OMB APPROVAL	
OMB Number:	3235-0045
Expires:	August 31, 2011
Estimated average burden hours per response	38

Required fields are shown with yellow backgrounds and asterisks.

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

File No.* SR - 2009 - * 17
Amendment No. (req. for Amendments *) 1

Proposed Rule Change by Municipal Securities Rulemaking Board

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

Initial *	Amendment *	Withdrawal	Section 19(b)(2) *	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)

Exhibit 2 Sent As Paper Document ☐

Exhibit 3 Sent As Paper Document ☐

Description

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

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 proposed rule change.

First Name * Peg Last Name * Henry

Title * Deputy General Counsel

E-mail * phenry@msrb.org

Telephone * (703) 797-6600 Fax (703) 797-6700

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 officer.

Date 08/04/2010

By Justin R. Pica
(Name *)

Director, Uniform Practice Policy
(Title *)

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.

Justin Pica, jpica@msrb.org

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

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

Form 19b-4 Information (required)

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 (required)

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 2 - Notices, Written Comments, Transcripts, Other Communications

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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

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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

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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

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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.

The Municipal Securities Rulemaking Board ("MSRB") is filing this partial amendment ("Amendment No. 1") to File No. SR-MSRB-2009-17, originally filed with the Securities and Exchange Commission (the "Commission") on November 18, 2009, with respect to a proposed rule change (the "original proposed rule change" and, together with Amendment No. 1, the "proposed rule change") concerning priority of customer orders in primary offerings of municipal securities.

The original proposed rule change consists of (i) amendments to Rule G-8, on books and records to be made by brokers, dealers and municipal securities dealers, Rule G-9, on preservation of records, and Rule G-11, on new issue syndicate practices; (ii) a proposed interpretation (the "proposed interpretive notice") of Rule G-17, on conduct of municipal securities activities; and (iii) the deletion of a previous Rule G-17 interpretive notice on priority of orders dated December 22, 1987[1] (the "1987 Interpretive Notice").

The original proposed rule change arose out of the Board's ongoing review of its General Rules as well as concerns expressed by institutional investors that their orders were sometimes not filled in whole or in part during a primary offering, yet the bonds became available shortly thereafter in the secondary market. They attributed that problem to two causes: first, some retail dealers were allowed to place orders in retail order periods without going away orders and second, syndicate members, their affiliates, and their respective related accounts were allowed to buy bonds in the primary offering for their own account even though other orders remained unfilled. There was also concern that these two factors could contribute to restrictions on access to new issues by retail investors, in a manner inconsistent with the issuer's intent.

Amendment No. 1 partially amends the text of the original proposed rule change to clarify that (i) amended MSRB Rule G-8(a)(viii) requires that records must be kept of whether there was a retail order period, regardless of whether the issuer required that there be one; (ii) the term "priority provisions" as used in amended Rule G-8(a)(viii)(A) includes both the customer priority provisions set forth in amended Rule G-11(e) and any other priority provisions of the syndicate (*e.g.*, those included in an agreement among underwriters); (iii) the recordkeeping requirements of amended Rule G-8(a)(viii) concerning deviations from the customer priority provisions and the specific reasons for doing so are the same for both sole underwriters and syndicate managers; and (iv) the customer priority requirements of the interpretive notice are the same as those of amended Rule G-11(e).[2] Amendment No. 1 also corrects a typographical error in amended G-11(e)(ii). In addition, the MSRB discusses the comment letters received by the

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[1] MSRB Notice of Interpretation Concerning Priority of Orders for New Issue Securities: Rule G-17 (December 22, 1987).

[2] The Amendment would make no changes to revised Rule G-9 as set forth in the original proposed rule change.

Commission in response to the notice for comment on the original proposed rule change published in the Federal Register.[3]

The MSRB is proposing the revision to the original proposed rule change set forth in clause (i) of the description of Amendment No. 1 above, because in many cases a retail order period is conducted based on the recommendation of the underwriter, not because the issuer has required that there be a retail order period. The MSRB considers it important to know whether there was a retail order period, regardless of whether the issuer required that there be one. There is no revision to the requirement of amended Rule G-8(a)(viii) that requires a record of the issuer's definition of "retail," if applicable.

