MSRB
Municipal Securities Rulemaking Board

October 31, 2019

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

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

Dear Ms. Countryman:

On August 1, 2019, the Municipal Securities Rulemaking Board ("MSRB") filed with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change to amend and restate the MSRB's August 2, 2012 interpretive notice[1] concerning the application of MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities, to underwriters of municipal securities (the "original proposed rule change").[2] The original proposed rule change would (1) update the 2012 Interpretive Notice in light of its implementation in the market since its first adoption and current market practices and (2) revise the 2012 Interpretive Notice to update and streamline certain of its disclosure obligations, such as incorporating certain implementation guidance[3] and frequently-asked-questions[4] issued subsequent to the 2012 Interpretive Notice in order to consolidate the MSRB's relevant guidance on this topic into a single publication.

To inform the development of the original proposed rule change, the MSRB initiated a retrospective review of the 2012 Interpretive Notice and sought public comment on draft amendments through two separate requests for comment prior to preparing the original proposed

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

2 The original proposed rule change as filed by the MSRB is available at http://www.msrb.org/~/media/Files/SEC-Filings/2019/MSRB-2019-10%20version%203.ashx?.

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

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

rule change.[5] In response to the requests for comment, the MSRB received a total of ten letters from a diverse group of market participants. Some commenters expressed support for the draft amendments to the 2012 Interpretive Notice. Others generally supported the MSRB's efforts to enhance the effectiveness of the disclosures required by the 2012 Interpretive Notice but suggested further revisions to the draft amendments or expressed various concerns related to the draft amendments. The MSRB found this input to be highly informative and valuable. After carefully considering the comments received in response to the Concept Proposal and Request for Comment, the MSRB incorporated revisions to the draft amendments prior to filing the original proposed rule change with the Commission. The SEC published the original proposed rule change for comment in the Federal Register on August 9, 2019[6] and subsequently received three comment letters.[7]

Consistent with the comments received in the MSRB's prior public comment periods, two commenters on the original proposed rule change generally expressed their continued support for the MSRB's efforts to enhance the effectiveness of the disclosures, while one commenter to the original proposed rule change expressed its lack of support until the MSRB further amends the original proposed rule change to incorporate various revisions. The MSRB found this additional input to be highly informative and valuable. After carefully considering the comments, the MSRB submitted a written response to the SEC on October 7, 2019 (the "First Response to Comments")[8] and filed an amendment to make certain revisions to the original proposed rule change ("Amendment No. 1") on the same date.[9]

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

6 See Exchange Act Release No. 86572 (Aug. 5, 2019), 84 FR 39646 (Aug. 9, 2019) (File No. SR-MSRB-2019-10). Except as otherwise expressly defined herein, the defined terms used in this letter shall have the meanings as defined in the proposed rule change (as subsequently defined herein).

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

8 See letter from Gail Marshall, Chief Compliance Officer, MSRB (Oct. 7, 2019) (the "First Response to Comments"), available at http://www.msrb.org/~/media/Files/SEC-Filings/2019/MSRB-2019-10-Response-to-Comments.ashx.

9 See Amendment No. 1, available at http://www.msrb.org/~/media/Files/SEC-Filings/2019/MSRB-2019-10-A-1.ashx.

As discussed in further detail in Amendment No. 1 and the MSRB's First Response to Comments, the MSRB revised the original proposed rule change in Amendment No. 1 to more precisely: (1) identify who needs to provide certain transaction specific disclosures in circumstances where a recommendation is not made by the syndicate manager or sole manager, (2) clarify the fair dealing obligation to deliver certain disclosures when an underwriter is acting as an agent to place securities on behalf of an issuer, and (3) define the scope of the proposed rule change with respect to its application to primary distributors of municipal fund securities. The original proposed rule change as amended by Amendment No. 1 is referred to as the "amended proposed rule change" hereinafter for ease of reference. The SEC published Amendment No. 1 for comment in the Federal Register on October 15, 2019[10] and received three comment letters on the amended proposed rule change.[11]

This letter describes the MSRB's response to the comments received by the SEC on the amended proposed rule change. Consistent with the comments received in the SEC's public comment period to the original proposed rule change some comments were supportive of the amended proposed rule change,[12] while other comments continued to encourage the MSRB to incorporate various revisions as further discussed below. The MSRB found this additional input to be highly informative and valuable.

This letter also describes the second amendment the MSRB is filing on this same date to correct certain typographical errors in the amended proposed rule change and make two minor technical amendments to the amended proposed rule change consistent with Amendment No. 1, all of which are intended to improve the overall clarity of the amended proposed rule change ("Amendment No. 2"). The amended proposed rule change as amended by Amendment No. 2 is referred to as the "proposed rule change" hereinafter for ease of reference.

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10 See Exchange Act Release No. 87256 (Oct. 8, 2019), 84 FR 55192 (Oct. 15, 2019) (File No. SR-MSRB-2019-10).

11 See letters from Leslie Norwood, Managing Director and Associate General Counsel, SIFMA (Oct. 29, 2019) (the "Second SIFMA Comment Letter"), Susan Gaffney, Executive Director, NAMA (Oct. 29, 2019) (the "Second NAMA Comment Letter"), and Michael Nicholas, Chief Executive Officer, Bond Dealers of America ("BDA") (Oct. 29, 2019) (the "BDA Comment Letter").

12 See Second SIFMA Comment Letter, at pp. 1-2 ("We thank the MSRB for: (1) adopting our proposal that the underwriter recommending the complex municipal securities transaction should be the one to make the requisite disclosure; (2) clarifying that placement agents may disclaim a fiduciary duty to the issuer if that is consistent with the nature of their arrangement; (3) clarifying the application of scope of the interpretation related to municipal fund securities; and (4) adopting changes regarding acknowledgement of receipt.") and Second NAMA Comment Letter ("We continue to support the MSRB's proposed changes to the Rule G-17 Interpretive Guidance.").

Discussion of Comments to the Proposed Rule Change

After carefully considering the comments received in response to the amended proposed rule change, the MSRB provides the following responses.

Certain Standardized Disclosures for Complex Municipal Securities Financing Recommendations. The original proposed rule change sets out a principles-based approach to an underwriter's fair dealing obligation to deliver certain disclosures and incorporates existing hypothetical examples from the Implementation Guidance and FAQs related to the 2012 Interpretive Notice, including scenarios regarding the delivery of transaction-specific disclosures for complex municipal securities financings.[13] The original proposed rule change states that an underwriter must deliver certain transaction-specific disclosures when it "reasonably believes" that an issuer's personnel "lack the requisite knowledge or experience" with a financing structure to fully evaluate it and that an underwriter "must make an independent assessment that such disclosures are appropriately tailored to the issuer's level of sophistication." It also states that:

> Underwriters can create, in anticipation of making such a [Complex Municipal Securities Financing Recommendation], individualized descriptions, with appropriate levels of detail, of the material financial characteristics and risks for each of the various complex municipal securities financing structures and/or products (including any typical variations) they may recommend from time to time to its various issuer clients, with such standardized descriptions serving as the base for more particularized disclosures for the specific complex financing the underwriter recommends to particular issuers. 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.

