SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-87478; File No. SR-MSRB-2019-10)

November 6, 2019

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1 and Amendment No. 2, to Amend and Restate the MSRB's August 2, 2012 Interpretive Notice Concerning the Application of Rule G-17 to Underwriters of Municipal Securities

I. Introduction

On August 1, 2019, the Municipal Securities Rulemaking Board (the "MSRB" or "Board") filed with the Securities and Exchange Commission (the "SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change (the "original proposed rule change") to amend and restate the MSRB's August 2, 2012 interpretive notice concerning the application of MSRB Rule G-17 to underwriters of municipal securities (the "2012 Interpretive Notice").[3] The original proposed rule change was published for comment in the Federal Register on August 9, 2019.[4]

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

2 17 CFR § 240.19b-4.

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

4 Exchange Act Release No. 86572 (Aug. 5, 2019), 84 FR 39646 (Aug. 9, 2019) ("Notice of Filing"). The comment period closed on August 30, 2019.

The Commission received three comment letters in response to the original proposed rule change.[5] On September 10, 2019, the MSRB granted an extension of time for the Commission to act on the filing until November 7, 2019. On October 7, 2019, the MSRB responded to the comments[6] and filed Amendment No. 1 to the original proposed rule change ("Amendment No. 1").[7] The Commission published notice of Amendment No. 1 in the Federal Register on October 15, 2019.[8] In response to Amendment No. 1, the Commission received three comment letters.[9] On October 31, 2019, the MSRB submitted a response to comments received on Amendment No. 1[10] and filed Amendment No. 2 to the original proposed rule change ("Amendment No.

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5 See Letter to Secretary, Commission, from Tamara K. Salmon, Associate General Counsel, Investment Company Institute dated Aug. 26, 2019 (the "ICI Letter"), Letter to Secretary, Commission, from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated August 30, 2019 (the "First SIFMA Letter"); Letter to Secretary, Commission, from Susan Gaffney, Executive Director, National Association of Municipal Advisors, dated August 30, 2019 (the "First NAMA Letter").

6 See Letter to Secretary, Commission, from Gail Marshall, Chief Compliance Officer, MSRB, dated October 7, 2019 (the "First Response Letter"), available at https://www.sec.gov/comments/sr-msrb-2019-10/srmsrb201910-6261133-193028.pdf.

7 Amendment No. 1 is available at http://msrb.org/~/media/Files/SEC-Filings/2019/MSRB-2019-10-A-1.ashx?.

8 See Exchange Act Release No. 87255 (October 8, 2019), 84 FR 55192 (October 15, 2019) (the "Notice of Amendment No. 1"). The comment period closed on October 29, 2019.

9 See Letter to Secretary, Commission, from Susan Gaffney, Executive Director, National Association of Municipal Advisors, dated October 29, 2019 (the "Second NAMA Letter); Letter to Secretary, Commission, from Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated October 29, 2019 (the "Second SIFMA Letter"); Letter to Secretary, Commission, from Michael Nicholas, Chief Executive Officer, Bond Dealers of America, dated October 29, 2019 (the "BDA Letter").

10 See Letter to Secretary, Commission, from Gail Marshall, Chief Compliance Officer, MSRB, dated October 31, 2019 (the "Second Response Letter" and, together with the First Response Letter, the "MSRB Response Letters"), available at https://www.sec.gov/comments/sr-msrb-2019-10/srmsrb201910-6381148-197768.pdf.

2").[11] This order approves the original proposed rule change, as modified by Amendment No. 1 and Amendment No. 2 (as so modified, the "proposed rule change"), on an accelerated basis.

II. Description of Proposed Rule Change

As described more fully in the Notice of Filing, Amendment No. 1, and Amendment No.2, the MSRB stated that the purpose of the proposed rule change is to update and streamline certain obligations specified in the 2012 Interpretive Notice (the 2012 Interpretive Notice, so amended by the proposed rule change, is referred to herein as the "Revised Interpretive Notice") and, thereby, benefit issuers and underwriters of municipal securities alike by reducing the burdens associated with those obligations, including the obligation of underwriters to make, and the burden on issuers to acknowledge and review, written disclosures that itemize risks and conflicts that are unlikely to materialize during the course of a transaction, not unique to a given transaction or a particular underwriter where a syndicate is formed, and/or otherwise duplicative.[12]

A. Incorporation of Subsequent MSRB Guidance into Revised Interpretive Notice

The MSRB stated that the proposed rule change would integrate certain concepts (with revisions as described in the Notice of Filing, Amendment No. 1, and Amendment No. 2) from (i) the MSRB's implementation guidance dated July 18, 2012 concerning the 2012 Interpretive Notice (the "Implementation Guidance")[13] and (ii) the regulatory guidance dated March 25, 2013

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11 Amendment No. 2 is available at http://msrb.org/~/media/Files/SEC-Filings/2019/MSRB-2019-10-A-2.ashx?.

