SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-65292; File No. SR-MSRB-2011-15)

September 8, 2011

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Proposed Interpretive Notice Concerning the Application of Rule G-17 to Municipal Advisors

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 24, 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 to municipal advisors. The MSRB requests that the proposed rule change be made effective on the date that rules defining the term "municipal advisor" under the Exchange Act are first made effective by the Commission or such later date as the proposed rule change is approved 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.

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

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

2 17 CFR 240.19b-4.

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

With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")[3], the MSRB was expressly directed by Congress to protect municipal entities and obligated persons. Accordingly, the MSRB is proposing to provide interpretive guidance that addresses how Rule G-17 applies to municipal advisors when advising obligated person clients or when soliciting municipal entities on behalf of others.

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

Duty to Obligated Persons; Fair Dealing. The Notice would provide that the Rule G-17 duty of fair dealing requires that the municipal advisor determine if a recommended municipal securities transaction or municipal financial product is suitable for its obligated person client, and that it provide disclosure of the material risks and characteristics of the transaction or product, as well as any incentives the municipal advisor has received for recommending the transaction or product and any other associated conflicts of interest. Further, under the Notice, the Rule G-17 duty of fair dealing would require that the municipal advisor exercise due care when providing advice to the obligated person client, and not undertake an engagement if the municipal advisor

[3] Pub. L. No. 111-203, 124 Stat. 1376 (2010).

does not have the necessary skills and resources to perform its duties in respect of the engagement.

The Notice also would provide that the municipal advisor must disclose all material conflicts of interest such as those that may color its judgment and impair its ability to render unbiased advice to its obligated person client, including those existing at the time the engagement is entered into, and those discovered or arising during the course of the engagement. The municipal advisor would be required to make these disclosures in writing and, in general, to obtain the informed consent thereto by an official of the obligated person having the authority to bind the obligated person by contract with the municipal advisor. Conflicts that constituted an unfair, deceptive, or dishonest practice would preclude a municipal advisor from undertaking an engagement with an obligated person client and disclosure of such conflict would not be effective in permitting such engagement to be undertaken.

The Notice would provide that a municipal advisor is required to provide written disclosure of the amount of its direct compensation and indirect compensation (e.g., amounts paid to affiliates) from the engagement, and the scope of services to be provided. The municipal advisor would also be required to provide written disclosure of the conflicts of interest associated with various forms of compensation, including the form of compensation applicable to its engagement, unless the obligated person client has required a particular form of compensation, in which case such disclosure would only need to address that particular form of compensation.

Deceptive, Dishonest or Unfair Practices. The Notice would provide that all representations made by municipal advisors to their obligated person clients, whether written or oral, must be truthful and accurate, and municipal advisors must not omit material facts, and that 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. A municipal advisor would not be permitted to represent that it has the requisite knowledge or expertise with respect to a particular type of transaction or product if the personnel that it intends to work on the engagement do not have the requisite knowledge or expertise.

The Notice would provide that in certain cases and depending upon the specific facts and circumstances of the engagement, a municipal advisor's compensation, including payments from third parties, may be so disproportionate to the nature of the municipal advisory services to be an unfair practice in violation of Rule G-17.

The Notice would also provide that kickback arrangements, and certain fee-splitting arrangements, with underwriters or the providers of investments or services to obligated persons are unfair, dishonest, and deceptive practices that are prohibited by Rule G-17, as are payments by municipal advisors made for the purpose of obtaining or retaining municipal advisory business, other than reasonable fees paid to a municipal advisor regulated by the MSRB.

Solicitation of a Municipal Entity; Fair Dealing. The Notice would provide that, while municipal advisors are not required to exercise a fiduciary duty when soliciting municipal entities on behalf of third parties (in such capacity, a "solicitor"), they are required to deal fairly with the municipal entities they solicit and not engage in conduct that is deceptive, dishonest, or unfair.