Commenters to the amended proposed rule change have stated that these principles are generally vague and have requested more clarity from the MSRB in how to apply certain of these disclosure principles.[14] The MSRB separately discusses these broader comments regarding the

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13 With Amendment No. 1, the proposed rule change refers to the term "complex municipal securities financing" to mean a municipal securities financing that issuer personnel responsible for the issuance of municipal securities would not be well positioned to fully understand or assess the implications of a recommended financing structure in its totality, because it is structured in a unique, atypical, or otherwise complex manner or incorporates a unique, atypical, or otherwise complex features or products.

14 See Second SIFMA Comment Letter, at p. 3 and the BDA Comment Letter, at p. 2. In addition to the MSRB's response below under the discussion entitled "Tiered Disclosure Requirements Based on Issuer Characteristics," the MSRB previously addressed these concerns in the original proposed rule change and in its First Response to Comments. See 84 FR 39671 and the First Response to Comments, at p 10.

'vagueness' of the description of the underwriter's fair dealing obligation to deliver certain transaction-specific disclosures more fully below.[15]

Nevertheless, in light of the Second SIFMA Comment Letter, the MSRB believes further clarity can be provided to market participants on how an underwriter's fair dealing obligation to deliver transaction-specific disclosures for certain complex municipal securities financings would operate under the amended proposed rule change. On this topic, the Second SIFMA Comment Letters states:

> For compliance purposes, underwriters must adopt policies and procedures that can be implemented for their transactions and businesses in a consistent manner that will satisfy regulatory requirements and examiners. SIFMA's members feel that it is reasonable to give any issuer to which it has recommended a common complex structure a standard[ized] written disclosure that describes the nature and risks of that common complex structure, with the understanding that this disclosure would be more tailored if the transaction deviated from the standard[ized disclosure]. In the vast majority of cases, an underwriter's "independent assessment" of the disclosures would be satisfied by these clear and concise standard[ized] disclosures pertaining to that specific type or class of financing.[16]

The MSRB generally agrees with SIFMA's statement that it would be consistent with the current text of the proposed rule change, as well as the intent of the original proposed rule change, for an underwriter to develop policies and procedures that provide for the development and delivery of certain standardized transaction-specific disclosures for complex municipal securities financings for which an underwriter anticipates commonly recommending to issuers ("Standardized Complex Municipal Securities Transaction Disclosures"). Assuming that the content of such Standardized Complex Municipal Securities Transaction Disclosure is (a) drafted in a clear and concise manner for issuer personnel of both greater and lesser degrees of sophistication and (b) otherwise consistent with the requirements of the Revised Interpretive Notice, the proposed rule change would only require the underwriter to tailor the content of such Standardized Complex Municipal Securities Transaction Disclosure to the extent that such disclosure did not fully describe the material financial features and risks unique to that particular recommended financing in such a clear and concise manner for the issuer personnel receiving the

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15 See the MSRB's response below under the discussion entitled "Tiered Disclosure Requirements Based on Issuer Characteristics."

16 Second SIFMA Comment Letter, at p. 3. The MSRB added the clarifying language to SIFMA's comment in brackets in order to better illustrate the discussion and not create confusion between the proposed rule change's defined term of "standard disclosures" and SIFMA's use of the phrase "standard written disclosure."

disclosure.[17] The MSRB does not need to amend the proposed rule change to address this comment because, as outlined above and demonstrated by the Second SIFMA Comment Letter, the concept can be reasonably understood from the existing language of the amended proposed rule change.

Compliance Date for the Proposed Rule Change. SIFMA requested that the MSRB set a compliance date of one year from the date the proposed rule change's amendments to the 2012 Interpretive Notice are final.[18] The Second SIFMA Comment Letter requested this timeframe to allow "sufficient time" for dealers to implement the proposed rule change's amendments and revise their policies and procedures.[19] The MSRB indicated in the original proposed rule change that, if the proposed rule change is approved by the Commission, it will publish a regulatory notice within 90 days of the publication of such approval in the Federal Register and such notice would specify the compliance date for the amendments described in the proposed rule change, which in any case would be not less than 90 days, nor more than one year, following the date of the regulatory notice.[20] This is consistent with the SIFMA's request. The MSRB will work with stakeholders, as needed, to determine reasonable compliance dates for the changes, recognizing SIFMA's request for at least a one-year compliance timeline given that policy and procedures would need to be updated to conform to the proposed rule change.

Delivery of the New Standard Disclosure Regarding 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 best interest of the issuer without regard to its own or other interests."[21] The proposed rule change would include a

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17 Relatedly, the MSRB believes that, in such circumstances, the underwriter would not fail to meet its fair dealing obligation to make an independent assessment under the proposed rule change if the underwriter reasonably determined that its Standardized Complex Municipal Securities Transaction Disclosures did not need to be tailored for a particular recommended financing given the manner in which such disclosures are drafted.

18 Second SIFMA Commenter Letter, at p. 5.

19 Id.

20 84 FR 39646.

21 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

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."[22] 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).[23] The MSRB incorporated this additional disclosure into the original proposed rule change based on comments from market participants that further emphasis was necessary to highlight the arm's-length, commercial nature of the underwriting relationship to issuers and to expressly inform issuers that they 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.[24]

Commenters to the amended proposed rule change have contrasting views on this additional disclosure. The Second NAMA Comment Letter stated its strong support for the disclosure as incorporated into the original proposed rule change.[25] On the other hand, the

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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.

22 84 FR 39664 ("By supplementing this language [prohibiting the discouragement of engaging a municipal advisor] 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 [original] proposed rule change would further promote an issuer's understanding of the distinct roles of an underwriter and a municipal advisor.")

23 84 FR 39656.

24 See 84 FR 39678 (citing the request from the Government Finance Officers Association (GFOA) that underwriters "affirmatively state that issuers may choose to hire a municipal advisor to represent their interests in a transaction'' and NAMA's statement 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'').