As more fully described below, the MSRB is proposing the revision to the original proposed rule change set forth in clause (ii) of the description of Amendment No. 1 above in response to a comment filed by the Regional Bond Dealers Association, which suggested that it was unclear what the term "priority provisions" meant in amended Rule G-8(a)(viii)(A).

The MSRB is proposing the revision to the original proposed rule change set forth in clause (iii) of the description of Amendment No. 1 above to conform the recordkeeping rules for syndicates and sole managers, finding no reason for distinguishing between the two. Furthermore, the revision to amended Rule G-8(a)(viii)(A) is intended to remove what might have been perceived as a difference between amended Rule G-11(e) and the proposed interpretive notice.

As more fully described below, the MSRB is proposing the revision to the original proposed rule change set forth in clause (iv) of the description of Amendment No. 1 above in response to a comment received from the Securities Industry and Financial Markets Association, which interpreted the use of the word "generally" to mean that there could be exceptions to the priority of orders provisions other than those set forth in the proposed interpretive notice. The revision makes it clear that the exceptions set forth in the proposed interpretive notice are the only exceptions. The Board considers those exceptions sufficient to cover the circumstances under which an underwriter might find it necessary to deviate from the priority provisions.

The MSRB requests that the Commission find good cause, pursuant to Section 19(b)(2) of the Act, for approving Amendment No. 1 prior to the thirtieth day after publication of notice of filing of Amendment No. 1 in the Federal Register. The MSRB believes that the Commission has good cause for granting accelerated approval of the proposed rule change because the revisions made by Amendment No. 1 are technical amendments that do not significantly alter the substance of the original proposed rule change, are consistent with the purpose of the original

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[3] *See* Securities Exchange Act Release No. 61110 (December 3, 2009), 74 Fed. Reg. 6573 (December 10, 2009).

proposed rule change, and do not raise significant new issues. The MSRB requests that the proposed rule change become effective for new issues of municipal securities for which the Time of Formal Award (as defined in Rule G-34(a)(ii)(C)(1)(a)) occurs more than 60 days after approval of the proposed rule change by the SEC.

Amendment to Text of Original Proposed Rule Change

The changes made by Amendment No. 1 are indicated below:[4]

Rule G-8: Books and Records to be Made by Brokers, Dealers and Municipal Securities Dealers

(a) Description of Books and Records Required to be Made. Except as otherwise specifically indicated in this rule, every broker, dealer and municipal securities dealer shall make and keep current the following books and records, to the extent applicable to the business of such broker, dealer or municipal securities dealer:

(i) – (vii) No additional changes.

(viii) Records Concerning Primary Offerings.

(A) For each primary offering for which a syndicate has been formed for the purchase of municipal securities, records shall be maintained by the syndicate manager showing the description and aggregate par value of the securities; the name and percentage of participation of each member of the syndicate; the terms and conditions governing the formation and operation of the syndicate; a statement of all terms and conditions required by the issuer (including whether **[**the issuer has required**]** **there was** a retail order period and the issuer's definition of "retail," if applicable); all orders received for the purchase of the securities from the syndicate; all allotments of securities and the price at which sold; those instances in which the syndicate manager allocated securities in a manner other than in accordance with the priority provisions**, including those instances in which the syndicate manager** **[**or**]** accorded equal or greater priority over other orders to orders by syndicate members for their own accounts or their respective related accounts; and the specific reasons **for doing so** **[**why it was in the best interests of the syndicate to do so**]**; the date and amount of any good faith deposit made to the issuer; the

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4 Underlining indicates additions made by the Amendment to the original proposed rule change; brackets indicate deletions made by the Amendment from the original proposed rule change.

date of settlement with the issuer; the date of closing of the account; and a reconciliation of profits and expenses of the account.