The Notice would provide that a solicitor must provide written disclosure of all material facts about the solicitation to the municipal entity being solicited, including, among other things, the amount and source of all compensation received by the solicitor, any payments (including in-kind) made by the solicitor to facilitate the solicitation regardless of characterization; and any relationships of the solicitor with any employees, board members, or affiliated persons of the

municipal entity or its officials who may have influence over the selection of the solicitor's client.

The Notice would provide that the solicitor, if engaged by its client to present information to the municipal entity about a product or service being offered by the client, is required to disclose all material risks and characteristics of the product or service, as well as any incentives received by the solicitor (other than compensation from its client) to recommend the product or service, and any other conflicts of interest regarding the product or service.

Deceptive, Dishonest or Unfair Practices. The Notice would provide that kickbacks and fee-splitting arrangements with others, made or entered into by solicitors for the purpose of facilitating the solicitation are unfair, dishonest, and deceptive practices that violate Rule G-17. The Notice would also provide that lavish gifts and gratuities (that exceed limits set forth in MSRB Rule G-20) made to officials of the municipal entity or affiliated parties may improperly influence the decision of the municipal entity to engage the solicitor's client, and may therefore be a violation of Rule G-17.

2. Statutory Basis

The MSRB believes that the proposed interpretive notice 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 obligated persons and municipal entities from fraudulent and manipulative acts and practices and promote just and equitable principles of trade, as well as emphasizing the duty of fair dealing owed by municipal advisors to their obligated person clients and to municipal entities when soliciting such entities on behalf of third parties. 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 "DUTY TO OBLIGATED PERSONS/DECEPTIVE, DISHONEST, OR UNFAIR PRACTICES" and "SOLICITATION OF A MUNICIPAL ENTITY/DECEPTIVE, DISHONEST, OR UNFAIR PRACTICES" 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 "DUTY TO OBLIGATED PERSONS/FAIR DEALING" and "SOLICITATION OF A MUNICIPAL ENTITY/FAIR DEAING" primarily would provide guidance as to conduct required to comply with the fair dealing component of the rule.

Section 15B(b)(2)(L)(iv) of the Exchange Act requires that rules adopted by the Board:

> not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud.

The proposed rule change is necessary for the protection of obligated persons and municipal entities and the robust protection of investors against fraud. Many municipal advisors play a key role in the structuring of offerings of municipal securities by obligated persons through municipal entities and the preparation of offering documents used to market those securities to investors. In some cases, they advise on the appropriateness of derivatives entered into by obligated persons, the effectiveness of which may have a substantial impact on the finances of their clients. In other cases, they solicit business from public pension funds, which, if not conducted according to the highest standards, may have a substantial effect on the finances of the state and local governments that control those funds. Municipal entities, obligated persons, and investors, therefore, have a substantial interest in municipal advisors conducting their municipal advisory activities fairly and not engaging in fraudulent conduct.

Accordingly, the MSRB does not believe that the proposed rule change would impose an unreasonable burden on small municipal advisors. However, the MSRB recognizes that there are costs of compliance. That is the reason the MSRB has included Appendix A to the Notice. By using Appendix A to provide disclosure concerning compensation conflicts, small municipal advisors will satisfy the compensation disclosure requirement of the Notice without having to retain legal counsel to assist them in the preparation of such disclosure.

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 municipal advisors advising obligated persons or soliciting third-party business from municipal entities.

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

On February 14, 2011, the MSRB requested comment on a draft of the Notice (the "draft Notice"). The MSRB received comment letters from: the American Federation of State, County and Municipal Employees ("AFSCME"); B-Payne Group Financial Advisors ("B-Payne Group"); Catholic Finance Corporation ("Catholic Finance"); Municipal Regulatory Consulting LLC ("MRC"); the National Association of Independent Public Finance Advisors ("NAIPFA"); Not for Profit Capital Strategies ("Capital Strategies"); Public Financial Management ("PFM"); and the Securities Industry and Financial Markets Association ("SIFMA").