25 Second NAMA Comment Letter ("Specifically, we would like to restate our agreement with adding underwriter disclosures to issuers that issuers may engage the services of

Second SIFMA Comment Letter restated objections to the inclusion of this amendment to the 2012 Interpretive Notice.[26] More specifically, the Second SIFMA Comment Letter reiterates that its members, ". . . consider this type of disclosure highly unusual and . . . has the potential to chill underwriter communications with the issuer and/or create a perceived or actual bias against underwriter-only transactions that, in either case, could lead to increased issuer borrowing costs."[27] The Second SIFMA Comment Letter further states that:

> In fact, the non-dealer municipal advisor community has set forth arguments that they should be able to act as placement agents, which are intermediaries between issuers and investors. There has been no suggestion that, in those cases, the non-dealer municipal advisor should disclose that they (sic) are not a registered broker-dealer, and that the issuer may choose to engage services of a broker-dealer to ensure the appropriate investor protections under the securities laws are satisfied and that the municipal advisor's loyalties are not divided. Therefore, SIFMA feels that the MSRB's statement in the filing that there is no burden on competition is false, and the filing does not meet the standard for approval under the Securities Exchange Act of 1934, thus meriting disapproval by the Commission.[28]

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municipal advisors who have a fiduciary duty to the issuer, unlike the underwriter."). See also First NAMA Comment Letter, at p. 2 ("[W]e strongly support the additional disclosures in the [original proposed rule change] that the underwriter must disclose to the issuer 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 well as the new language that 'Underwriters also must not recommend that issuers not retain a municipal advisor.'").

26 Second SIFMA Comment Letter, at p. 4. See also First SIFMA Comment letter, at pp. 3-4 ("SIFMA and its members strongly object to the new requirement that underwriters must inform an issuer that 'the issuer may choose to engage the services of a municipal advisor to represent its interests in the transaction.'").

27 Second SIFMA Comment Letter, at p. 4.

28 Id. As discussed further below, the MSRB notes that the original proposed rule change did acknowledge that the incorporation of the new standard disclosure would create some burden on underwriters through certain compliance costs. See 84 FR 39656. Further, as the MSRB notes that pursuant to MSRB Rule G-42 a municipal advisor has a fiduciary duty to its municipal entity issuer clients that encompasses a duty of care and duty of loyalty. This duty of loyalty requires a municipal advisor to deal honestly and with the utmost good faith with a municipal entity issuer client and act in a municipal entity issuer client's best interests without regard to the financial or other interests of the municipal advisor. See Rule G-42, Supplementary Material .02.

Lastly, the BDA Comment Letter also reiterated its prior objections to the inclusion of the new standard disclosure, stating "underwriters should not be required to promote the services of other market participants."[29]

After carefully considering the most recent comments from NAMA, BDA, and SIFMA, the MSRB continues to believe that the proposed disclosure would further clarify the distinctions between an underwriter – who is subject to a duty of fair dealing in the course of its municipal securities activities with issuers – 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 issuers in accordance with the MSRB's statutory mandate at a relatively minimal burden to underwriters.[30] Moreover, the MSRB remains persuaded by the comments from market participants – particularly statements from the issuer community – that issuers may be improperly dissuaded from considering the engagement of a municipal advisor and, in any case, would benefit from better understanding the distinctions of the role of a municipal advisor.[31]

In terms of the potential burden on dealers resulting from this new standard disclosure, the MSRB acknowledged in the original proposed rule change that the additional disclosure would cause underwriters to incur costs associated with revising their policies and procedures and delivering the new disclosure in their standard disclosures during transactions.[32] Specifically, the MSRB concluded that any costs associated with the proposed rule change would be outweighed by its benefits and, since the proposed rule change would be applicable to all underwriters, it would not have a negative impact on market competition among dealers.[33] The MSRB continues to believe that the proposed rule change is consistent with the Act and the

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29 BDA Comment Letter, at pp. 1-2. The MSRB previously addressed this concern regarding the "promot[ion]" of other market participants in the text of the original proposed rule change. See 84 FR 39677-39679 (discussing various comments and other considerations, including comments related to a "bias against underwriter only transactions" and "possible negative effects that this proposed change may have on issuer decision-making").

30 84 FR 39656.

31 See 84 FR 39677-39679 (discussing the request from GFOA that "underwriters affirmatively state that issuers may choose to hire a municipal advisor to represent their interests in a transaction" among various other comments).

32 84 FR 39664-39665.

33 84 FR 39665.

comments to the proposed rule change do not change the MSRB's analysis in this regard.[34] Accordingly, the MSRB declines to incorporate any revisions to the proposed rule change in response to these comments from SIFMA and BDA. The MSRB appreciates the concerns raised by SIFMA and BDA with respect to the potential burden on competition that could result if the MSRB's proposed rule change is approved and the Commission's Proposed MA Exemptive Order also is adopted as proposed. However, the MSRB believes that, at this time, it is premature to propose amendments to MSRB rules and/or interpretive guidance that may become necessary should regulatory disparities result.

Finally, SIFMA commented that the Revised Interpretive Notice should make clear that neither municipal advisors nor underwriters may misrepresent the services and duties that the other is permitted to provide. As the MSRB noted in the original proposed rule change, because the Revised Interpretive Notice is focused on underwriters' fair dealing obligations to issuers, not the duties of loyalty and care that municipal advisors owe their municipal entity clients, the Revised Interpretive Notice is not the appropriate vehicle to address this type of comment, recognizing that MSRB Rule G-42, on the duties of non-solicitor municipal advisors, effectively prohibits a municipal advisor from knowingly misrepresenting its services or the services of an underwriter.[35]

Standard for the 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.[36] As described in the original

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34 As previously noted in the MSRB's First Response to Comments, comments related to the Commission's "Notice of Proposed Exemptive Order Granting a Conditional Exemption from the Broker Registration Requirements of Section l5(a) of the Securities Exchange Act of 1934 for Certain Activities of Registered Municipal Advisors" (the "Commission's Proposed MA Exemptive Order") are out of scope of the proposed rule change. See Exchange Act Release No. 87204 (Oct. 2, 2019), 84 FR 54062 (Oct. 9, 2019) (File No. S7-16-19) and the First Response to Comments, at p. 7 ("The MSRB believes this concern [regarding the Commission's Proposed MA Exemptive Order] is outside the scope of the proposed rule change and declines to address it further"). In this instance, it would be prematurely speculative for the MSRB to analyze the competitive effects on the municipal securities market that might result from the interaction of the proposed rule change with the Commission's Proposed MA Exemptive Order. Likewise, it would be premature to address BDA's request that MSRB Rule G-23 and Rule G-17 disclosures should be integrated at this time. See BDA Comment Letter, at p. 3; see also MSRB Notice 2019-13 "Request for Comment on MSRB Rule G-23 on Activities of Dealers Acting as Financial Advisors" (May 20, 2019).

35 84 FR 39678, fn. 210 and related discussion.