(B) For each primary offering for which a syndicate has not been formed for the purchase of municipal securities, records shall be maintained by the sole underwriter showing the description and aggregate par value of the securities; all terms and conditions required by the issuer (including whether **[**the issuer has required**]** **there was** a retail order period and the issuer's definition of "retail," if applicable); all orders received for the purchase of the securities from the underwriter; all allotments of securities and the price at which sold; **those instances in which the underwriter accorded equal or greater priority over other orders to orders for its own account or its related accounts, and the specific reasons for doing so;** the date and amount of any good faith deposit made to the issuer; and the date of settlement with the issuer.

(ix) - (xxiv) No additional changes.

(b) - (g) No additional changes.

Rule G-11: Primary Offering Practices

(a) - (e)(i) No additional changes.

(e)(ii) In the case of a primary offering for which a syndicate has not been formed, unless otherwise agreed to **[**be**]** **with** the issuer, the sole underwriter shall give priority to customer orders over orders for its own account or orders for its related accounts, to the extent feasible and consistent with the orderly distribution of securities in the offering.

(f) - (j) No additional changes.

* * * * * * * * * *

Interpretation on Priority of Orders for Securities in a Primary Offering under Rule G-17

On December 22, 1987, the MSRB published a notice[1] interpreting the fair practice principles of Rule G-17 as they apply to the priority of orders for new issue securities (the "1987 notice"). The MSRB wishes to update the guidance provided in the 1987 notice due to changes in the marketplace and subsequent amendments to Rule G-11.

Rule G-11(e) requires syndicates to establish priority provisions and, if such priority provisions may be changed, to specify the procedure for making changes. The rule also permits a syndicate to allow the syndicate manager, on a case-by-case basis, to allocate securities in a manner other than in accordance with the priority provisions if the syndicate manager determines

in its discretion that it is in the best interests of the syndicate. Under Rule G-11(f), syndicate managers must furnish information, in writing, to the syndicate members about terms and conditions required by the issuer,[2] priority provisions, and the ability of the syndicate manager to allocate away from the priority provisions, among other things. Syndicate members must promptly furnish this information, in writing, to others upon request. This requirement was adopted to allow prospective purchasers to frame their orders to the syndicate in a manner that would enhance their ability to obtain securities since the syndicate's allocation procedures would be known.

In addition to traditional priority provisions found in syndicate agreements, municipal securities underwriters frequently agree to other terms and conditions specified by the issuer of the securities relating to the distribution of the issuer's securities. Such provisions include, but are not limited to, requirements concerning retail order periods. MSRB Rule G-17 states that, in the conduct of its municipal securities business, each broker, dealer, and municipal securities dealer ("dealer") shall deal fairly with all persons and shall not engage in any deceptive, dishonest or unfair practice. These requirements specifically apply to an underwriter's activities conducted with a municipal securities issuer, including any commitments that the underwriter makes regarding the distribution of the issuer's securities. An underwriter may violate the duty of fair dealing by making such commitments to the issuer and then failing to honor them. This could happen, for example, if an underwriter fails to accept, give priority to, or allocate to retail orders in conformance with the provisions agreed to in an undertaking to provide a retail order period. A dealer who wishes to allocate securities in a manner that is inconsistent with an issuer's requirements must not do so without the issuer's consent.

Except as otherwise provided in this notice, [P]**p**rinciples of fair dealing [generally] will require the syndicate manager to give priority to customer orders over orders for its own account, orders by other members of the syndicate for their own accounts, orders from persons controlling, controlled by, or under common control with any syndicate member ("affiliates") for their own accounts, or orders for their respective related accounts,[3] to the extent feasible and consistent with the orderly distribution of securities in a primary offering. This principle may affect a wide range of dealers and their related accounts given changes in organizational structures due to consolidations, acquisitions, and other corporate actions that have, in many cases, resulted in increasing numbers of dealers, and their related dealer accounts, becoming affiliated with one another.