12 See Notice of Filing.

13 See MSRB Notice 2012-38 (July 18, 2012).

answering certain frequently asked questions regarding the 2012 Interpretive Notice (the "FAQs")[14] into the Revised Interpretive Notice, thereby consolidating the Implementation Guidance, FAQs, and the Revised Interpretive Notice into a single publication.[15]

i. Applicability of the Revised Interpretive Notice to the Continuous Offering of Municipal Fund Securities

The MSRB noted that the Implementation Guidance makes clear that the 2012 Interpretive Notice applies not only to primary offerings of new issues of municipal bonds and notes by an underwriter, but also to a dealer serving as primary distributor (but not to dealers serving solely as selling dealers) in a continuous offering of municipal fund securities, such as interests in 529 savings plans.[16] In the original proposed rule change, the MSRB incorporated this concept from the Implementation Guidance, adding a reference to Achieving a Better Life Experience (ABLE) programs.[17] In response to concerns raised in the comments to the original proposed rule change, the MSRB proposed in Amendment No. 1 and Amendment No. 2 to modify the proposed rule change to state, "[t]his notice does not apply to a dealer acting as a primary distributor in a continuous offering of municipal fund securities."[18] Thus, the MSRB stated, the original proposed rule change, as revised by Amendment No. 1 and Amendment No. 2, makes clear that the specific fair dealing duties outlined in the proposed rule change – which

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14 See MSRB Notice 2013-08 (Mar. 25, 2013).

15 See Notice of Filing.

16 Id.

17 Id.

18 See Amendment No.1, Amendment No. 2.

articulate the delivery of certain disclosures at particular times during the course of an underwriting transaction – would not be applicable to the situations of a dealer serving as a primary distributor in a continuous offering of municipal fund securities.[19] The MSRB noted that Amendment No. 1 did not revise the portion of the text of the original proposed rule change indicating that the fair dealing obligations outlined in the interpretive notice may serve as one of many bases for dealers acting in a capacity not specifically addressed therein – such as a dealer serving as a primary distributor in a continuous offering of municipal fund securities – to determine how to establish appropriate policies and procedures for ensuring it meets its fair dealing obligations under Rule G-17.[20]

ii. Applicability of the Revised Interpretive Notice to a Primary Offering that is Placed with Investors by a Placement Agent

The MSRB noted that the Implementation Guidance provides that no type of underwriting is wholly excluded from the application of the 2012 Interpretive Notice, including certain private placement activities.[21] The MSRB stated that the proposed rule change would incorporate this concept from the Implementation Guidance into the Revised Interpretive Notice with certain revisions, as discussed in further detail in the Notice of Filing and Amendment No. 1.[22] Pursuant to Amendment No. 1, the MSRB added language to the Revised Interpretive Notice clarifying that the disclosures delivered by an underwriter to an issuer must not be inaccurate or

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19 See Amendment No. 1.

20 Id.

21 See Notice of Filing.

22 See Notice of Filing, Amendment No. 1.

misleading, and that nothing in the Revised Interpretive Notice should be construed as requiring an underwriter to make a disclosure to an issuer that is false.[23]

In addition, the MSRB stated that the proposed rule change would update the 2012 Interpretive Notice by incorporating supplemental language into the Revised Interpretive Notice intended to harmonize it with the Commission's adoption of its permanent rules regarding the registration and record-keeping requirements applicable to municipal advisors, and related exclusions and exceptions, which went into effect after the effective date of the 2012 Interpretive Notice.[24] The MSRB stated that it believes that the guidance provided by this harmonizing language is in keeping with the existing references included in the 2012 Interpretive Notice and its guidance regarding the existence of other relevant or similar legal obligations that could have a bearing on an underwriter's fair dealing obligations under Rule G-17.[25]

iii. Statements Regarding Negotiated Offerings and Defining Negotiated and Competitive Offerings for Purposes of the Revised Interpretive Notice

The MSRB stated that by its terms, and as presently stated in the Implementation Guidance, the 2012 Interpretive Notice applies primarily to negotiated offerings of municipal securities, with many of its provisions not applicable to competitive offerings.[26] The MSRB noted that the Implementation Guidance clarified what constitutes a negotiated offering for

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23 See Amendment No. 1.

24 See Notice of Filing.

25 Id.

26 Id.

purposes of the 2012 Interpretive Notice, and the MSRB stated that the proposed rule change would incorporate this language into the Revised Interpretive Notice.[27]

iv. Applicability of the Revised Interpretive Notice to Persons Other than Issuers of Municipal Securities

The MSRB noted that the 2012 Interpretive Notice outlines the duties that a dealer owes to an issuer of municipal securities when the dealer underwrites a new issuance, and that the Implementation Guidance provides that the 2012 Interpretive Notice "does not set out the underwriter's fair dealing obligations to other parties involved with a municipal securities financing, including a conduit borrower."[28] The MSRB stated that the proposed rule change would incorporate the language from the Implementation Guidance into the Revised Interpretive Notice with conforming revisions, stating "[t]his notice does not set out the underwriter's fair-practice duties to other parties to a municipal securities financing (e.g., conduit borrowers)."[29]

v. Statements Regarding Underwriters' Discouragement of the Engagement of a Municipal Advisor

The MSRB noted that the Implementation Guidance further clarifies the scope of the prohibition included in the 2012 Interpretive Notice, affirming that an underwriter must not recommend that the issuer not retain a municipal advisor.[30] The MSRB stated that the proposed rule change would incorporate this concept into the Revised Interpretive Notice certain revisions,

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27 Id.

