SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-65263; File No. SR-MSRB-2011-09)

September 6, 2011

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Proposed Rule Change Consisting of Proposed Interpretive Notice Concerning the Application of MSRB Rule G-17, on Conduct of Municipal Securities and Municipal Advisory Activities, to Underwriters of Municipal Securities

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Exchange Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on August 22, 2011, the Municipal Securities Rulemaking Board ("Board" or "MSRB") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The MSRB is filing with the SEC a proposed rule change consisting of a proposed interpretive notice (the "Notice") concerning the application of MSRB Rule G-17 (on conduct of municipal securities and municipal advisory activities) to underwriters of municipal securities. The MSRB requests that the proposed rule change be made effective 90 days after approval by the Commission.

The text of the proposed rule change is available on the MSRB's website at www.msrb.org/Rules-and-Interpretations/SEC-Filings/2011-Filings.aspx, at the MSRB's principal office, and at the Commission's Public Reference Room.

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

2 17 CFR 240.19b-4.

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

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

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

1. Purpose

(a) With the passage of the Dodd-Frank Act, the MSRB was expressly directed by Congress to protect municipal entities. Accordingly, the MSRB is proposing to provide additional interpretive guidance that addresses how Rule G-17 applies to dealers in the municipal securities activities described below.

A more-detailed description of the provisions of the Notice follows:

Representations to Issuers. The Notice would provide that all representations made by underwriters to issuers of municipal securities in connection with municipal securities underwritings (e.g., issue price certificates and responses to requests for proposals), whether written or oral, must be truthful and accurate and may not misrepresent or omit material facts.

Required Disclosures to Issuers. The Notice would provide that an underwriter of a negotiated issue that recommends a complex municipal securities transaction or product (e.g., a variable rate demand obligation with a swap) to an issuer has an obligation under Rule G-17 to disclose all material risks (e.g., in the case of a swap, market, credit, operational, and liquidity risks), characteristics, incentives, and conflicts of interest (e.g., payments received from a swap

provider) regarding the transaction or product. Such disclosure would be required to be sufficient to allow the issuer to assess the magnitude of its potential exposure as a result of the complex municipal securities financing. In the case of routine financing structures, underwriters would be required to disclose the material aspects of the structures if the issuers did not otherwise have knowledge or experience with respect to such structures.

The disclosures would be required to be made in writing to an official of the issuer whom the underwriter reasonably believed had the authority to bind the issuer by contract with the underwriter (i) in sufficient time before the execution of a contract with the underwriter to allow the official to evaluate the recommendation and (ii) in a manner designed to make clear to such official the subject matter of such disclosures and their implications for the issuer. If the underwriter did not reasonably believe that the official to whom the disclosures were addressed was capable of independently evaluating the disclosures, the underwriter would be required to make additional efforts reasonably designed to inform the official or its employees or agent.[3]

Underwriter Duties in Connection with Issuer Disclosure Documents. The Notice would provide that 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).

[3] Section 4s(h)(5) of the Commodity Exchange Act requires that a swap dealer with a special entity client (including states, local governments, and public pension funds) must have a reasonable basis to believe that the special entity has an independent representative that has sufficient knowledge to evaluate the transaction and its risks, as well as the pricing and appropriateness of the transaction. Section 15F(h)(5) of the Exchange Act imposes the same requirements with respect to security-based swaps.

New Issue Pricing and Underwriter Compensation. The Notice would provide that 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. The Notice distinguishes the fair pricing duties of competitive underwriters (submission of bona fide bid based on dealer's best judgment of fair market value of securities) and negotiated underwriters (duty to negotiate in good faith). The Notice would provide that, in certain cases and depending upon the specific facts and circumstances of the offering, the underwriter's compensation for the new issue (including both direct compensation paid by the issuer and other separate payments or credits received by the underwriter from the issuer or any other party in connection with the underwriting) may be so disproportionate to the nature of the underwriting and related services performed, as to constitute an unfair practice that is a violation of Rule G-17.

Conflicts of Interest. The Notice would require disclosure by an underwriter of potential conflicts of interest, including third-party payments, values, or credits made or received, profit-sharing arrangements with investors, and the issuance or purchase of credit default swaps for which the underlying reference is the issuer whose securities the dealer is underwriting or an obligation of that issuer.

Retail Order Periods. The Notice would remind underwriters not to disregard the issuers' rules for retail order periods by, among other things, accepting or placing orders that do not satisfy issuers' definitions of "retail."