Rule G-17 does not require the syndicate manager to accord greater priority to customer orders over orders submitted by non-syndicate dealers (including selling group members). However, prioritization of customer orders over orders of non-syndicate dealers may be necessary to honor terms and conditions agreed to with issuers, such as requirements relating to retail orders.

The MSRB understands that syndicate managers must balance a number of competing interests in allocating securities in a primary offering and must be able quickly to determine when it is appropriate to allocate away from the priority provisions, to the extent consistent with the

issuer's requirements. Thus, Rule G-17 does not preclude the syndicate manager or managers from according equal or greater priority to orders by syndicate members for their own accounts, affiliates for their own accounts, or their respective related accounts if, on a case-by-case basis, the syndicate manger determines in its discretion that it is in the best interests of the syndicate. However, the syndicate manager shall have the burden of justifying that such allocation was in the best interests of the syndicate. Syndicate managers should ensure that all allocations, even those away from the priority provisions, are fair and reasonable and consistent with principles of fair dealing under Rule G-17.

It should be noted that all of the principles of fair dealing articulated in this notice extend to any underwriter of a primary offering, whether a sole underwriter, a syndicate manager, or a syndicate member.

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[1] **MSRB Notice of Interpretation Concerning Priority of Orders for New Issue Securities: Rule G-17 (December 22, 1987).**

[2] The requirements of Rule G-11(f) with respect to issuer requirements were adopted by the MSRB in 1998. *See* Exchange Act Release No. 40717 (November 27, 1998) (File No. SR-MSRB-97-15).

[3] "Related account" has the meaning set forth in Rule G-11(a)(xi).

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Statement on Comments Received

Comment letters on the original proposed rule change were received from the Investment Company Institute ("ICI"), the Regional Bond Dealers Association ("RBDA"), the Securities Industry and Financial Markets Association ("SIFMA"), and John C. Melton, Sr.

I. ICI Comment Letter.

ICI supports the proposal. Its letter states that "the proposal would improve access to new issues by investors." It also says that, "The experience of our members has demonstrated that industry practice over the previous year has allowed for the regular disregard of [previous MSRB guidance on priority of orders]."

The ICI letter then discusses the provisions of the proposal concerning retail order periods. ICI urges the MSRB not to leave the definition of "retail" to issuers, but instead to formulate a definition of "retail" that would include institutions trading on behalf of retail investors. Its letter says that institutions are frequently only allowed to purchase bonds during institutional order periods, even though they are trading on behalf of retail investors. Furthermore, it states that many retail investors are, therefore, unable to purchase the bonds

available during retail order periods or do so without "the ability to evaluate the pricing in the same manner as larger institutional investors."

MSRB Response: The MSRB appreciates the support of ICI for the original proposed rule change. It also appreciates the concerns regarding the pricing of bonds purchased by retail investors expressed by ICI. The MSRB is aware of the substantial retail participation in the municipal securities market that is accomplished through mutual fund investments. Nevertheless, MSRB rules do not require that primary offerings of municipal securities include retail order periods. The MSRB considers it appropriate to leave that decision and the decision of how "retail" is defined to issuers of municipal securities.

II. RBDA Comment Letter.

RBDA urges the MSRB to clarify the proposal by providing that syndicate managers and sole underwriters may refuse to prioritize as a customer order any order that the syndicate manager or sole underwriter "reasonably believes" to have been placed by an "opportunistic investor" purchasing bonds with the expectation of selling them at higher prices shortly thereafter. Its December 30, 2009 comment letter states that "failure to make such a clarification in the amendment could result in priority provisions that directly, if inadvertently, undermine the MSRB's stated intent to redress potential abuses in the allocation of securities to customers."

MSRB Response: The proposed rule change would permit deviation from the priority provisions of amended Rule G-11 if following the priority provisions was not consistent with the orderly distribution of securities in the offering or, in the case of syndicates, the syndicate manager determined that it was in the best interests of the syndicate to deviate from the priority provisions. The MSRB believes that, depending on the specific facts and circumstances, a sole underwriter or syndicate manager could reasonably determine that according priority to an order from a customer whom the sole underwriter or syndicate manager reasonably believes would purchase municipal securities with the expectation of selling them at higher prices shortly thereafter might be an appropriate basis for departing from the priority provisions consistent with the proposed rule change.