SCOPE OF NOTICE

- Comment: Delay Provisions Until SEC Rule on Municipal Advisors Finalized. SIFMA requested that the MSRB withdraw or delay some or all of the provisions of the draft Notice until the SEC has defined "municipal advisor," after which time they asked that the MSRB afford commenters an additional opportunity to comment on the Notice.
- MSRB Response: Because Rule G-17 became applicable to municipal advisors on December 23, 2010, the MSRB feels it is important to provide guidance on how the rule applies to municipal advisors. The MSRB has requested that the proposed rule change be made effective on the date that rules defining the term "municipal advisor" under the Exchange Act are first made effective by the SEC, or such later date that the SEC approves the proposed rule change. At that time, the MSRB may propose additional guidance, if necessary.

- Comment: Duty When Advising Obligated Persons. Capital Strategies requested that the MSRB clarify a municipal advisor's duty when a financing alternative for a municipal advisor's obligated person client is not in the best interests of a municipal entity.
- MSRB Response: The MSRB determined to address these comments by revising the Notice so that it would provide (in endnote 7): "Although a municipal advisor advising an obligated person does not have a fiduciary duty to the municipal entity that is the conduit issuer for the obligated person (but is not the client of the advisor), it still has a fair dealing duty to the municipal entity." Thus, when a municipal advisor is advising an obligated person, its primary obligation of fair dealing is to its client. The municipal advisor would not be required to act in the best interests of the municipal entity acting as a conduit issuer, although the advisor would be prohibited from acting in a deceptive, dishonest or unfair manner.
- Comment: Interpretation of Fair Dealing Too Broad. SIFMA said that the draft Notice interpreted a municipal advisor's fair dealing obligations far beyond the common understanding of "fair dealing" and beyond prior interpretations of fair dealing as applied to brokers, dealers, and municipal securities dealers ("dealers"). SIFMA said that the draft Notice imposed many "fiduciary-like" obligations on municipal advisors when advising entities other than municipal entities. SIFMA further commented that concepts of a duty of care and a duty to disclose conflicts and obtain consent have never before been interpreted to be part of a duty to deal fairly under Rule G-17, and that imposing these duties under Rule G-17 may be inconsistent with existing obligations of currently regulated persons.

- MSRB Response: The MSRB has determined not to make any changes to the Notice based on these comments. The MSRB notes that prior interpretations of the concept of "fair dealing" with respect to dealers applied to counterparty, not advisory, relationships, and that a comparison between such prior interpretations and duties applicable to an advisor would therefore be inappropriate. Further, the MSRB considered carefully the violations of fair dealing and fiduciary duty in numerous state and federal cases, as well as SEC proceedings, and determined that fair dealing obligations and fiduciary obligations in an advisory relationship were closely aligned and not as disparate as SIFMA might suggest.

DUTY TO OBLIGATED PERSONS

Appropriateness; Due Care.

- Comment: Revise "Appropriateness" Standard. SIFMA questioned whether the draft Notice created a new standard of conduct by requiring a municipal advisor to advise an obligated person client as to the appropriateness of a municipal financial product or transaction or whether "appropriateness" was intended by the MSRB to mean the same thing as "suitability." SIFMA and MRC said that the MSRB should define the duty to be consistent with other suitability standards currently applicable to dealers.
- MSRB Response: The MSRB determined to address this comment by revising the Notice so that it would substitute the term "suitability" for the term "appropriateness" and to provide that the municipal advisor must have reasonable grounds for believing that a recommended municipal securities transaction or municipal financial product is suitable for the client, based on certain information about the client and the product or transaction known by the municipal advisor.