Dealer Payments to Issuers. Finally, the Notice would remind underwriters that certain lavish gifts and entertainment, such as those made in conjunction with rating agency trips, might be a violation of Rule G-17, as well as Rule G-20.

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

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

Section 15B(b)(2)(C) of the Exchange Act, provides that the rules of the MSRB shall:

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

The proposed rule change is consistent with Section 15B(b)(2) of the Exchange Act because it will protect issuers of municipal securities from fraudulent and manipulative acts and practices and promote just and equitable principles of trade, while still emphasizing the duty of fair dealing owed by underwriters to their customers. Rule G-17 has two components, one an anti-fraud prohibition, and the other a fair dealing requirement (which promotes just and equitable principles of trade). The Notice would address both components of the rule. The sections of the Notice entitled "Representations to Issuers," "Underwriter Duties in Connection with Issuer Disclosure Documents," "Excessive Compensation," "Payments to or from Third Parties," "Profit-Sharing with Investors," "Retail Order Periods," and "Dealer Payments to Issuer

Personnel" primarily would provide guidance as to conduct required to comply with the anti-fraud component of the rule and, in some cases, conduct that would violate the anti-fraud component of the rule, depending on the facts and circumstances. The sections of the Notice entitled "Required Disclosures to Issuers," "Fair Pricing," and "Credit Default Swaps" primarily would provide guidance as to conduct required to comply with the fair dealing component of the rule.

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

The MSRB does not believe that the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act, since it would apply equally to all underwriters of municipal securities.

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

On February 14, 2011, the MSRB requested comment on the proposed rule change.[4] The MSRB received 5 comment letters. Comment letters were received from the American Federation of State, County and Municipal Employees ("AFSCME"); the Bond Dealers of America ("BDA"); Municipal Regulatory Consulting LLC ("MRC"); the National Association of Independent Public Finance Advisors ("NAIPFA"); and the Securities Industry and Financial Markets Association ("SIFMA"). The comments are summarized according to the subject headings of the Notice.

Representations to Issuers

- Comments: Reasonable Basis for Certificates. SIFMA said that the MSRB should reconsider the requirement for an underwriter to have a reasonable basis for the representations and material information in certificates it provides, arguing that other

[4] See MSRB Notice 2011-12 (February 14, 2011).

regulatory requirements (e.g., IRC Section 6700 and wire fraud statutes) already govern such representations. It said that the MSRB should, at least, confirm that an underwriter would meet this obligation when it verifies the information in the certificate against the official books of the issuer and any other factual information within the underwriter's control.

MSRB Response: The MSRB has determined to make no change to this requirement of the Notice and notes that the "reasonable basis" requirement of the Notice in the context of certificates provided by an underwriter is consistent with the view of the Commission that the underwriter must have a reasonable basis for belief in the truthfulness and completeness of the key representations made in any disclosure documents used in an offering of municipal securities. See endnote 10 to the Notice. It is also consistent with Internal Revenue Service interpretations of Section 6700 of the Internal Revenue Code, which address the application of the penalty to statements (including underwriter certificates) material to tax exemption that the maker knew or had "reason to know" were false or fraudulent, such as the one cited in note 9 to SIFMA's comment letter. Therefore, the Notice imposes no additional requirement upon underwriters.

Review of the official books of the issuer and other factual information within the underwriter's control may assist the underwriter in forming a reasonable basis for its certificate. However, if the certificate relies on the representations of others or facts not within the underwriter's control, additional due diligence on the part of the underwriter may be required. The MSRB notes that a quote from the Internal Revenue Service publication cited in SIFMA's letter provides some useful guidance on the level of inquiry required: "Participants [in a bond financing] can rely on matters of fact or material

provided by other participants necessary to make their own statements or draw their own conclusions, unless they have actual knowledge or a reason to know of its inaccuracy or the statement is not credible or reasonable on its face." The Internal Revenue Service summarized the legislative history of Section 6700. See H. Conf. Rep. No. 101-247, 101st Cong., 1st Sess. 1397.