RBDA questions why the proposed revision to Rule G-8 would require syndicate managers to keep records of both: (i) those instances in which the syndicate manager allocated securities in a manner other than in accordance with the priority provisions and (ii) those instances in which the syndicate manager accorded equal or greater priority over other orders to orders by syndicate members for their own accounts or their respective related accounts.

MSRB Response: In order for the proposed recordkeeping rule to track the proposed amendment to Rule G-11 more closely, Amendment No. 1 would amend the syndicate recordkeeping rule (Rule G-8(a)(viii)(A)) to require records of: "those instances in which the syndicate manager allocated securities in a manner other than in accordance with the priority provisions, including those instances in which the syndicate manager accorded equal or greater

priority over other orders to orders by syndicate members for their own accounts or their respective related accounts. . . ."

The RBDA letter objects to the requirement of the proposed rule change that syndicate managers keep records of the specific reasons why they considered it to be in the best interests of the syndicate to deviate from the priority provisions. They argue that it is unclear how much and what sort of detail regarding these reasons is required. They also assert that the requirement for such "qualitative analysis" will create an opportunity to "second guess in hindsight" the recorded judgment of the syndicate manager.

MSRB Response: Existing Rule G-11 already provides that, in the event the syndicate manager allocates bonds other than in accordance with the priority provisions of the syndicate, "the syndicate manager or managers shall have the burden of justifying that such allocation was in the best interests of the syndicate." The proposed rule change does not change this requirement. It merely requires the syndicate manager to keep a contemporaneous record of such justification.

III. SIFMA Comment Letter.

The SIFMA comment letter states that it opposes the proposed amendments to Rules G-8, G-9, and G-11 for the following reasons:

- SIFMA infers that the MSRB's intent is to prevent flipping and, "there are many reasons why orders are not filled and many ways securities can be sold at higher prices in the secondary market that do not require regulatory response."

  MSRB Response: The MSRB reiterates that its goal behind the proposed rule change was to achieve a broader distribution of municipal securities, and the proposed rule change was not directed at flipping.

- SIFMA argues that, while the MSRB has the authority to write rules to prevent fraudulent and manipulative acts and practices and could issue the proposed interpretation of Rule G-17, it does not have the authority to determine the preferred order of distributing securities, because its statutory authority does not address that.

  MSRB Response: The MSRB is directed by Congress in section 15B of the Securities Exchange Act of 1934 to write rules designed, among other things, "to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest." Broadening the distribution of municipal securities to investors in the primary market, at what are generally attendant lower prices than those available in the secondary market, is clearly within that statutory purpose.

Indeed, the genesis of Rule G-11 was the concern expressed by Congress that the "economic power accruing to banks by virtue of their role as major consumers as well as underwriters of new issue municipals has led to a loose set of syndicate rules which permit banks to be underwriter distributors of new issues of municipal bonds and in the same issue give their own investment portfolio the prerogatives and priorities of public institutional orders."[5] That concern led to the provision of section 15B that requires the MSRB to write rules to "establish the terms and conditions under which any municipal securities dealer may sell, or prohibit any municipal securities dealer from selling, any part of a new issue of municipal securities to a municipal securities investment portfolio during the underwriting period." This provision of section 15B led to the adoption of Rule G-11 and the MSRB saw no reason to distinguish for purposes of Rule G-11 between bank-related portfolios, on the one hand, and affiliated investment trusts or related portfolios of securities firms, on the other.[6]

- SIFMA argues that helping to ensure that institutional orders are filled is the "antithesis" of a broader distribution of municipal securities. Allowing orders from non-underwriter dealers to be accorded equal priority with customer orders contradicts the MSRB's statement that the purpose of the proposal was to encourage a broader distribution of securities.