28 Id.

29 Id.

30 Id.

as more fully discussed in the Notice of Filing, providing that "Underwriters also must not recommend issuers 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."[31]

vi. Statements Regarding Third-Party Payments

The MSRB noted that the Implementation Guidance clarifies the obligation of underwriters to disclose certain third-party payments, as well as other payments, values or credits received by an underwriter.[32] The MSRB stated that proposed rule change would incorporate the language from the Implementation Guidance into the Revised Interpretive Notice, with certain revisions, including the removal of language regarding "normal course of business" payments that the MSRB believed was redundant, as more fully described in the Notice of Filing. [33]

vii. Need for Each Underwriter in a Syndicate to Deliver Dealer-Specific Conflicts of Interest When Applicable

The MSRB noted that the FAQs clarify what disclosures may be effected by a syndicate manager on behalf of co-managing underwriters in the syndicate. The MSRB stated that the proposed rule change would incorporate the relevant language from the FAQs into the Revised Interpretive Notice with certain revisions, including the technical clarification that such disclosures apply to "actual material conflicts of interest" and "potential material conflicts of

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31 Id.

32 Id.

33 Id.

interest" in order to make the statements consistent with related amendments in the proposed rule change, as more fully described in the Notice of Filing.[34]

viii. Statements Regarding the Timing for the Delivery of Certain Disclosures

The MSRB noted that the Implementation Guidance and FAQs clarify the timing for the delivery of the disclosures under the 2012 Interpretive Notice.[35] The MSRB stated that the proposed rule change would incorporate these timing concepts from the Implementation Guidance and FAQs into the Revised Interpretive Notice with certain revisions (e.g., by utilizing the Revised Interpretive Notice's defined terms of "standard disclosure," "dealer-specific disclosures," and "transaction-specific disclosures").[36]

The MSRB stated that the proposed rule change also would incorporate the concept that the timelines are defined to ensure that underwriters act promptly to deliver disclosures in light of all the relevant facts and circumstances, but are not "intended to establish strict, hair-trigger tripwires resulting in mere technical rule violations."[37]

ix. Statements Regarding Whether Underwriters May Rely on Certain Representations of Issuer Officials

The MSRB noted that the FAQs clarify the circumstances under which an underwriter may rely on the representations of issuer officials.[38] The MSRB stated that the proposed rule

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34 Id.

35 Id.

36 Id.

37 Id.

38 Id.

change would incorporate this language from the FAQs into the Revised Interpretive Notice with clarifying language regarding the relevance of facts discovered during the course of an underwriter's due diligence, including diligence related to the transaction generally or pursuant to an underwriter's own determination of whether it has any actual material conflicts of interest or potential material conflicts of interest.[39] Specifically, the Revised Interpretive Notice supplements the existing statement from the FAQs with language intended to clarify that if an underwriter becomes aware of a fact through the normal course of its diligence that would lead it to doubt a representation of an issuer official, such information may rise to the level of a red flag that would not allow the underwriter to reasonably rely on the written representation.[40]

x. Statements Regarding an Underwriter Having a Reasonable Basis for Its Representations and Other Material Information Provided to Issuers

The MSRB noted that the 2012 Interpretive Notice states that underwriters must "have a reasonable basis for representations and other material information provided to issuers" and clarifies that the obligation "extends to the reasonableness of assumptions underlying the material information being provided," and that the Implementation Guidance further contextualizes this reasonable basis standard.[41] The MSRB stated that the proposed rule change would incorporate this language from the Implementation Guidance into the Revised Interpretive Notice with certain revisions, including removing certain language regarding an underwriter's

39 Id.

40 Id.

41 Id.

use of assumptions, which the MSRB believed was potentially confusing and redundant, as further described in the Notice of Filing.[42]

xi. Statements Regarding Whether a Particular Recommended Financing Structure or Product is Complex

The MSRB noted that the 2012 Implementation Guidance contains a description of a "complex municipal securities financing" that is further clarified in the Implementation Guidance.[43] The MSRB further noted the 2012 Interpretive Notice then provides a non-exclusive, illustrative list of examples of new issue structures that constitute a complex municipal securities financing.[44]

The MSRB stated that the proposed rule change would incorporate this language from the Implementation Guidance into the Revised Interpretive Notice with conforming revisions and an update to the illustrative, non-exclusive list of interest rate benchmarks to include the Secured Overnight Financing Rate (SOFR).[45] The MSRB stated that it believes this edit is a necessary update to ensure that the Revised Interpretive Notice would reflect current market practices.[46]

xii. Statements Regarding the Specificity of Disclosures

The MSRB noted that the 2012 Interpretive Notice provides that an underwriter of a negotiated issue that recommends a complex municipal securities transaction or product to an

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42 Id.

43 Id.

44 Id.

45 Id.

46 Id.

issuer has an obligation to disclose all financial material risks known to the underwriter and reasonably foreseeable at the time of the disclosure, financial characteristics, incentives, and conflicts of interest regarding the transaction or product.[47] The MSRB further noted that the Implementation Guidance provided clarification and additional guidance with respect to this obligation, as further described in the Notice of Filing.[48] The MSRB stated that the proposed rule change would incorporate the language from the Implementation Guidance into the Revised Interpretive Notice with certain revisions as further described in the Notice of Filing and Amendment No. 1, including the removal of the statement regarding how such disclosures might assist issuers.[49]

xiii. Statements Regarding Profit Sharing Arrangements

The MSRB noted that the 2012 Interpretive Notice states that, "[a]rrangements between the underwriter and an investor purchasing new issue securities from the underwriter according to which profits realized from the resale by such investor of the securities are directly or indirectly split or otherwise shared with the underwriter also would, depending on the facts and circumstances (including in particular if such resale occurs reasonably close in time to the original sale by the underwriter to the investor), constitute a violation of the underwriter's fair dealing obligation under Rule G-17."[50] The MSRB stated that the proposed rule change would

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47 Id.