36 84 FR 39654.

proposed rule change, the requirement to provide such disclosure under the 2012 Interpretive Notice is triggered if: the new issue is sold in a negotiated underwriting; the matter to be disclosed represents a conflict of interest, either in reality or potentially; and any such actual or potential conflict of interest is material.[37] These aspects of the 2012 Interpretive Notice would remain applicable under the original proposed rule change. However, the original proposed rule change would provide that an underwriter's potential material conflict of interest must be disclosed as part of the dealer-specific disclosures if, but only if, the potential material conflict of interest is "reasonably likely" to mature into an actual material conflict of interest during the course of that specific transaction.[38] This aspect of the original proposed rule change would reduce a dealer's burden by narrowing the dealer-specific disclosures currently required under the 2012 Interpretive Notice from all potential material conflicts to those potential material conflicts that meet this more focused standard.[39]

The Second SIFMA Comment Letter and the BDA Comment Letter request that the MSRB require only disclosures of actual conflicts of interest.[40] Specifically, the Second SIFMA Comment Letter "reiterates its request that the MSRB require only disclosures of actual conflicts of interest."[41] Similarly, the BDA Comment Letter stated, "[w]e urge the MSRB to limit conflict disclosure to actual, not potential, conflicts of interest."[42]

As indicated in the original proposed rule change and in the MSRB's First Response to Comments, 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

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37 Id.

38 84 FR 39655.

39 84 FR 39658.

40 See First SIFMA Comment Letter, at p. 3 ("SIFMA again asks the MSRB to require only disclosures of actual conflicts of interest) and Second SIFMA Comment Letter, at p. 2. The MSRB previously addressed this topic in response to the First SIFMA Comment Letter in the MSRB's First Response to Comments. See the MSRB's First Response to Comments, at p. 10 (link available at note 9 supra).

41 The Second SIFMA Comment Letter, at p. 2.

42 BDA Comment Letter, p. 2. The MSRB also notes that BDA incorrectly characterizes the proposed rule change as causing "an expansion" in the type of potential material conflicts that must be disclosed. As noted in the original proposed rule change, the amendment would narrow the required disclosures from all potential material conflicts of interest to those "reasonably likely" potential material conflicts of interest. See 84 FR 39658.

the obligation for underwriters to continue to provide these disclosures.[43] To the degree that an underwriter has knowledge that a material conflict of interest does not currently exist, but is reasonably likely to ripen into an actual material conflict of interest during the course of the underwriting transaction, the MSRB continues to believe that the municipal securities market is best served by the underwriter providing advanced notification to the issuer of the likelihood of such material conflict of interest, rather than waiting to disclose the conflict until it has ripened into an actual conflict. As the Second SIFMA Comment Letter and the BDA Comment Letter do not alter the MSRB's conclusions in this regard, the MSRB declines to incorporate such comments into Amendment No. 2.

Tiered Disclosure Requirements Based on Issuer Characteristics. As noted above, the original proposed rule change sets out a principles-based approach to an underwriter's fair dealing obligation to deliver certain disclosures and incorporates existing hypothetical examples from the Implementation Guidance and FAQs related to the 2012 Interpretive Notice.[44] For example, the original proposed rule change states that an underwriter must deliver certain transaction-specific disclosures when it "reasonably believes" that an issuer's personnel "lack the requisite knowledge or experience" with a financing structure to fully evaluate it and that an underwriter "must make an independent assessment that such disclosures are appropriately tailored to the issuer's level of sophistication."[45] Similarly, the original proposed rule change states that an underwriter has an obligation under Rule G-17 "to communicate more particularized transaction-specific disclosures" in the case of a complex municipal securities financing "than those that may be required in the case of routine financing structures."[46]

The First SIFMA Comment Letter requests that the MSRB, ". . . provide clarity to regulated dealers regarding how the content of these transaction-based disclosures may potentially vary by issuer sophistication and still survive regulatory scrutiny."[47] Echoing these comments from the First SIFMA Comment Letter, the BDA Comment Letter states the proposed rule change ". . . would create a vague and imprecise standard for determining what is a [complex municipal securities financing] and what kinds of information related to the transaction would need to be disclosed and under what conditions."[48] The Second SIFMA Comment Letter

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43 84 FR 39674.

44 84 FR 39653.

45 See Exhibit 5 of the original proposed rule change (link at supra note 2).

46 Id.

47 First SIFMA Comment Letter, at p. 2. The MSRB addressed this comment in its First Response to Comments (link at note 9 supra).

48 BDA Comment Letter, at p. 2. In terms of the BDA's concern that the proposed rule change "introduces a vague concept of 'tiered disclosure' tailored to an individual

reiterates the concern that the proposed rule change, ". . . will create confusion as to the required content of the complex securities disclosures for any particular issuer or issuance."[49]

As stated in the original proposed rule change and in the MSRB's First Response to Comments, the MSRB evaluated formal disclosure tiers and declined to adopt such tiers or other disclosure requirements based on rigid issuer classifications in response to prior stakeholder comments. The MSRB continues to believe that there is not an obvious, appropriate methodology for classifying issuers in a manner that would advance the policies underlying the 2012 Interpretive Notice or would materially relieve burdens for underwriters or issuers, and requiring different disclosure standards for different issuers may have unintended consequences that compromise issuer protections.[50] The comments received on the amended proposed rule change do not alter the MSRB's conclusions in this regard.

Discussion of Technical Revisions Incorporated into Amendment No. 2

The MSRB has incorporated certain revisions in Amendment No. 2 regarding typographical errors in the amended proposed rule change and other similar technical revisions resulting from Amendment No. 1. More specifically, the phrase "in a continuous" was incorporated into Amendment No. 1 in a duplicative manner that could hinder a reader's understanding of the proposed rule change. Relatedly, Amendment No. 1 did not consistently apply revisions to new footnote 31 of Exhibits 4 and 5 to the amended proposed rule change because it omitted certain references to both an "element or product" in two instances.

The attachment to this letter sets forth Amendment No. 2.

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

Sincerely,

Gail Marshall
Chief Compliance Officer

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issuer's level of sophistication without providing any guidance on how to determine an issuer's disclosure needs," the MSRB responds to this concern under the discussion above entitled "Certain Standardized Disclosures for Complex Municipal Securities Financing Recommendations."

49 Second SIFMA Comment Letter, at p. 3.

50 84 FR 39671.

The Municipal Securities Rulemaking Board ("MSRB") is filing this second amendment ("Amendment No. 2") to File No. SR-MSRB-2019-10, originally filed with the Securities and Exchange Commission (the "SEC" or "Commission") on August 1, 2019 and previously amended by an amendment the MSRB filed with the SEC on October 7, 2019 ("Amendment No. 1"),[1] with respect to a proposed rule change to amend and restate the MSRB's August 2, 2012 interpretive notice[2] concerning the application of MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities, to underwriters of municipal securities (the "original proposed rule change"). For ease of reference, the original proposed rule change as amended by Amendment No. 1 is referred to as the "amended proposed rule change" hereinafter, and the amended proposed rule change as amended by this Amendment No. 2 is referred to as the "proposed rule change" hereinafter.