  MSRB Response: As explained in the ICI comment letter, many institutional investors serve as vehicles for individual investors to invest in municipal securities. In fact, as of September 2009, 20% of municipal securities were held by mutual funds on behalf of retail investors. They frequently are able to negotiate lower prices for their customers than individual retail investors can achieve and provide a means for individual investors to achieve diversification without making large investments. The proposed rule change does not require that underwriters accord non-underwriter dealers the same priority as customers.[7] It simply permits them to do so. Unlike underwriters, they have not been retained by issuers to distribute the issuers' securities.

- SIFMA argues that the exceptions to the priority provisions of the proposal contradict the MSRB's purported intent to broaden the distribution of municipal securities (*e.g.*, "unless

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5 Sen. Rep. 94-75, 94th Cong., 1st Sess. at 49.

6 MSRB Notice of Proposed Rule G-11 on Syndicate Practices (August 17, 1977).

7 Rule D-9 defines "customer" as "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 securities."

otherwise agreed to by the issuer" and "to the extent feasible and consistent with the orderly distribution of securities in the offering").

MSRB Response: In the proposed interpretation, the MSRB notes that it "understands that syndicate managers must balance a number of competing interests in allocating securities in a primary offering and must be able quickly to determine when it is appropriate to allocate away from the priority provisions, to the extent consistent with the issuer's requirements." The interpretation applies equally to sole underwriters. Flexibility is needed to account for various market conditions that may make distribution of the issuer's securities difficult. Also, the proposed rule change makes no attempt to interfere with the contractual relationship between the issuer and the underwriter. The need for such flexibility does not contradict the purpose of achieving broader distribution of municipal securities.

- SIFMA states that the MSRB does not define what is meant by an "orderly distribution of securities." It is unclear whether a dealer may "ignore" the priority provisions, if doing so would result in an orderly distribution of securities.

  MSRB Response: The phrase "orderly distribution of new issue securities" was used in the 1987 Interpretive Notice, which this proposed rule change replaces. It recognizes that, while broad distribution of securities was a concern of Congress when it enacted section 15B, the underwriter must be free to exert some control over that process if necessary to achieve a favorable result for the issuer.

- SIFMA argues that the proposed rule change would seem to indicate that the priority provisions may be deviated from if it is in the best interests of the syndicate to do so. That is not consistent with the proposed interpretation.

  MSRB Response: It is the MSRB's intent that the priority provisions may be deviated from if it is in the best interests of the syndicate to do so. The proposed interpretation contains the same exception as is found in the proposed amendment to Rule G-11:

  > Thus, Rule G-17 does not preclude the syndicate manager or managers from according equal or greater priority to orders by syndicate members for their own accounts, affiliates for their own accounts, or their respective related accounts if, on a case-by-case basis, the syndicate manger determines in its discretion that it is in the best interests of the syndicate.

- SIFMA argues that the proposal will have a detrimental effect on competition and borrowing costs. SIFMA states that the MSRB's statement that the proposal would apply equally to all dealers is not accurate, arguing that the proposal would isolate a very large group of municipal market investors and, because they are affiliated with or related to the

> syndicate manager, subordinate them to other investors. SIFMA concludes that this will reduce competition for municipal securities and raise issuers' borrowing costs, especially given the increasing numbers of dealers that are related to one another.
>
> MSRB Response: The proposal will apply equally to all dealers when they serve as underwriters. All underwriters will continue to be able to place going-away orders (*i.e.*, orders for which customers are already conditionally committed) during the primary offering that would be accorded priority under the proposal. The fact that Rule G-14 requires that such orders be reported to the MSRB's Real-Time Trade Reporting System as interdealer orders will not cause such orders to be treated as interdealer orders for purposes of the priority of orders provisions of Rule G-11(e) and Rule G-17, as long as an equivalent amount of customer orders for the same securities is reported under Rule G-14 on the same day as the interdealer order is executed.
>
> The proposed rule change incorporates the same exceptions to the priority provisions that exist under current law. What the proposed rule change would do is to require accountability of underwriters who deviated from the priority provisions, because they would be required to keep records of their reasons for doing so.
>
> The MSRB also notes that a "municipal securities investment trust" is only a related account if sponsored by a syndicate member, sole underwriter, or an affiliate of either. To be a sponsor of such a trust a dealer or its affiliate must share in the benefits and burdens of ownership of the municipal securities in the trust. The provision of structuring, remarketing, or liquidity services with respect to such a trust will not alone cause the trust to be a related account of the dealer or affiliate providing such services.