48 Id.

49 See Notice of Filing, Amendment No. 1. See also "Amending the Nature, timing and Manner of Disclosures – Assignment of responsibility for the Standard Disclosures and Transaction-Specific Disclosures," *infra*.

50 See Notice of Filing.

incorporate into the Revised Interpretive Notice additional language from the Implementation Guidance, which reads, in relevant part, "[u]nderwriters 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."[51]

B. Amending the Nature, Timing, and Manner of Disclosures

The MSRB stated that the proposed rule change would define certain categories of underwriter disclosures and assign the responsibility for the delivery of certain disclosures to the syndicate manager in circumstances where a syndicate is formed, as described below and as further described in the Notice of Filing and Amendment No. 1.[52]

i. Definitions of Certain Categories of Underwriter Disclosures

The MSRB stated that the proposed rule change would define the following terms in order to delineate a dealer's various fair dealing obligations under the Revised Interpretive Notice: "standard disclosures" as collectively referring to the disclosures concerning the role of an underwriter and an underwriter's compensation; "dealer-specific disclosures" as collectively referring to the disclosures concerning an underwriter's actual material conflicts of interest and potential material conflicts of interest; and "transaction-specific disclosures" as collectively referring to the disclosures concerning the material aspects of financing structures that the underwriter recommends.[53]

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51 Id.

52 See Notice of Filing, Amendment No. 1.

53 See Notice of Filing.

ii. Assignment of Responsibility for the Standard Disclosures and Transaction-Specific Disclosures

The MSRB noted that the 2012 Interpretive Notice states that a syndicate manager is permitted, but not required, to make the standard disclosures and the transaction-specific disclosures on behalf of the other underwriters in the syndicate.[54] The MSRB stated that the amendments in the original proposed rule change would obligate only the syndicate manager[55] of a syndicate – or sole underwriter, as the case may be – to make the standard disclosures and transaction-specific disclosures and would eliminate any obligation of other co-managing underwriters in the syndicate to make the standard disclosures and transaction-specific disclosures.[56] In response to concerns raised in the comments to the original proposed rule change, the MSRB proposed in Amendment No. 1 to modify the original proposed rule change to state that the underwriter making a recommendation to an issuer regarding a financing structure or product, including, when applicable, a Complex Municipal Securities Financing Recommendation,[57] has the fair dealing obligation to deliver the applicable transaction-specific disclosures.[58] Consequently, the MSRB stated, pursuant to Amendment No. 1, when the syndicate manager (or any other underwriter in the syndicate) is not the underwriter making the recommendation of a financing structure or product to the issuer, such underwriter does not have

54 Id.

55 As defined in Exhibit 5 to Amendment No. 2.

56 See Notice of Filing.

57 As defined in Exhibit 5 to Amendment No. 2.

58 See Amendment No. 1.

a fair dealing obligation under the proposed rule change to deliver the transaction-specific disclosures with respect to such financing structure or product.[59]

In addition, the MSRB stated that the proposed rule change provides that any disclosures delivered by a syndicate manager prior to or concurrent with the formation of a syndicate would not need to be identified as delivered in the capacity of the syndicate manager or otherwise redelivered "on behalf" of the syndicate.[60]

The MSRB further noted that, pursuant to the proposed rule change, each member of the syndicate would remain responsible for ensuring the delivery of any dealer-specific disclosures if, but only if, such syndicate member had actual material conflicts of interest or potential material conflicts of interest that must be disclosed.[61]

iii. Separate Identification of the Standard Disclosures

The MSRB noted that the 2012 Interpretive Notice currently permits the delivery of omnibus disclosure documents, in which the standard disclosures need not be separately identified from the transaction-specific disclosures and dealer-specific disclosures.[62] The proposed rule change would require the separate identification and formatting of the standard disclosures (i.e., disclosures concerning the role of the underwriter and the underwriter's compensation) from the transaction-specific disclosure and the dealer-specific disclosures.[63]

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59 Id.

60 See Notice of Filing.

61 Id.

62 Id.

63 Id.

iv. Meaning of "Recommendation" for Purposes of Disclosures Related to Complex Municipal Securities Financings

The MSRB noted that the 2012 Interpretive Notice provides that an underwriter in a negotiated offering that recommends a complex municipal securities financing to an issuer must 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 (a "complex municipal securities financing disclosure").[64] As the MSRB further noted, the Implementation Guidance provides that the requirement to provide a complex municipal securities financing disclosure is triggered if: the new issue is sold in a negotiated offering; the new issue is a complex municipal securities financing; and such financing was recommended by the underwriter.[65] The MSRB stated that these aspects of the 2012 Interpretive Notice would remain applicable under the Revised Interpretive Notice.[66]

However, the MSRB noted that the 2012 Interpretive Notice does not define the term "recommendation" for purposes of this requirement.[67] The MSRB stated that it believes it is important to provide this clarification to facilitate dealer compliance with the proposed rule change. Therefore, as further described in the Notice of Filing, the MSRB stated that the proposed rule change would clarify that a communication by an underwriter is a

64 Id.

65 Id.

66 Id.

67 Id.

"recommendation" that triggers the obligation to deliver a complex municipal securities financing disclosure if – given its content, context, and manner of presentation — the communication reasonably would be viewed as a call to action to engage in a complex municipal securities financing or reasonably would influence an issuer to engage in a particular complex municipal securities financing.[68]

v. "Reasonably Likely" Standard for Disclosure of Potential Material Conflicts of Interest

The MSRB noted that the 2012 Interpretive Notice currently requires the underwriter to disclose to the issuer any actual material conflicts of interest and any potential material conflicts of interest, and that the Implementation Guidance provides guidance as to when such obligation is triggered.[69] The MSRB stated that these aspects of the 2012 Interpretive Notice would remain applicable under the Revised Interpretive Notice. However, the MSRB noted, the proposed rule change provides that an underwriter's potential material conflict of interest must be disclosed as part of the dealer-specific disclosures if, but only if, the potential material conflict of interest is "reasonably likely" to mature into an actual material conflict of interest during the course of that specific transaction.[70] The MSRB noted that the proposed rule change will not diminish an underwriter's fair dealing obligation to update, or otherwise supplement, its dealer-specific disclosures in circumstances when a previously undisclosed potential conflict of interest later ripens into an actual material conflict of interest.[71]

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68 Id.