Required Disclosures to Issuers

- Comments: Complex Financings. SIFMA argued that more guidance is needed on the complex municipal securities financings requirements.
  - It said that a transaction should only be deemed complex if the municipal issuer informed the underwriter that the issuer had never engaged in the type of transaction before and therefore might not understand the transaction's material risks and characteristics.
  - It also said that the MSRB should provide more guidance and definition with regard to what types of transactions will be considered "complex," arguing that references to "external index not typically used in the municipal securities market" and "atypical or complex arrangements" were vague.
  - It also said that issuers that required an analysis of the risks and characteristics of a transaction should hire independent advisors or separately contract for this service with their underwriters.

  MSRB Response: In response to SIFMA's first comment above, the MSRB has added the following language to the Notice: "The level of disclosure required may vary according to the issuer's knowledge or experience with the proposed financing structure or similar structures, capability of evaluating the risks of the recommended financing, and

financial ability to bear the risks of the recommended financing, in each case based on the reasonable belief of the underwriter." This language is based on the suitability analysis required by the Financial Industry Regulatory Authority ("FINRA") of dealers selling complex products, such as options and securities futures,[5] although the Notice does not go so far as to impose a suitability requirement on underwriters of municipal securities with respect to issuers.[6] The MSRB notes that this language applies only to disclosures concerning material terms and characteristics of a complex municipal securities financing. The Notice also provides: "In all events, the underwriter must disclose any incentives for the underwriter to recommend the complex municipal securities financing and other associated conflicts of interest." The MSRB does not agree with SIFMA that an issuer should be required to exercise its supposed "bargaining power" in order to receive such disclosures.

In response to SIFMA's second comment above, the Notice does provide examples of complex municipal securities financings: "variable rate demand obligations ("VRDOs") and financings involving derivatives (such as swaps)." In response to SIFMA's comment, the Notice now also distinguishes those examples from: "the typical fixed rate offering." It also now provides that: "Even a financing in which the interest rate is benchmarked to an index that is commonly used in the municipal marketplace (e.g.,

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5 FINRA Rules 2360 and 2370.

6 The Notice does not address whether engaging in any of the activities described in the Notice would cause a dealer to be considered a "municipal advisor" under the Exchange Act and the rules promulgated thereunder and, therefore, subject to a fiduciary duty. The MSRB notes that dealers that recommend swaps or security-based swaps to municipal entities may also be subject to rules of the Commodity Futures Trading Commission or those of the SEC. See, e.g., Federal Register Vol. 75, No. 245 (December 22, 2010) and Federal Register Vol. 76, No. 137 (July 18, 2011).

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."

With regard to SIFMA's third comment, while the MSRB agrees that an issuer seeking an independent assessment of the risks and characteristics of a transaction recommended by an underwriter may wish to hire a separate municipal advisor for that purpose, at its own election, the MSRB is firmly of the view that basic principles of fair dealing require an underwriter to disclose the risks and characteristics of a complex municipal securities financing that it has itself determined to recommend to the issuer.

The MSRB notes that the Notice has been amended to provide that, in the case of routine financing structures, underwriters would be required to disclose the material aspects of the structures if the issuers did not otherwise have knowledge or experience with respect to such structures.

- Comments: Recommendations. NAIPFA argued that underwriters should also be required -- in the same manner and to the same extent as advisors would be required -- to have a reasonable basis for any recommendation they made and to disclose material risks about the course of conduct they recommend, along with the risks and potential benefits of reasonable alternatives then available in the market. SIFMA said that the MSRB should clarify whether a dealer's recommendation of a swap will subject it to a fiduciary duty. MRC said that the requirements for disclosures in the context of complex municipal securities financings should be set forth in Rule G-19.

  MSRB Response: The MSRB has determined not to impose a suitability duty in this context at this time. The Notice also does not address whether the provision of advice by underwriters will cause them to be considered municipal advisors under the Exchange

Act and, accordingly, subject to a fiduciary duty. In the view of the MSRB, the duty of fair dealing is subsumed within a fiduciary duty, so additional duties may apply to the provision of advice by underwriters that the Commission considers to be municipal advisory activities. See also footnote 6 herein.

- Comments: Recipients of Disclosures. BDA and SIFMA said that an underwriter should only need to have a reasonable belief that it was making required disclosures to officials with the authority to bind the issuer, particularly if the official represented that he/she has such authority.

  MSRB Response: The MSRB agrees with this comment and has revised the Notice accordingly.

- Comments: Timing of Disclosures. SIFMA said that the MSRB should clarify that disclosures should only be required once. It said that, as an example, a representation in a response to an RFP or otherwise before the underwriter is engaged should suffice.