The proposed rule change would (1) update the 2012 Interpretive Notice in light of its implementation in the market since its first adoption and current market practices and (2) revise the 2012 Interpretive Notice to update and streamline certain of its disclosure obligations, such as incorporating certain implementation guidance[3] and frequently-asked-questions[4] issued subsequent to the 2012 Interpretive Notice in order to consolidate the MSRB's relevant guidance on this topic into a single publication. The SEC published notice of the original proposed rule change on August 5, 2019, and notice was then published in the Federal Register on August 9, 2019.[5] The Commission received three comment letters in response to the original proposed rule change.[6] The MSRB found this input to be highly informative and valuable.

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1 See Amendment No. 1, available at http://www.msrb.org/~/media/Files/SEC-Filings/2019/MSRB-2019-10-A-1.ashx.

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

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

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

5 See Exchange Act Release No. 86572 (Aug. 5, 2019), 84 FR 39646 (Aug. 9, 2019) (File No. SR-MSRB-2019-10). Except as otherwise defined herein, the terms defined in this Amendment No. 2 shall have the same meanings as used in the proposed rule change.

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

After carefully considering these comments, the MSRB submitted a written response to the SEC on October 7, 2019 (the "First Response to Comments")[7] and filed Amendment No. 1 with the SEC on the same day.[8] As discussed in further detail in Amendment No. 1 and the First Response to Comments, the MSRB revised the original proposed rule change by operation of Amendment No. 1 to more precisely: (1) identify who needs to provide certain transaction specific disclosures in circumstances where a recommendation is not made by the syndicate manager or sole manager, (2) clarify the fair dealing obligation to deliver certain disclosures when an underwriter is acting as an agent to place securities on behalf of an issuer, and (3) define the scope of the proposed rule change with respect to its application to primary distributors of municipal fund securities. The SEC published notice of Amendment No. 1 and the amended proposed rule change on October 8, 2019, and notice was then published in the Federal Register on October 15, 2019.[9]

The SEC received three comment letters on the amended proposed rule change.[10] Consistent with the comments received in the SEC's public comment period to the original proposed rule change, some comments were supportive of the amended proposed rule change,[11] while other comments continued to encourage the MSRB to incorporate various revisions. The MSRB found this additional input to be highly informative and valuable. After carefully

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7 See letter from Gail Marshall, Chief Compliance Officer, MSRB (Oct. 7, 2019), available at http://www.msrb.org/~/media/Files/SEC-Filings/2019/MSRB-2019-10-Response-to-Comments.ashx.

8 See note 1 supra.

9 See Exchange Act Release No. 87256 (Oct. 8, 2019), 84 FR 55192 (Oct. 15, 2019) (File No. SR-MSRB-2019-10).

10 See letters from Leslie Norwood, Managing Director and Associate General Counsel, SIFMA (Oct. 29, 2019) (the "Second SIFMA Comment Letter"), Susan Gaffney, Executive Director, NAMA (Oct. 29, 2019) (the "Second NAMA Comment Letter"), and Michael Nicholas, Chief Executive Officer, Bond Dealers of America ("BDA") (Oct. 29, 2019) (the "BDA Comment Letter").

11 See Second SIFMA Comment Letter, at pp. 1-2 ("We thank the MSRB for: (1) adopting our proposal that the underwriter recommending the complex municipal securities transaction should be the one to make the requisite disclosure; (2) clarifying that placement agents may disclaim a fiduciary duty to the issuer if that is consistent with the nature of their arrangement; (3) clarifying the application of scope of the interpretation related to municipal fund securities; and (4) adopting changes regarding acknowledgement of receipt.") and Second NAMA Comment Letter ("We continue to support the MSRB's proposed changes to the Rule G-17 Interpretive Guidance.").

considering these comment letters, the MSRB is filing a response to comments with the SEC in concert with the filing of this Amendment No. 2.[12]

The MSRB is also filing this Amendment No. 2 to make certain technical revisions in light of certain typographical errors in the amended proposed rule change and other similar technical revisions resulting from Amendment No. 1. More specifically, the phrase "in a continuous" was incorporated into Amendment No. 1 in a duplicative manner that could hinder a reader's understanding of the proposed rule change. Relatedly, Amendment No. 1 did not consistently apply revisions to new footnote 31 of Exhibits 4 and 5 of the amended proposed ruel change because it omitted certain references to both an "element or product" in two instances. Thus, the proposed revisions to the amended proposed rule change are technical modifications.

The revisions made by Amendment No. 2 to the amended proposed rule change are contained in the attached Exhibit 4. Material proposed to be added is underlined. Material proposed to be deleted is enclosed in brackets. The text of the proposed rule change is attached as Exhibit 5. Material proposed to be added is underlined. Material proposed to be deleted is enclosed in brackets.

The MSRB believes the Commission has good cause, pursuant to Section 19(b)(2) of the Securities Exchange Act of 1934, for granting accelerated approval of Amendment No. 2. The revisions in this Amendment No. 2 to the amended proposed rule change are technical in nature, fully consistent with Amendment No. 1, and, thereby unlikely to be controversial.

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[12] The MSRB this day submitted a response to comments discussing these amendments and other matters. See letter from Gail Marshall, Chief Compliance Officer, MSRB, to Secretary, Commission, dated October 31, 2019.

EXHIBIT 4

TEXT OF DRAFT AMENDMENTS*

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

Under Rule G-17 of the Municipal Securities Rulemaking Board (the "MSRB"), brokers, dealers, and municipal securities dealers ("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.[2] With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[3] the MSRB was expressly directed by Congress to protect municipal entities. Accordingly, in 2012, the MSRB provided additional interpretive guidance that addressed how Rule G-17 applies to dealers acting in the capacity of underwriters in the municipal securities transactions described therein (the "2012 Interpretive Notice").[4]

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

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* Underlining indicates new language; brackets denote deletions.

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

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

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

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

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

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

Applicability of the Notice

Except where a competitive underwriting is specifically mentioned, this notice applies to negotiated underwritings only.[6] This notice applies to a primary offering of a new issue of municipal securities that is placed with investors by a dealer serving as placement agent, although certain disclosures may be omitted as described below.

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

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

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

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. Furthermore, when municipal entities are customers[7] of dealers, they are subject to the same protections under MSRB rules, including Rule G-17, that apply to other customers.[8] The MSRB notes that an underwriter has a duty of fair dealing to investors in addition to its duty of fair dealing to issuers. An underwriter also has a duty to comply with other MSRB rules as well as other federal and state securities laws.

Basic Fair Dealing Principle

As noted above, Rule G-17 precludes a dealer, in the conduct of its municipal securities activities, from engaging in any deceptive, dishonest, or unfair practice with any person, including an issuer. 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), even in the absence of fraud.