69 Id.

70 Id.

71 Id.

vi. Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties

As the MSRB noted, the 2012 Interpretive Notice requires underwriters to provide issuers with certain standard disclosures, dealer-specific disclosures, and transaction-specific disclosures, when and if applicable. By their respective definitions, the standard disclosures cover generic conflicts of interest that could apply to any underwriter in any underwriting; the dealer-specific disclosures are the actual material conflicts of interest and potential material conflicts of interest generally unique to a specific underwriter; and the transaction-specific disclosures relate to the specific financing structure recommended by an underwriter.[72] The MSRB stated that the proposed rule change would expressly state that underwriters 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.[73]

vii. Disclosures must be "Clear and Concise"

The MSRB noted that the 2012 Interpretive Notice currently requires disclosures to be "designed to make clear to such official the subject matter of such disclosures and their implications for the issuer."[74] The MSRB stated that the proposed rule change would provide that an underwriter's disclosures must be delivered in a "clear and concise" manner.[75]

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72 Id.

73 Id.

74 Id.

75 Id.

viii. Definition of Municipal Entity

The MSRB noted that the 2012 Interpretive Notice currently provides a definition of "municipal entity" that references Section 15B(e)(8) under the Exchange Act.[76] In light of the Commission's definition contained in Exchange Act Rule 15Ba1-1[77] and the MSRB's definition of "municipal entity" as used under Rule G-42, both of which were adopted after the publication of the 2012 Interpretive Notice, the MSRB stated that the proposed rule change would incorporate a specific reference to this rule definition, in addition to the general statutory definition, to avoid any confusion about the scope of the Revised Interpretive Notice and to promote harmonization with Exchange Act Rule 15Ba1-1 and Rule G-42.[78]

C. Additional Standard Disclosure Regarding the Engagement of Municipal Advisors

The MSRB noted that the 2012 Interpretive Notice currently requires an underwriter to make five discrete statements regarding the underwriter's role as part of the standard disclosures, including a disclosure that, "unlike a municipal advisor, the underwriter does not have a fiduciary duty to the issuer under the federal securities laws and is, therefore, not required by federal law to act in the best interest of the issuer without regard to its own or other interests."[79] The MSRB stated that the proposed rule change would incorporate a new standard disclosure

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76 Id.

77 See Registration of Municipal Advisors, Release No. 34-70462 (September 20, 2013), 78 FR 67467 (hereinafter, the "MA Rule Adopting Release") (November 12, 2013) (available at http://www.sec.gov/rules/final/2013/34-70462.pdf).

78 See Notice of Filing.

79 Id.

that "the issuer may choose to engage the services of a municipal advisor with a fiduciary obligation to represent the issuer's interests in the transaction."[80]

D. Permit E-mail Read Receipt to Serve as Issuer Acknowledgement

The MSRB noted that the 2012 Interpretive Notice currently requires underwriters to attempt to receive written acknowledgement of receipt by the official of the issuer other than by evidence of automatic e-mail receipt.[81] The MSRB stated that the proposed rule change would permit an e-mail read receipt to serve as the issuer's acknowledgement under the Revised Interpretive Notice.[82] The proposed rule change would define the term "e-mail read receipt" to mean "an automatic response generated by a recipient issuer official confirming that an e-mail has been opened." The MSRB stated that it believes that this proposed change will not compromise issuer protection, because the proposed rule change would require the e-mail read receipt to come from an issuer official that is not party to a conflict, based on the underwriter's knowledge, and either has been specifically identified by the issuer to receive such disclosure communications or, in the absence of such specific identification, is an issuer official who the underwriter reasonably believes has the authority to bind the issuer by contract with the underwriter. The MSRB further stated that the proposed rule change would also clarify that, "[w]hile 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

80 Id.

81 Id.

82 Id.

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."[83]

E. Other Technical and Conforming Amendments

The MSRB stated that the proposed rule change would make certain other technical and conforming changes to the proposed rule change, as described in detail in the Notice of Filing, Amendment No. 1, and Amendment No. 2.[84]

In the Notice of Filing, the MSRB stated that it will publish a regulatory notice within 90 days of the publication of approval of the proposed rule change in the Federal Register, and such notice will specify the compliance date for the amendments described in the proposed rule change, which in any case shall be not less than 90 days, nor more than one year, following the date of the notice establishing such compliance date.[85] The MSRB is requesting accelerated approval of Amendment No. 1 and Amendment No. 2.[86]

III. Summary of Comments Received and MSRB's Responses to Comments

As noted previously, the Commission received three comment letters in response to the Notice of Filing and three comment letters in response to Amendment No. 1. The MSRB responded to the comment letters on the Notice of Filing in its First Response Letter,[87] and the MSRB responded to the comment letters on Amendment No. 1 in its Second Response Letter.[88]

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83 Id.