  MSRB Response: The Notice does not require disclosures to be made more than once per issue. An RFP response could be an appropriate place to make required disclosures as long as the proposed structure of the financing is adequately developed at that point to permit the disclosures required by the Notice.

Underwriter Duties in Connection with Issuer Disclosure Documents

- Comments: Reasonable Basis for Official Statement Materials. SIFMA argued that an underwriter should not be required to have a reasonable basis for the representations it makes, or other material information it provides in connection with the preparation by the issuer of its disclosure documents. Instead, SIFMA argued that the MSRB should permit an underwriter to agree with an issuer that the underwriter will only be responsible for

materials furnished to an issuer if the underwriter has (i) consented, in writing, to such materials being used in offering documents and (ii) agreed with the issuer that the underwriter and not the issuer will assume responsibility for the accuracy and proper presentation of such material. SIFMA said that an underwriter should be able to limit its responsibility for information provided by disclosing to the issuer any limitations on the scope of its analysis and factual verification it performed. Furthermore, it argued that any duty should extend only to material information provided by the underwriter and not to all information and analysis, suggesting that an underwriter should not have to verify the assumptions and facts that underlie cash flows it prepared.

MSRB Response: The MSRB does not agree with this comment and reminds SIFMA of the view of the SEC as summarized in endnote 9 to the Notice: 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 Rel. No. 34-26100 (Sept. 22, 1988) (proposing Exchange Act Rule 15c2-12) at text following note 70 (the "1988 Proposing Release"). The SEC stated in the 1988 Proposing Release 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." It would seem a curious result, therefore, for the underwriter not to be required under Rule G-17 to have a reasonable basis for its own representations set forth in the official statement, as well as a reasonable basis for the material information it provides to the issuer in connection with the preparation of the official statement, including a reasonable belief in the truthfulness and completeness of

any information provided by others that serves as a material basis for such underwriter's information.

Underwriter Compensation and New Issue Pricing

- Comments: Fair Pricing. BDA said that the fair pricing obligation in the context of a new issue should employ a good faith standard. It said that there is no prevailing market price for new issues and that comparisons to secondary market trades are difficult because of the infrequency of trades and the differences among issuers. Similarly, SIFMA said that an underwriter should only be required to purchase securities at the price that it and the issuer negotiated and agreed to in good faith, without regard to a prevailing market price, which it said does not exist for new issue securities. It said that the MSRB's proposal will encourage increased reliance on credit ratings, which it characterized as contrary to the intent of Dodd-Frank and SEC policy guidance.

  MSRB Response: In response to this comment, the MSRB has amended the Notice to remove references to prevailing market price. Consistent with SIFMA's observation that many underwriters already make representations as to the fair market price of new issues in tax certificates to issuers, the Notice now reads: "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."

Conflicts of Interest

- Comments: Conflicts Disclosure. NAIPFA argued that underwriters should be required to comply with all the rules regarding conflicts to which municipal advisors would be subject under Rule G-17. Specifically, NAIPFA said that underwriters should be required to disclose with respect to all issues that they:
    - are not acting as advisors but as underwriters;
    - are not fiduciaries to the issuer but rather counterparties dealing at arm's-length;
    - have conflicts with issuers because they represent the interests of the investors or other counterparties, which may result in benefits to other transaction participants at direct cost to the issuer;
    - seek to maximize their profitability and such profitability may or may not be transparent or disclosed to the issuer; and
    - have no continuing obligation to the issuer following the closing of transactions.

  On the other hand, SIFMA argued that the Notice would impose a "fiduciary-lite" duty on underwriters, citing as examples the disclosures required of underwriters recommending complex municipal securities financings and the required disclosures of business relationships and methods of doing business, including their financial incentives. It said that underwriters should not be required to make such disclosures as long as their failure to do so did not amount to false or fraudulent conduct.

