

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 entities¹ 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

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Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Aug. 2, 2012) (superseded upon the effective date of this notice as described below).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

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 customers⁷ 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

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 manager¹⁰ 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

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 manager¹³ 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

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.

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-

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

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

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 acknowledgement²⁵ 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.

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

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

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

(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

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

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

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

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

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" orders⁴⁸ 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}

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).