84 See Notice of Filing, Amendment No. 1, Amendment No. 2.

85 See Notice of Filing.

86 See Amendment No. 1, Amendment No. 2.

87 See First Response Letter.

88 See Second Response Letter.

One commenter expressed its support for the original proposed rule change[89] and for Amendment No. 1.[90]

A. Application to Underwriters of Municipal Fund Securities

In the original proposed rule change, the MSRB proposed to revise the 2012 Interpretive Notice to incorporate existing language from the Implementation Guidance clarifying the application of the notice "to a dealer serving as a primary distributor (but not to dealers serving solely as selling group members) in a continuous offering of municipal fund securities, such as interests in 529 savings plans and Achieving a Better Life Experience (ABLE) programs."[91] In response to the Notice of Filing, one commenter requested that the MSRB revise the original proposed rule change to further "distinguish the disclosure required of 529 underwriters from those required of bond offering underwriters" and recommended specific revisions in this regard.[92] For example, the commenter requested that the standard disclosures concerning the underwriter's role under the original proposed rule change allow such disclosures to be amended "to the extent applicable to the nature of the relationship with the issuer."[93]

The MSRB responded that it believes there is merit to the commenter's view that the proposed rule change "should provide additional guidance regarding its application to underwriters of 529 plans," but that the MSRB did not believe incorporating the specific

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89 See First NAMA Letter.

90 See Second NAMA Letter.

91 See Notice of Filing.

92 See ICI Letter.

93 Id.

revisions proposed by the commenter would be prudent because such revisions may reduce the clarity of the disclosure obligations applicable to other underwriters and, thereby, reduce the overall clarity of the Revised Interpretive Notice.[94] The MSRB further stated that it believes that the commenter's comments regarding the need to provide more clarity in this regard would be better addressed in an interpretation or other guidance separately issued under Rule G-17 that more narrowly considers the fair dealing obligations of dealers serving as primary distributors in a continuous offering of municipal fund securities.[95]

Consequently, rather than incorporating the specific text proposed by the commenter, the MSRB, in Amendment No. 1 and Amendment No. 2, incorporated a revision to the original proposed rule change that, the MSRB stated, would strike the relevant text incorporated from the Implementation Guidance, which, as filed, would clarify the application of the original proposed rule change to the circumstances of a continuous offering of municipal fund securities.[96] The proposed rule change, as amended by Amendment No.1 and Amendment No. 2, would replace this language with a statement that "[t]his notice does not apply to a dealer acting as a primary distributor in a continuous offering of municipal fund securities."[97] The MSRB further states that it intends to make clear that the specific fair practice duties outlined in the Revised Interpretive Notice articulating the delivery of certain disclosures at particular times

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94 See First Response Letter.

95 Id.

96 Id.

97 Id.

during the course of an underwriting transaction would not be applicable to the situations of a dealer serving as a primary distributor in a continuous offering of municipal fund securities.[98]

B. Delivery of Complex Municipal Securities Financing Disclosures

In response to the Notice of Filing, one commenter expressed concern that the text of the original proposed rule change did not identify "who needs to provide transaction specific disclosures for a swap recommendation if not made by the syndicate manager or sole manager."[99] This commenter encouraged the MSRB to amend the original proposed rule change to make clear that "the duty to provide such disclosures should remain with the underwriter or dealer providing or recommending the derivatives, even after a syndicate is formed."[100] The commenter stated that "recommendations on derivatives require specialized knowledge and . . . in this case, the underwriter or dealer making the recommendation and otherwise providing the derivative product be responsible for making the appropriate transaction-specific disclosures on the material aspects of this financing structure to the issuer."[101]

The MSRB stated that it believes that there is merit to this point and agreed with the commenter's suggestion that the original proposed rule change should be amended to clarify in the amended revised interpretive notice that, except in limited circumstances, the underwriter making a financing recommendation to an issuer has a fair dealing obligation to deliver the requisite transaction-specific disclosures.[102] More specifically, the MSRB agreed with the

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98 Id.

99 See First SIFMA Letter.

100 Id.

101 Id.

102 See First Response Letter.

commenter's view that the duty to provide a complex municipal securities financing disclosure generally should remain with the dealer "recommending" a financing structure and/or "providing" a specific product within that structure (such as a derivative product), "even after the syndicate is formed."[103]

Accordingly, pursuant to Amendment No. 1, the MSRB revised the original proposed rule change to make clear that: (1) the underwriter making a recommendation to the issuer regarding a financing structure has the fair dealing obligation to deliver the applicable transaction-specific disclosures, and (2), conversely, when the syndicate manager (or any other underwriter in the syndicate) is not the underwriter making such a recommendation to the issuer, then such underwriter does not have a fair dealing obligation under the amended revised interpretive notice to deliver the transaction-specific disclosures.[104] The MSRB stated that it believes that these revisions in Amendment No. 1 are responsive to this comment and are consistent with the goal of the Board's retrospective review of the 2012 Interpretive Notice.[105] The MSRB also believes that these revisions in Amendment No. 1 will continue to reduce the number of duplicative disclosures that an issuer receives during the course of a transaction involving an underwriting syndicate.[106]

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103 Id.