- Comment: Address Competing Standards. SIFMA said that the MSRB should not impose an appropriateness standard on regulated entities that were already subject to a competing standard. SIFMA said that the Rule G-17 obligation to advise obligated person clients of material risks should be deemed satisfied if the municipal advisor complied with similar requirements under another applicable regulatory regime. Further, SIFMA said that this duty should be limited to specified transactions and not extended to ordinary course transactions such as bank deposits and the issuance of fixed or floating rate debt.
- MSRB Response: The MSRB disagrees in part with these comments and accordingly has determined not to make the changes to the Notice suggested by these comments, except as noted above. As noted above, the MSRB revised the Notice so that it would substitute the word "suitability" for the term "appropriateness" to align what SIFMA suggested might be potentially conflicting regulatory regimes. Further, the municipal advisor would not be deemed to have automatically satisfied the requirements of Rule G-17 by satisfying the requirements of another regulatory regime. The MSRB believes that adoption of SIFMA's comments with respect to ordinary course transactions would negate a significant purpose of the Notice.
- Comment: Risk Disclosure; Duplication and Scope. Catholic Finance suggested that where an underwriter had proposed a specific transaction and had adequately disclosed the risks, the municipal advisor need not also disclose the risks. Catholic Finance also requested clarification about whether the disclosure of risks and material incentives had to be in writing, as well as whether the same disclosures needed to be repeated to experienced clients in similar, successive transactions.

- MSRB Response: The MSRB has determined not to make the changes suggested by these comments. While a municipal advisor would not be required to disclose the same risks that an underwriter has disclosed, the municipal advisor would be required to determine the adequacy of such disclosure and advise its client as to whether the municipal advisor had reasonable grounds for believing the transaction or product recommended by the underwriter is suitable for such client. Such evaluation and advice are separate from whatever disclosure the underwriter presents. Further, while the disclosure of material risks would not be required to be in writing, the municipal advisor would be required to disclose any incentives and any other conflicts of interest in writing. Finally, with respect to disclosing the same risks to experienced clients in similar, successive transactions, the municipal advisor would be expected to consider whether disclosure would be advisable in light of new facts or circumstances concerning the client or the market, or the client's choice of new or different personnel directed to complete the transaction.
- Comment: Determine Status of Client. Capital Strategies requested that the MSRB clarify a municipal advisor's obligation if the status of its client could not be determined until after substantial advisory activity had taken place, citing an instance of a client initially considering a tax-exempt borrowing (and therefore being considered obligated person) but finally deciding to obtain a bank loan.
- MSRB Response: This comment is more appropriately addressed to the SEC, which has the authority to define the term "obligated person" as used in the Exchange Act.
- Comment: Limit Obligations to Terms of Contract. SIFMA and NAIPFA argued that a municipal advisor should be required to do only what the obligated person client contracted for, and SIFMA said that an advisor need not expressly disclaim an obligation

absent an explicit agreement between the parties. SIFMA also said that Rule G-17 should not imply additional obligations when reviewing a product or transaction recommended to its client by another, specifically the obligation to review for appropriateness and to disclose material risks, outside of what has been specifically contracted for between the parties.

- MSRB Response: The MSRB has determined not to make any changes to the Notice as a result of this comment. The MSRB expects that municipal advisors that wish to limit their engagements with obligated persons would do so in writings (whether as part of engagement letters or separately) that limit the scope of their engagements to particularly enumerated services or which state that any services not specified in the writing would not be provided by the advisor. This should impose no measurable additional cost on the advisor or the obligated person.
- Comment: Clarify Due Diligence Obligations. NAIPFA suggested that various duties, such as a duty to investigate or to make reasonable inquiry, appear to be variations on due diligence requirements and requested that they be worded in the same manner in the draft Notice and a proposed interpretive notice under proposed Rule G-36 (on fiduciary duty of municipal advisors). NAIPFA asked that these be revised and clarified. SIFMA suggested that any duty to analyze appropriateness be limited to facts that the municipal advisor was required to obtain under MSRB rules, or otherwise had in its possession, and that no further due diligence be required.
- MSRB Response: The MSRB has determined not to make any changes to the Notice based on these comments. The Notice would not impose a "due diligence" obligation upon municipal advisors. However, to the extent that a municipal advisor makes a

recommendation, the fulfillment of such advisor's suitability obligation as described above would necessitate that the advisor gather and review the information on which such suitability determination is based. The wording of the Notice differs from that of the Rule G-36 proposed notice because of the different duties owed by municipal advisors to their clients under the two notices.

Disclosure of Conflicts.

