommendation of the complex municipal securities financing and other associated material conflicts of interest.[33][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, and financial ability to bear the risks of the recommended financing, in each case based on the reasonable belief of the sole underwriter or the syndicate manager.[34][9] 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 [underwriter to recommend] the complex municipal securities financing and other associated conflicts of interest.

As previously mentioned, [T]the disclosures [described in this section of this notice] must be made in writing to an official of the issuer whom the sole underwriter or syndicate manager reasonably believes has the authority to bind the issuer by contract with the underwriter(s): (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 the financing, rather than being general in nature.[35] A sole underwriter or syndicate manager 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 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 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 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

[33][8] For example, a conflict of interest may exist when [the] a sole underwriter or syndicate manager is also 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.

[34][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.

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

complex financing the underwriter recommends to particular issuers.[36] Underwriters 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.[37]

If the sole underwriter 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.[38][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).

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[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.

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

[38][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 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 52.

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.[39][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)[40][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.[41][13]

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[39][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.

[40][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."

[41][13] *See* 1997 Interpretation (note 2 *supra*).

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 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.[42][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.[43] 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

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

[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.

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.[44][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[45][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.[46][17] These rules are

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[44][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).

[45][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).

[46][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.

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.[47][18]

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

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[47][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).