104 Id.

105 Id.

106 Id.

C. Application to Underwriters Serving as Placement Agents.

In the original proposed rule change, the MSRB proposed to revise the 2012 Interpretive Notice to incorporate existing language from the Implementation Guidance that clarifies the application of the 2012 Interpretive Notice to circumstances in which a dealer serves as an agent of an issuer in the placement of the issuer's municipal securities.[107] In response to the Notice of Filing, one commenter expressed concerns regarding this portion of the original proposed rule change. [108] The commenter encouraged the MSRB to strike the language in footnote 12 of Exhibit 5 of the original proposed rule change and replace it with language that grants dealers the flexibility to omit and disclaim certain fair dealing disclosures when an engagement with an issuer to place municipal securities makes such disclosures not true.[109] Specifically, the commenter requested that the proposed language in footnote 12 of Exhibit 5 be replaced with the following statement, "[i]f the nature of the engagement makes one or more of the required disclosures not true, then it should be permissible to omit such disclosures and disclaim such in the relevant engagement letter." [110]

The MSRB stated that it believes there is merit to the commenter's concern that the Revised Interpretive Notice should not be interpreted to require a dealer serving as an agent to an issuer in the placement of the issuer's municipal securities to deliver inaccurate disclosures.[111] Therefore, the MSRB proposed in Amendment No. 1, to revise the original

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107 See Notice of Filing.

108 See First SIFMA Letter.

109 Id.

110 Id.

111 See First Response Letter.

proposed rule change to supplement the existing language with the following text, "[a]s 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."[112] The MSRB stated that it believes this revision to be a clarifying change, because an underwriter's overarching fair dealing obligation under Rule G-17 prohibits it from engaging in any deceptive or dishonest practice. [113]

D. Certain Standardized Disclosures for Complex Municipal Securities Financing

In response to Amendment No. 1, two commenters raised concerns about the standardized disclosures with respect to complex municipal securities financings.[114] One commenter expressed concerns that the proposed rule change would create a vague and imprecise standard for determining what is a complex municipal securities financing and what kinds of information related to the transaction would need to be disclosed and under what conditions.[115] The commenter stated that underwriters need more precision and guidance around this standard in order to implement sound compliance and consistent disclosures, and urged the MSRB to revise this element of the proposed rule change.[116] Another commenter stated that its members read the term "individualized" in the proposed rule changed to mean that standard or model disclosures are designed to be clear, concise and tailored to the specific type or class of

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112 Id.

113 Id.

114 See BDA Letter, Second SIFMA Letter.

115 See BDA Letter.

116 Id.

financing, and not a book of disclosures relating to all potential types of financings, and requested confirmation from the MSRB that this interpretation is accurate.[117]

The MSRB stated that it generally agrees with the statement that it would be consistent with the current text of the proposed rule change, as well as the intent of the original proposed rule change, for an underwriter to develop policies and procedures that provide for the development and delivery of certain standardized transaction-specific disclosures for complex municipal securities financings for which an underwriter anticipates commonly recommending to its issuer clients ("Standardized Complex Municipal Securities Transaction Disclosures").[118] The MSRB further provided that, assuming that the content of such Standardized Complex Municipal Securities Transaction Disclosure is (a) drafted in a clear and concise manner for issuer personnel of both greater and lesser degrees of sophistication and (b) otherwise consistent with the requirements of the Revised Interpretive Notice, the proposed rule change would only require the underwriter to tailor the content of such Standardized Complex Municipal Securities Transaction Disclosure to the extent that such disclosure did not fully describe the material financial features and risks unique to that particular recommended financing in such a clear and concise manner for the issuer personnel receiving the disclosure.[119] The MSRB stated that it does not need to amend the proposed rule change to address this comment because, as outlined in the Second Response Letter and as noted by the commenter, the concept can be reasonably understood from the existing language of the amended proposed rule change.[120]

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117 See Second SIFMA Letter.

118 See Second Response Letter.

119 Id.

120 Id.

In response to the commenter's concern that the standard for determining what is a complex municipal securities financing is vague, the MSRB stated that it previously has addressed these concerns in its previous statements.[121]

E. Tiered Disclosure Requirements Based on Issuer Characteristics

In response to the Notice of Filing, and again in response to Amendment No. 1, one commenter stated that it believes that tiered disclosure requirements may be beneficial to issuers and underwriters.[122] The commenter requested that the MSRB "provide examples of concrete hypotheticals in order to provide clarity to regulated dealers regarding how the content of [the] transaction-based disclosures may potentially vary by issuer sophistication and still survive regulatory scrutiny."[123]

The MSRB noted that the proposed rule change sets out a principles-based approach to an underwriter's fair dealing obligation to deliver certain disclosures and incorporates existing hypothetical examples from the Implementation Guidance and FAQs.[124] The MSRB stated that it evaluated formal disclosure tiers and declined to adopt such tiers or other disclosure requirements based on rigid issuer classifications in response to prior stakeholder comments because the MSRB believes there is not an obvious, appropriate methodology for classifying issuers in a manner that would advance the policies underlying the 2012 Interpretive Notice or that would materially relieve burdens for underwriters or issuers, and requiring different

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121 Id.