- Comment: Incorporate Requirements of Advisory Contracts in Rule G-23. MRC suggested that the requirements to disclose conflicts and to obtain informed consent would be more appropriately addressed in MSRB Rule G-23, and that the requirements should be removed from the draft Notice.
- MSRB Response: The MSRB disagrees with these comments and has determined not to make any changes to the Notice based on these comments. Rule G-23 only concerns financial advisory activities of dealers with respect to issues of municipal securities. The Notice would be the appropriate place to address these disclosures by all municipal advisors with obligated person clients.
- Comment: Disclose Linking Fees and Engagements. Catholic Finance suggested that disclosure concerning forms of compensation include disclosures by dealer firms offering to link engagements and fees as a municipal advisor with a separate engagement as underwriter on a separate transaction.
- MSRB Response. The MSRB has determined not to make any changes to the Notice based on these comments. The Notice would provide that other, associated conflicts of interest would be required to be disclosed and described, if applicable. This provision of the Notice would thus address many additional types of conflicts.

Forms of Compensation.

- Comment: Disclosure of Conflicts Confusing and Unnecessary. Several commenters suggested that the MSRB delete Appendix A to the draft Notice (Disclosure of Conflicts with Various Forms of Compensation) and the requirement of the Notice that municipal advisors disclose the conflicts with various forms of compensation (B-Payne Group, MRC; NAIPFA; PFM). Commenters argued that the disclosure would be confusing and that the type of fee arrangement (specifically contingent fees) did not affect professional performance. MRC suggested that any disclosure requirements were more appropriately addressed in Rule G-23. NAIPFA suggested that disclosure of conflicts in forms of compensation be limited to the conflicts applicable to the form of compensation methodology at the time the compensation methodology was proposed. NAIPFA also suggested that "pitches" or other discussions of ideas with municipal entities prior to engagement should not require delivery of the disclosure. AGFS supported the proposal to require municipal advisors to clarify the advantages and disadvantages of various forms of compensation.
- MSRB Response: The MSRB has determined to revise the Notice so that it would address these comments. Because municipal advisors owe a duty of fair dealing with respect to their obligated person clients, the MSRB considers it essential that they disclose all material conflicts to their clients. The Notice has been revised so that it would provide that, if the obligated person client has required that a particular form of compensation be used, the disclosure provided by the municipal advisor would need only address that form of compensation. The revised Notice would also require that conflicts disclosures, including those regarding compensation, need only be delivered before the

municipal advisor has been engaged to provide municipal advisory services, unless the conflicts are discovered or arise later.

The MSRB has determined not to eliminate Appendix A from the Notice. Appendix A was included in the Notice for the benefit of small municipal advisors to help them avoid the need to hire an attorney to prepare compensation conflicts disclosure associated with common forms of compensation. Use of Appendix A would not be mandatory and municipal advisors would be free to draft their own disclosure addressing these conflicts.

- Comment: Disclose Fees of All Participants. B-Payne Group said that fees of all participants (including bond attorneys) should be disclosed.
- MSRB Response: In the view of the MSRB, it is appropriate to interpret Rule G-17 differently for arm's-length counterparty relationships on the one hand (such as underwriters appropriately maintain with issuers) and advisory relationships on the other. The MSRB notes that it does not have jurisdiction over bond lawyers, unless they are functioning as municipal advisors, and, therefore, in most cases, may not require them to disclose compensation conflicts.
- Comment: Due Diligence to Determine Authority of Municipal Official. NAIPFA suggested that, in determining the authority of an official of an obligated person client to enter into a contract, to receive various disclosures, and to deliver informed consent, a municipal advisor should be permitted to rely on the apparent authority of such official to acknowledge the conflicts disclosure, assuming the advisor has no reason to believe that such person lacks the requisite authority.
- MSRB Response: The MSRB has determined to revise the Notice so that it would provide that a municipal advisor is required to deliver written disclosures of conflicts to,

and receive informed consent from, those officials of the obligated person whom the municipal advisor reasonably believes have the authority to bind the obligated person client by contract with the municipal advisor.