  MSRB Response: A number of NAIPFA's suggested disclosures were presented to the MSRB in connection with the MSRB's proposed amendments to Rule G-23 and were addressed by the MSRB in its filing with the SEC.[7] The MSRB's interpretive notice regarding Rule G-23 contained in that filing provides that a dealer will be considered to

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[7] See Amendment No. 1 to SR-MSRB-2011-03 (May 26, 2011). See also Exchange Act Release No. 64564 (May 27, 2011) (File No. SR-MSRB-2011-03).

be acting as an underwriter for purposes of Rule G-23(b) if, among other things, it provides written disclosure to the issuer from the earliest stages of its relationship with the issuer that it is an underwriter and not a financial advisor and does not engage in a course of conduct that is inconsistent with arm's-length relationship with the issuer. The writing must make clear that the primary role of an underwriter is to purchase, or arrange for the placement of, securities in an arm's-length commercial transaction between the issuer and the underwriter and that the underwriter has financial and other interests that differ from those of the issuer. Rule G-17 is appropriately applied differently to market participants with different roles in a financing. Thus, for example, Rule G-17 may appropriately be interpreted to apply different standards of conduct to municipal advisors, which function as trusted advisors to municipal entities and obligated persons, than it does to underwriters of municipal securities, which are arm's-length counterparties to issuers of municipal securities, and dealers who solicit municipal entities on behalf of third-party clients.

Consistent with this interpretation of Rule G-17, the disclosures required by the Notice do not amount to the imposition of a fiduciary duty, whether "lite" or otherwise, on underwriters of municipal securities. Simple principles of fair dealing require that underwriters have more than a caveat emptor relationship with their issuer clients.

- Comments: Payments to and from Third Parties. BDA said that the MSRB should clarify what types of third party payments it was interested in and that they should not include tender option bond programs and similar arrangements. Alternatively, BDA said that generic disclosure should suffice. It argued that a requirement to disclose retail distribution and selling group arrangements was unnecessary because such arrangements

were typically disclosed in official statements. In addition, SIFMA said that the MSRB should clarify the details of required disclosures and confirm that issuer consent to disclosures regarding third-party payments is not required. It argued that payments or internal credits among the underwriter and its affiliates should not be required to be disclosed. It made the same argument with respect to payments or other benefits received from collateral transactions, such as credit default swaps (CDS). While it argued that the proposed standard was inconsistent with SEC and FINRA requirements, it did not cite specific examples.

MSRB Response: The MSRB believes that issuers of municipal securities should be apprised of payments, values, or credits made to underwriters that might 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. For example, if a swap dealer affiliate of the underwriter were to make a payment to, or otherwise credit, the underwriter for the underwriter's successful recommendation that the issuer enter into a swap that is integrally related to a municipal securities issue, the Notice would require that such payment or credit be disclosed to the issuer. Generic disclosure would not suffice. However, only payments made in connection with the dealer's underwriting of a new issue would be required to be disclosed. Payments from purchasers of interests in tender option bond programs would not typically be made in connection with the underwriting and, therefore, would not typically be required to be disclosed. The MSRB considers it essential that an issuer be made aware of retail distribution and selling group arrangements that are integral to the underwriter's ability to provide the services that it has contracted with the issuer to provide. If such arrangements are already disclosed in

official statements, this requirement of the Notice should not impose an additional burden on the underwriter.

- Comments: Profit-Sharing with Investors. SIFMA said that the MSRB should provide guidance on what is meant by profit-sharing with investors that, depending upon the facts and circumstances, could result in a Rule G-17 violation.

  MSRB Response: The provisions of the Notice concerning profit-sharing with investors resulted in part from reports to the MSRB that underwriters of Build America Bonds sold such bonds to institutional investors that then resold the bonds to such underwriters shortly thereafter at prices above their initial purchase price but below rising secondary market prices. If these reports were accurate and reflected formal or informal arrangements between such underwriters and institutional investors, these re-sales allowed the investors and the underwriters to share in the increase in value of the bonds. The MSRB has amended the Notice to note that "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."

- Comments: CDS Disclosures. BDA said that general disclosures about trading in an issuer's CDS should suffice and that information barriers within firms might prevent more detailed knowledge by the dealer personnel underwriting an issuer's securities. SIFMA made the same arguments and additionally said that the proposal that underwriters disclose their CDS activity would be highly prejudicial because it would require underwriters to disclose their hedging and risk management activities and could potentially compromise counterparty arrangements. It argued that, if this requirement

were maintained by the MSRB, it should exempt dealing in CDS that reference a basket of securities, including the issuer's.

MSRB Response: The MSRB is mindful that appropriate information barriers may prevent personnel of a dealer firm engaged in underwriting activities from knowing about hedging activities of other parts of the dealer. However, the Notice requires only that a dealer that engages in the issuance or purchase of a credit default swap for which the underlying reference is an issuer for which the dealer is serving as underwriter, or an obligation of that issuer, must disclose that to the issuer. The Notice does not require information about specific trades or confidential counterparty information. The MSRB has amended the Notice to provide that disclosures would not be required with regard to trading in CDS based on baskets or indexes including the issuer or its obligation(s) unless the issuer or its obligation(s) represented 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. The most commonly traded municipal CDS basket -- Markit MCDX -- currently imposes this 2% limit on the components of its basket.