Role of Underwriters and Conflicts of Interest

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

- The disclosures discussed under "Disclosures Concerning the Underwriters' Role" and "Disclosures Concerning Underwriters' Compensation" (the "standard disclosures") must

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

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

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

be provided by the sole underwriter or the syndicate manager[10] to the issuer as described below.

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

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

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

[11] Where an underwriting syndicate is formed, the syndicate manager has the sole responsibility hereunder for providing the standard disclosures. Consistent with this obligation placed on the syndicate manager, only the syndicate manager must maintain and preserve records of the standard disclosures in accordance with MSRB rules. Further, the MSRB acknowledges that an underwriter may not know if a syndicate will form at the time that certain disclosures are sent. In instances in which an underwriter has provided a standard disclosure prior to or concurrent with the formation of a syndicate, it shall suffice that the then-underwriter (later syndicate manager) has delivered a standard disclosure, and no affirmative statement is necessary that a disclosure is being made on behalf of any existing or future syndicate members for the syndicate manager to have met its fair dealing obligations in this regard. Notwithstanding the obligation of a syndicate manager to deliver the standard disclosures, nothing herein would prohibit, or should be construed as prohibiting, another underwriter from delivering a standard disclosure in order to, for example, comply with another regulatory or statutory obligation.

[12] Each underwriter, whether a sole underwriter, syndicate manager, or other member of the underwriting syndicate, has a fair dealing obligation under this notice to deliver transaction-specific disclosures where such underwriter has made a recommendation to an issuer regarding a financing structure or product. The fair dealing obligation to deliver such a transaction-specific disclosure, includes, but is not limited to, determining the level of disclosure required based on the type of financing structure or product recommended and a reasonable belief of the issuer's knowledge and experience regarding

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

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

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

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that particular type of financing structure or product. In such cases, as further discussed below, a sole underwriter, syndicate manager, or other member of the underwriting syndicate who has not made such a recommendation would not need to deliver transaction-specific disclosures in order to meet its fair dealing obligation under this notice.

13 *See also* note 30 *infra*.

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

A dealer acting as a placement agent in the primary offering of a new issuance of municipal securities should also consider how the scope of its activities may interact with the registration and record-keeping requirements for municipal advisors adopted by the Securities and Exchange Commission (the "Commission") under Section 15B of the Exchange Act (15 U.S.C. 78o-4), including the application of the exclusion from the definition of "municipal advisor" applicable to a dealer acting as an underwriter pursuant to Exchange Act Rule 15Ba1-1(d)(2)(i). *See* Registration of Municipal Advisors, Exchange Act Release No. 70462 (September 20, 2013), 78 FR 67467 (hereinafter, the "MA Rule Adopting Release"), at 67515 – 67516 (November 12, 2013) (available at http://www.sec.gov/rules/final/2013/34-70462.pdf) (stating: "The Commission does not

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

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

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

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

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

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

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believe that the underwriter exclusion should be limited to a particular type of underwriting or a particular type of offering. Therefore, if a registered broker-dealer, acting as a placement agent, performs municipal advisory activities that otherwise would be considered within the scope of the underwriting of a particular issuance of municipal securities as discussed, the broker-dealer would not have to register as a municipal advisor."); *see also* the MA Rule Adopting Release, 78 FR at 67513 – 67514 (discussing activities within and outside the scope of serving as an underwriter of a particular issuance of municipal securities for purposes of the underwriter exclusion).

15 *Id.*

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

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

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

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

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

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

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

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

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

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

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

specific disclosures includes material conflicts of interest arising after the time of engagement with the issuer, as noted below.

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

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

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

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

- An underwriter must make the dealer-specific disclosures at or before the time the underwriter has been engaged to perform the underwriting services.[22] Thereafter, an

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

21 *See also* note 30 *infra*.

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

underwriter must make any applicable dealer-specific disclosures discovered or arising after being engaged as an underwriter as soon as practicable after being discovered and with sufficient time for the issuer to fully evaluate any such conflict and its implications.[23]

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

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

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each underwriter in the syndicate must make any applicable dealer-specific disclosures discovered or arising after being engaged as an underwriter in the syndicate as soon as practicable after being discovered and with sufficient time for the issuer to fully evaluate such a conflict and its implications.

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

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

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

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

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

Representations to Issuers

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

Required Disclosures to Issuers

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

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

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

underwriter reasonably believes lack the requisite knowledge or experience to fully understand or assess the implication of a financing structure or product, the underwriter making such recommendation must provide disclosures on the material aspects of such financing structures or products that it recommends (*i.e.*, the "transaction-specific disclosures").[30]

In some cases, issuer personnel responsible for the issuance of municipal securities would not be well positioned to fully understand or assess the implications of a recommended financing structure in its totality, because it is structured in a unique, atypical, or otherwise complex manner or incorporates unique, atypical, or otherwise complex features or products (a "complex municipal securities financing").[31] Examples of complex municipal securities financings include, but are not limited to, variable rate demand obligations ("VRDOs"), financings involving derivatives (such as swaps), and financings in which interest rates are benchmarked to an index (such as LIBOR, SIFMA, or SOFR).[32] When a recommendation regarding a complex municipal securities financing has been made by an underwriter in a negotiated offering,[33] the underwriter

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

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

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

33 For purposes of determining when an underwriter recommends a financing structure in a negotiated offering or recommends a complex municipal securities financing in a negotiated offering (a "Complex Municipal Securities Financing Recommendation"), the MSRB's guidance on the meaning of "recommendation" for dealers in MSRB Notice 2014-07: SEC Approves MSRB Rule G-47 on Time-of-Trade Disclosure Obligations, MSRB Rules D-15 and G-48 on Sophisticated Municipal Market Professionals, and Revisions to MSRB Rule G-19 on Suitability of Recommendations and Transactions

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

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(March 12, 2014) is applicable by analogy. For example, whether an underwriter has made a Complex Municipal Securities Financing Recommendation is not susceptible to a bright line definition but turns on the facts and circumstances of the particular situation. An important factor in determining whether a Complex Municipal Securities Financing Recommendation has been made is whether – given its content, context, and manner of presentation – a particular communication from an underwriter to an issuer regarding a financing structure or product reasonably would be viewed as a call to action or reasonably would influence an issuer to engage in such a financing structure or product deemed a complex municipal securities financing. In general, the more individually tailored the underwriter's communication is to a specific issuer about a complex municipal securities financing, the greater the likelihood that the communication reasonably would be viewed as a Complex Municipal Securities Financing Recommendation.