- Comment: Consent Presumed With Receipt of Written Agreement. NAIPFA suggested that a municipal advisor be permitted to presume consent if it receives an executed contract (or similar document), or verbal agreement that a written engagement letter (or similar document) has been accepted, or written or verbal acknowledgement that the advisor has been selected following a request for proposal ("RFP") process in which the form of compensation was appropriately disclosed and applicable disclosure provided.
- MSRB Response: The MSRB notes that the following provisions of the Notice would address this comment. The Notice would provide: "For purposes of Rule G-17, an obligated person client will be deemed to have consented to conflicts that are clearly described in its engagement letter or other written contract with the municipal advisor, if the obligated person client expressly acknowledges the existence of such conflicts. If the official of the obligated person client agrees to proceed with the municipal advisory engagement after receipt of the conflicts disclosure but will not provide written acknowledgement of such conflicts, the municipal advisor may proceed with the engagement after documenting with specificity why it was unable to obtain such written acknowledgement." Accordingly, the MSRB has determined not to make any changes to the Notice to address this comment.

Misrepresentations.

- Comment: Disclose Only General Conflicts of Interest. SIFMA said that it would be difficult for an advisor to accurately determine its capacity, resources, and knowledge

when discussing a potential engagement with an obligated person client or on a forward-looking basis, and suggested that it be able to satisfy its obligation by providing generalized disclosures about its qualifications.

- MSRB Response: The Notice would specify, in the context of a response to an RFP, that the response must accurately describe the municipal advisor's knowledge and capabilities, and prohibits a municipal advisor from making false or misleading statements about its knowledge and capabilities, or omitting material facts about its knowledge and capabilities. The municipal advisor would be expected to base its response on its understanding about the scope of the engagement at that time. If the scope of the engagement changes, the municipal advisor would be prohibited from making false or misleading statements about its continued ability to perform the engagement. Accordingly, the MSRB has determined not to make any changes to the notice based on this comment.

Excessive Compensation.

- Comment: Definition of Excessive Compensation. NAIPFA and B-Payne Group requested further clarification on the definition of "excessive compensation." NAIPFA suggested certain criteria, including, among other things: (i) the time and labor required, the novelty and difficulty of the issue involved, and the skill requisite to perform the municipal advisory services properly; (ii) the fee customarily charged in the locality for similar municipal advisory services; (iii) the amount involved and the results obtained; (iv) the nature and length of the professional relationship with the client; (v) the experience, reputation, and ability of the municipal advisor or municipal advisors performing the services; and (vi) whether the fee is fixed or contingent. B-Payne Group

objected to any evaluation of whether its fees were excessive, arguing that no regulator was in a position to evaluate the reasonableness of the municipal advisor's fee.

- MSRB Response: The MSRB has determined to revise the Notice so that it would address these comments. The Notice would describe excessive compensation as compensation that is so disproportionate to the nature of the municipal advisory services performed as to indicate that the municipal advisor is engaging in an unfair practice in violation of Rule G-17. The MSRB would revise the Notice so that it would provide that "The MSRB recognizes that what is considered reasonable compensation for a municipal advisor will vary according to the municipal advisor's expertise, the complexity of the financing, whether the fee is contingent upon the closing of the transaction, and the length of time spent on the engagement, among other factors." As this language recognizes, many factors can appropriately affect the amount of the fee, and the specific factors listed in the Notice would not be exclusive. Thus, it may be that the various other factors noted by commenters could have an impact on the compensation paid to a municipal advisor. In all cases, the municipal advisor should be able to support the legitimacy of its fees.

SOLICITATION OF A MUNCIPAL ENTITY

Disclosure of Material Facts; Gifts.

- Comment: Extent of Disclosure May Be of Questionable Value. SIFMA suggested that the requirement to disclose all relationships with influential employees, board members, or affiliates of the municipal entity may be extensive and of questionable value. Further, SIFMA noted that a solicitor may not be in the best position to disclose all material risks

and characteristics, and that such effort will be duplicative of the provider's (its client's) obligation once it has been retained an a municipal advisor.