SIFMA noted its support for the proposed interpretation in its September 11, 2009 comment letter. In this comment letter, it opines that the proposed interpretation is "less rigorous" than the proposed amendment to Rule G-11 and, therefore, provides "greater flexibility." This statement is based on the use in the proposed interpretation of the word "generally" in the following sentence:

> Principles of fair dealing *generally* will require the syndicate manager to give priority to customer orders over orders for its own account, orders by other members of the syndicate for their own accounts, orders from persons controlling, controlled by, or under common control with any syndicate member ("affiliates") for their own accounts, or orders for their respective related accounts, to the extent feasible and consistent with the orderly distribution of securities in a primary offering. [emphasis supplied]

MSRB Response: The word "generally" is included in the preceding sentence because the proposed interpretation also contains a permissible "best interests of the syndicate" exception

and provides that underwriters must follow issuer requirements, provided that all allocations are fair and reasonable and consistent with principles of fair dealing under Rule G-17. There was no intent to make the proposed interpretation "less rigorous" than the proposed amendment to Rule G-11. For the avoidance of doubt, Amendment No. 1 would revise the foregoing sentence from the proposed interpretation as follows:

> Except as otherwise provided in this notice, [P]principles of fair dealing [generally] will require the syndicate manager to give priority to customer orders over orders for its own account, orders by other members of the syndicate for their own accounts, orders from persons controlling, controlled by, or under common control with any syndicate member ("affiliates") for their own accounts, or orders for their respective related accounts, to the extent feasible and consistent with the orderly distribution of securities in a primary offering.

Finally, the SIFMA comment letter states that the proposed interpretation is more flexible than the proposed amendment to Rule G-11 because it accords sole underwriters the "orderly distribution of securities" exception to the priority provisions, while the proposed amendment to Rule G-11 does not.

MSRB Response: The text of proposed MSRB Rule G-11(e)(ii) as quoted by SIFMA in its comment letter is missing the final clause found in the original proposed rule change. The complete quotation is as follows and does in fact provide the same exception for sole underwriters under proposed Rule G-11(e)(ii) as does the proposed interpretation:

> (ii) In the case of a primary offering for which a syndicate has not been formed, unless otherwise agreed to be the issuer, the sole underwriter shall give priority to customer orders over orders for its own account or orders for its related accounts, to the extent feasible and consistent with the orderly distribution of securities in the offering.

V. Melton Comment Letter.

Mr. Melton states that the intent of the MSRB is to restrict activity that many see as free riding in new issue municipal offerings. He suggests that the proposal should be re-drafted to allow underwriters the flexibility to identify flippers and treat those orders as dealer orders rather than affording flippers customer status. He is also of the view that the "best interests of the syndicate" exception "would require unnecessary effort and not provide assurance that an underwriter could protect itself against allegations of rule violations in new issue allocations."

MSRB Response: As set forth in the MSRB's response to the RBDA comment letter, the MSRB considers it consistent with the permitted exceptions from the priority provisions for a sole underwriter or syndicate manager to refuse to accord priority to an order from a customer whom the sole underwriter or syndicate manager reasonably believes would purchase municipal

securities with the expectation of selling them at higher prices shortly thereafter. Furthermore, as set forth in the MSRB's response to the SIFMA comment letter, the proposed rule change incorporates the same exceptions to the priority provisions that exist under current law. What the proposed rule change would do is to require accountability of underwriters who deviated from the priority provisions, because they would be required to keep records of why they did so.