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

35 For example, when a Complex Municipal Securities Financing Recommendation to an issuer for a VRDO is made, the underwriter who recommends the VRDO should inform the issuer of the risk of interest rate fluctuations and material risks of any associated credit or liquidity facilities (*e.g.*, the risk that the issuer might not be able to replace the facility upon its expiration and might be required to repay the facility provider over a short period of time). As an additional example, if the underwriter recommends 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 disclosures should be sufficient to allow the issuer to assess the magnitude of its potential exposure as a result of the complex municipal securities financing. Such disclosures must also inform the issuer that there may be accounting, legal, and other risks associated with the swap and that the issuer should consult with other professionals concerning such risks. If the underwriter who has made a Complex Municipal Securities

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

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

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

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Financing Recommendation is affiliated with the swap dealer proposed to be the executing swap dealer, the underwriter may satisfy its disclosure obligation under this notice with respect to the swap if such disclosure has been provided to the issuer by the affiliated swap dealer or the issuer's swap or other financial advisor that is independent of such underwriter and the swap dealer, as long as the underwriter has a reasonable basis for belief in the truthfulness and completeness of such disclosure. If the issuer decides to enter into a swap with another dealer, the sole underwriter or syndicate manager is not required to make disclosures with regard to that swap product under this notice. The MSRB notes that a dealer who recommends a swap or security-based swap to an issuer may also be subject to rules of the Commodity Futures Trading Commission or those of the Securities and Exchange Commission ("SEC").

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

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

designed to make clear to such official the subject matter of such disclosures and their implications for the issuer.

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

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

Underwriter Duties in Connection with Issuer Disclosure Documents

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

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38 *See* note 18 *supra*.

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

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

41 Underwriters that assist issuers in preparing official statements must remain cognizant of their duties under federal securities laws. With respect to primary offerings of municipal securities, the SEC has noted, "By participating in an offering, an underwriter makes an implied recommendation about the securities." *See* Exchange Act Release No. 26100 (Sept. 22, 1988) (proposing Exchange Act Rule 15c2-12) at text following fn. 70. The SEC has stated that "this recommendation itself implies that the underwriter has a

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

Underwriter Compensation and New Issue Pricing

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

Fair Pricing. The duty of fair dealing under Rule G-17 includes an implied representation that the price an underwriter pays to an issuer is fair and reasonable, taking into consideration all relevant factors, including the best judgment of the underwriter as to the fair market value of the issue at the time it is priced.[42] In general, a dealer purchasing bonds in a competitive underwriting for which the issuer may reject any and all bids will be deemed to have satisfied its duty of fairness to the issuer with respect to the purchase price of the issue as long as the dealer's

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reasonable basis for belief in the truthfulness and completeness of the key representations made in any disclosure documents used in the offerings." Furthermore, pursuant to Exchange Act Rule 15c2-12(b)(5), an underwriter may not purchase or sell municipal securities in most primary offerings unless the underwriter has reasonably determined that the issuer or an obligated person has entered into a written undertaking to provide certain types of secondary market disclosure and has a reasonable basis for relying on the accuracy of the issuer's ongoing disclosure representations. Exchange Act Release No. 34961 (Nov. 10, 1994) (adopting continuing disclosure provisions of Exchange Act Rule 15c2-12) at text following fn. 52.

42 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.

bid is a bona fide bid (as defined in MSRB Rule G-13)[43] that is based on the dealer's best judgment of the fair market value of the securities that are the subject of the bid. In a negotiated underwriting, the underwriter has a duty under Rule G-17 to negotiate in good faith with the issuer. This duty includes the obligation of the dealer to ensure the accuracy of representations made during the course of such negotiations, including representations regarding the price negotiated and the nature of investor demand for the securities (*e.g.*, the status of the order period and the order book). If, for example, the dealer represents to the issuer that it is providing the "best" market price available on the new issue, or that it will exert its best efforts to obtain the "most favorable" pricing, the dealer may violate Rule G-17 if its actions are inconsistent with such representations.[44]

Conflicts of Interest

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

Profit-Sharing with Investors. Arrangements between the underwriter and an investor purchasing new issue securities from the underwriter (including purchases that are contingent upon the delivery by the issuer to the underwriter of the securities) according to which profits

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

44 *See* 1997 Interpretation (note 2 *supra*).

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

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

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

Retail Order Periods

Rule G-17 requires an underwriter that has agreed to underwrite a transaction with a retail order period to, in fact, honor such agreement.[47] A dealer that wishes to allocate securities in a manner that is inconsistent with an issuer's requirements must not do so without the issuer's consent. In addition, Rule G-17 requires an underwriter that has agreed to underwrite a transaction with a retail order period to take reasonable measures to ensure that retail clients are bona fide. An underwriter that knowingly accepts an order that has been framed as a retail order when it is not (*e.g.*, a number of small orders placed by an institutional investor that would otherwise not qualify as a retail customer) would violate Rule G-17 if its actions are inconsistent with the

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

47 *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).

issuer's expectations regarding retail orders. In addition, a dealer that places an order that is framed as a qualifying retail order but in fact represents an order that does not meet the qualification requirements to be treated as a retail order (*e.g.*, an order by a retail dealer without "going away" orders[48] from retail customers, when such orders are not within the issuer's definition of "retail") violates its Rule G-17 duty of fair dealing. The MSRB will continue to review activities relating to retail order periods to ensure that they are conducted in a fair and orderly manner consistent with the intent of the issuer and the MSRB's investor protection mandate.

Dealer Payments to Issuer Personnel

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

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

{DATE TO BE SPECIFIED}

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

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

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

EXHIBIT 5

TEXT OF DRAFT AMENDMENTS*

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

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

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

* Underlining indicates new language; brackets denote deletions.

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

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

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

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

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

Applicability of the Notice

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

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

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

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

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

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

Basic Fair Dealing Principle

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

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

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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).

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

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

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

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

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

[11] Where an underwriting syndicate is formed, the syndicate manager has the sole responsibility hereunder for providing the standard disclosures. Consistent with this obligation placed on the syndicate manager, only the syndicate manager must maintain and preserve records of the standard disclosures in accordance with MSRB rules. Further, the MSRB acknowledges that an underwriter may not know if a syndicate will form at the time that certain disclosures are sent. In instances in which an underwriter has provided a standard disclosure prior to or concurrent with the formation of a syndicate, it shall suffice that the then-underwriter (later syndicate manager) has delivered a standard disclosure, and no affirmative statement is necessary that a disclosure is being made on behalf of any existing or future syndicate members for the syndicate manager to have met its fair dealing obligations in this regard. Notwithstanding the obligation of a syndicate manager to deliver the standard disclosures, nothing herein would prohibit, or should be

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

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

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

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

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construed as prohibiting, another underwriter from delivering a standard disclosure in order to, for example, comply with another regulatory or statutory obligation.