- MSRB Response: The MSRB disagrees with this comment, especially given the relationship-driven business that enforcement actions have revealed. See, e.g., endnote 15 to the Notice. Accordingly, the MSRB has determined not to make any changes to the Notice to address these comments.
- Comment: Address Gifts in Rule G-20. SIFMA suggested that the MSRB should address the issue of gifts in MSRB Rule G-20, as it has done for similar prohibitions on dealers.
- MSRB Response: The MSRB notes that the provisions in the Notice regarding Rule G-20 would only be reminders of existing MSRB guidance under Rule G-17, which is equally applicable to municipal advisors. Accordingly, the MSRB has determined not to make any changes to the Notice to address this comment.
- Comment: Limit Duties of Affiliated Solicitors. SIFMA said that the duties attendant on solicitors should not apply to solicitors affiliated with municipal advisors, and such solicitors should not be considered to be engaged in municipal advisory activities when soliciting on behalf of their municipal advisor affiliates.
- MSRB Response: The MSRB notes that affiliated solicitors are not included in the definition of "municipal advisor" under Section 15B(e)(4) of the Exchange Act and that Rule G-17 and the Notice would not apply to such solicitors. The Notice has been revised to refer to solicitations on behalf of "unrelated" third parties.
- Comment: Clarify Referrals and Solicitations. Catholic Finance requested clarification on whether referrals to it from prior clients constituted solicitation, and whether services performed as part of its exempt purpose and for its constituents at reduced or no

compensation, or loans made to its constituents at subsidized rates, would constitute gifts under Rule G-17.

- MSRB Response**:** The MSRB has determined not to make any changes to the Notice based on this comment**.** The MSRB note**s** that the definition of "solicitation of a municipal entity or obligated person" found in Section 15B(e)(9) of the Exchange Act does not apply to solicitations for which compensation is neither directly nor indirectly received. Under amendments to MSRB Rule G-20 proposed by the MSRB, the rule would only restrict gifts made to natural persons.

OTHER COMMENTS.

- Comment: Manner of Regulation and Cost of Compliance. B-Payne Group expressed the view that the MSRB should regulate municipal advisors by getting "experienced personnel on the ground in regional markets and charge them with staying on top of situations," rather than regulating municipal advisors as the MSRB regulates dealers. It argued for exemptions from MSRB rules for small municipal advisors and said the cost of compliance for such advisors would outweigh the regulatory benefit. Other parts of the comment letter addressed matters that were outside the scope of the request for comment on draft Rule G-17 (e.g., professional qualifications testing, training for local finance officials) and are not summarized here.
- MSRB Response: For regulation of municipal advisors to be fair, all municipal advisors must know what rules apply to them. Rule G-17 requires municipal advisors to conduct their municipal advisory activities in a fair manner, and the proposed rule change would provide guidance to municipal advisors on what that duty of fair dealing means so they can tailor their conduct accordingly. Without such guidance, "experienced personnel on

the ground" would likely enforce the Exchange Act in an inconsistent manner, which the MSRB doubts that B-Payne Group would consider fair.

The MSRB recognizes that there are costs of compliance with its rules. That is the reason the MSRB has included Appendix A to the Notice. By using Appendix A to provide disclosure concerning compensation conflicts, small municipal advisors will satisfy the compensation disclosure requirement of the Notice without having to retain legal counsel to assist them in the preparation of such disclosure.

- Comment: Implementation Period. SIFMA suggested that because Rule G-17 would subject municipal advisors to rules they are not currently subject to, the MSRB should consider providing for an implementation period of no less than one year.
- MSRB Response. The MSRB recognizes that some municipal advisors may be subject to rules that are not currently applicable. However, the appropriate implementation period will depend upon the provisions of the SEC's rule relating to municipal advisors.

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 they can effectively comment on the proposed rule change prior to the date of final adoption of the Commission's permanent rules for the registration of 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-2011-15 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-2011-15. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and

3:00 pm. Copies of 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-2011-15 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.[4]

Elizabeth M. Murphy
Secretary

[4] 17 CFR 200.30-3(a)(12).