Retail Order Periods

- Comments: Retail Orders. BDA said that the MSRB should clarify what reasonable measures underwriters must take to ensure that retail orders are bona fide and said that underwriters should be able to rely on representations of selling group members. SIFMA made similar arguments about reliance upon representations of co-managers made in agreements among underwriters.

  MSRB Response: The MSRB is aware that, in many cases, orders are placed in retail order periods in a manner that is designed to "game" the retail order period requirements

of the issuer. For example, in a retail order period in which the issuer has defined a retail order as one not exceeding $1,000,000 in principal amount, a dealer may place a number of $1,000,000 orders. Such a pattern of orders should cause a member of the underwriting syndicate to question whether such orders are bona fide retail orders. While it would be good practice for senior managing underwriters to require that co-managers and selling group members represent that orders represented to be retail orders in fact meet the issuer's definition of "retail," the MSRB would not consider such representations to be dispositive and would expect the senior manager to make appropriate inquiries when "red flags" such as described above could cause the senior manager to question the nature of the order. As an example of a "reasonable measure," a senior managing underwriter might require the zip codes attributable to the retail orders. With regard to orders placed by retail dealers, the MSRB reiterates that it would not consider an order "for stock," without "going away orders," to be a customer order.[8]

Dealer Payments to Issuer Personnel

- Comments: Rule G-20. SIFMA requested that the MSRB clarify that its statements regarding Rule G-20 in the Notice were only reminders and that the MSRB did not intend to expand its previous guidance on Rule G-20 by means of the Notice.

  MSRB Response: The provisions in the Notice regarding Rule G-20 are only reminders of existing MSRB guidance.

Miscellaneous

- Comments: Coordinated Rulemaking. AFSCME strongly supported the notice; however, it urged the MSRB to coordinate its rulemaking with the SEC and the CFTC. BDA said

[8] See Exchange Act Release No. 62715 (August 13, 2010) (File No. SR-MSRB-2009-17).

that the Notice should not create overlapping and potentially conflicting obligations with SEC and CFTC rules and that the Notice might be premature, given ongoing rulemaking by the SEC and the CFTC. SIFMA said that the MSRB should defer the imposition of disclosure requirements concerning swaps and security-based swaps because these would be the subject of rulemaking by the SEC and CFTC.

MSRB Response: The MSRB is aware of ongoing rulemaking by the SEC and the CFTC and has taken care to ensure that any requirements of the Notice are consistent with such rulemaking. For example, the provisions of the Notice concerning the disclosures associated with complex municipal securities financings are appropriately consistent with the CFTC's proposed business conduct rule for swap dealers and major swap participants[9] and the SEC's proposed business conduct rule for security-based swap dealers and major security-based swap participants.[10] The MSRB may undertake additional rulemaking as necessary to ensure such consistency in the future. In addition, dealers are reminded that they may be subject to other regulatory requirements.

- Comments: Effective Date. SIFMA argued that many of the Notice's requirements would require the development of compliance systems and that the Notice should not become effective for at least one year after its approval by the SEC.

  MSRB Response: The MSRB agrees that some delay in the effective date of the proposed rule change is appropriate, because the MSRB has not previously articulated an interpretation of Rule G-17 that would require many of the specific disclosures required by the Notice. However, the MSRB considers a delay of one year to be too long. The

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[9] See Federal Register Vol. 75, No. 245 (December 22, 2010).

[10] See Federal Register Vol. 76, No. 137 (July 18, 2011).

MSRB has requested that the proposed rule change be made effective 90 days after approval by the Commission.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Exchange Act. Interested persons are also invited to submit views and arguments as to whether underwriters should be required to disclose to municipal entities the conflicts of interest associated with their compensation arrangements in a manner similar to what the MSRB has proposed for municipal advisors. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-MSRB-2011-09 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-MSRB-2011-09. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm.

Copies of such filing also will be available for inspection and copying at the MSRB's offices. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-2011-09 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Elizabeth M. Murphy
Secretary

[11] 17 CFR 200.30-3(a)(12).