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

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

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

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

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

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

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

[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

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understanding, a fiduciary relationship with the issuer. In such case, it would be appropriate for an underwriter to omit those disclosures deemed inapplicable as a result of such relationship.

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

[15] *Id.*

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

otherwise imply that the hiring of a municipal advisor would be redundant because the sole underwriter or underwriting syndicate can provide the services that a municipal advisor would.

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

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

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

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

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

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

[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

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

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

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

making disclosures of dealer-specific conflicts of interest to an issuer should concentrate on making them in a complete and understandable manner and need not necessarily organize them according to the categories listed above, particularly if adhering to a strict categorization process might interfere with the clarity and conciseness of disclosures.

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

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

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

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

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

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

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

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

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

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

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

official to evaluate the recommendation, as described below under "Required Disclosures to Issuers."]

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

Acknowledgement of Disclosures. When delivering a disclosure, [T]the underwriter must attempt to receive written acknowledgement[25] [(other than by automatic e-mail receipt) by the] from an official of the issuer identified by the issuer as a primary contact for the issuer's [of] receipt of the foregoing disclosures.[26] In the absence of such identification, an underwriter may

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

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

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

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

Representations to Issuers

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

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

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

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

Required Disclosures to Issuers

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

[However, i]In some cases, issuer personnel responsible for the issuance of municipal securities would not be well positioned to fully understand or assess the implications of a recommended financing structure in its totality, because [the financing] it is structured in a unique, atypical, or otherwise complex manner or incorporates unique, atypical, or otherwise complex features or products (a "complex municipal securities financing").[6][31] Examples of complex municipal

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

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

[31][6] If a complex municipal securities financing consists of an otherwise routine financing structure that incorporates a unique, atypical, or complex element or product and the issuer personnel have knowledge or experience with respect to the routine elements of the financing,

securities financings include, but are not limited to, variable rate demand obligations ("VRDOs"),[and] financings involving derivatives (such as swaps), and financings in which interest rates are benchmarked to an index (such as LIBOR, SIFMA, or SOFR).[32] [An underwriter in a negotiated offering that recommends a complex municipal securities financing to an issuer has an obligation under Rule G-17 to make more particularized disclosures than those that may be required in the case of routine financing structures.] When a recommendation regarding a complex municipal securities financing structure has been made by an underwriter in a negotiated offering,[33] the underwriter making the recommendation has an obligation under Rule G-17 to communicate more particularized transaction-specific disclosures than those that may be required in the case the recommendation of routine financing structures or products.[34]

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the disclosure of material risks and characteristics may be limited to those relating to such specific element or product and any material impact such element or product may have on other features that would normally be viewed as routine.

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

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

[34] An underwriter must make reasonable judgments regarding whether it has recommended a financing structure or product to an issuer and whether a particular financing structure or product recommended by the underwriter to the issuer is complex, understanding that the fact that a structure or product has become relatively common in the market does not reduce its complexity.

The underwriter making the recommendation must also disclose the material financial characteristics of the complex municipal securities financing, as well as the material financial risks of the financing that are known to the underwriter and reasonably foreseeable at the time of the disclosure.[35][7] It must also disclose any incentives for the [underwriter to recommend the] recommendation of the complex municipal securities financing and other associated material conflicts of interest.[36][8] Such disclosures must be made in a fair and balanced manner based on principles of fair dealing and good faith.

Not all negotiated offerings involve a recommendation by the underwriter(s), such as where a sole underwriter merely executes a transaction already structured by the issuer or its municipal advisor.

[35][7] For example, when a Complex Municipal Securities Financing Recommendation for a VRDO is made, the [an]underwriter [that] who recommends a VRDO should inform the issuer of the risk of interest rate fluctuations and material risks of any associated credit or liquidity facilities (*e.g.*, the risk that the issuer might not be able to replace the facility upon its expiration and might be required to repay the facility provider over a short period of time). As an additional example, if the underwriter recommends that the issuer swap the floating rate interest payments on the VRDOs to fixed rate payments under a swap, the underwriter must disclose the material financial risks (including market, credit, operational, and liquidity risks) and material financial characteristics of the recommended swap (*e.g.*, the material economic terms of the swap, the material terms relating to the operation of the swap, and the material rights and obligations of the parties during the term of the swap), as well as the material financial risks associated with the VRDO. Such disclosure should be sufficient to allow the issuer to assess the magnitude of its potential exposure as a result of the complex municipal securities financing. [The underwriter]Such disclosures must also inform the issuer that there may be accounting, legal, and other risks associated with the swap and that the issuer should consult with other professionals concerning such risks. If the underwriter['s] who has made a Complex Municipal Financing Securities Recommendation is affiliated with the swap dealer [is] proposed to be the executing swap dealer, the underwriter may satisfy its disclosure obligation with respect to the swap if such disclosure has been provided to the issuer by the affiliated swap dealer or the issuer's swap or other financial advisor that is independent of such underwriter and the swap dealer, as long as the underwriter has a reasonable basis for belief in the truthfulness and completeness of such disclosure. If the issuer decides to enter into a swap with another dealer, the underwriter is not required to make disclosures with regard to that swap product under this notice. The MSRB notes that a dealer[s] [that]who recommends a swap[s] or security-based swap[s] to a municipal [entities] entity may also be subject to rules of the Commodity Futures Trading Commission or those of the Securities and Exchange Commission ("SEC").

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

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

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

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

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

[38] See note 19 supra.

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

underwriter could incorporate, to the extent applicable, any refinements to the base description needed to fully describe the material financial features and risks unique to that financing.[40]

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

Underwriter Duties in Connection with Issuer Disclosure Documents

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

Underwriter Compensation and New Issue Pricing

Excessive Compensation. An underwriter's compensation for a new issue (including both direct compensation paid by the issuer and other separate payments, values, or credits received by the underwriter from the issuer or any other party in connection with the underwriting), in certain

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

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

cases and depending upon the specific facts and circumstances of the offering, may be so disproportionate to the nature of the underwriting and related services performed as to constitute an unfair practice with regard to the issuer that it is a violation of Rule G-17. Among the factors relevant to whether an underwriter's compensation is disproportionate to the nature of the underwriting and related services performed, are the credit quality of the issue, the size of the issue, market conditions, the length of time spent structuring the issue, and whether the underwriter is paying the fee of the underwriter's counsel or any other relevant costs related to the financing.

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

Conflicts of Interest

Payments to or from Third Parties. In certain cases, compensation received by [the]an underwriter from third parties, such as the providers of derivatives and investments (including affiliates of [the]an underwriter), may color the underwriter's judgment and cause it to

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

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

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

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

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

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

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

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

notional amount of the credit default swap or the underwriter otherwise caused the issuer or its obligation(s) to be included in the basket or index.

Retail Order Periods

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

Dealer Payments to Issuer Personnel

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

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

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

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

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

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

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

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