122 See First SIFMA Letter, Second SIFMA Letter.

123 See First SIFMA Letter.

124 See First Response Letter.

disclosure standards for different issuers may have unintended consequences that compromise issuer protections.[125] The MSRB stated that the comments do not alter the MSRB's conclusions in this regard. [126]

F. Standard for the Disclosure of Potential Material Conflicts of Interest

In response to the Notice of Filing, and again in response to Amendment No. 1, two commenters requested that the MSRB amend the original proposed rule change to require only disclosures of actual conflicts of interest.[127] The MSRB noted that the 2012 Interpretive Notice currently requires the underwriter to disclose to the issuer any actual material conflicts of interest and any potential material conflicts of interest, which requirement is triggered if: the new issue is sold in a negotiated underwriting; the matter to be disclosed represents a conflict of interest, either in reality or potentially; and any such actual or potential conflict of interest is material.[128] The MSRB stated that these aspects of the 2012 Interpretive Notice would remain applicable under the proposed rule change. However, the proposed rule change would provide that an underwriter's potential material conflict of interest must be disclosed as part of the dealer-specific disclosures if, but only if, the potential material conflict of interest is "reasonably likely" to mature into an actual material conflict of interest during the course of that specific transaction.[129] This MSRB further noted that this revision would reduce a dealer's

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125 See First Response Letter, Second Response Letter.

126 Id.

127 See First SIFMA Letter, Second SIFMA Letter, BDA Letter.

128 See First Response Letter.

129 Id.

burden by narrowing the dealer-specific disclosures currently required under the 2012 Interpretive Notice from all potential material conflicts to those potential material conflicts that meet this more focused standard.[130]

The MSRB reiterated that, as indicated in the Notice of Filing, it believes that the disclosure of material conflicts of interest remains significant to an issuer's evaluation of the dealer providing underwriting services, which justifies the obligation for underwriters to continue to provide these disclosures.[131] To the degree that an underwriter has knowledge that a material conflict of interest does not currently exist, but is reasonably likely to ripen into an actual material conflict of interest during the course of the underwriting transaction, the MSRB stated that it continues to believe that the municipal securities market is best served by the underwriter providing advanced notification to the issuer of the likelihood of such material conflict of interest, rather than waiting to disclose the conflict until it has ripened into an actual conflict.[132]

G. Standard Disclosure Regarding the Engagement of a Municipal Advisor

In response to the Notice of Filing, and again in response to Amendment No. 1, two commenters requested that the MSRB amend the original proposed rule change to eliminate the new standard disclosure that "the issuer may choose to engage the services of a municipal advisor with a fiduciary obligation to represent the issuer's interests in the transaction."[133] One

130 Id.

131 See First Response Letter, Second Response Letter.

132 Id.

133 See First SIFMA Letter, Second SIFMA Letter, BDA Letter.

commenter also stated that the Revised Interpretive Notice should make clear that neither municipal advisors nor underwriters may misrepresent the services and duties that the other is permitted to provide.[134] The MSRB reiterated that it believes that this additional disclosure will further clarify the distinctions between an underwriter – who is subject to a duty of fair dealing when providing advice regarding the issuance of municipal securities to municipal entities – and a municipal advisor – who is subject to a federal statutory fiduciary duty when providing advice regarding the issuance of municipal securities to municipal entities – and, thereby, would promote the protection of municipal entity issuers in accordance with the MSRB's statutory mandate at a relatively minimal burden to underwriters.[135] The MSRB acknowledged that the additional disclosure would cause underwriters to incur costs associated with revising their policies and procedures and delivering the new disclosure in their standard disclosures during transactions; however, the MSRB concluded that any costs associated with the proposed rule change would be outweighed by its benefits.[136] The MSRB further stated that, because the Revised Interpretive Notice is limitedly focused on underwriters' fair dealing obligations to issuers, not the duties of loyalty and care that municipal advisors owe their municipal entity clients, the Revised Interpretive Notice is not the appropriate vehicle to address the duties of municipal advisors, recognizing that MSRB Rule G-42, on the duties of non-solicitor municipal advisors, effectively prohibits a municipal advisor from knowingly misrepresenting its services or the services of an underwriter.[137]

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134 See Second SIFMA Letter.

135 See First Response Letter, Second Response Letter.

136 See Second Response Letter.

137 Id.

H. Interaction of Proposed Rule Change with Pending Matters

In response to the Notice of Filing, and again in response to Amendment No. 1, two commenters expressed concerns about the interaction of the proposed rule change with other pending matters.[138] One commenter[139] expressed concerns that the text of the proposed rule change may "front-run" a related issue that is now under consideration by the Commission regarding the duties of municipal placement agents under the federal securities laws.[140] Another commenter expressed the belief that the MSRB missed an important and timely opportunity to provide substantial compliance efficiencies by combining and integrating underwriter disclosures required under MSRB Rules G-17 and G-23, and urged the MSRB to do so.[141] The MSRB declined to address these concerns, stating that the matters that commenters requested the MSRB address are outside the scope of the proposed rule change, which does not pertain to the duties of municipal advisors.[142]

I. Compliance Date for the Proposed Rule Change

In response to Amendment No. 1, one commenter requested that the MSRB set a compliance date of one year from the date the proposed rule change's amendments to the 2012

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138 See First SIFMA Letter, Second SIFMA Letter, BDA Letter.

139 See First SIFMA Letter, Second SIFMA Letter.

140 See "Notice of Proposed Exemptive Order Granting a Conditional Exemption from the Broker Registration Requirements of Section l5(a) of the Securities Exchange Act of 1934 for Certain Activities of Registered Municipal Advisors," Exchange Act Release No. 87204 (Oct. 2, 2019), 84 FR 54062 (Oct. 9, 2019).

141 See BDA Letter.

142 See First Response Letter, Second Response Letter.

Interpretive Notice are final.[143] The commenter requested this timeframe to allow "sufficient time" for dealers to implement the proposed rule change's amendments and revise their policies and procedures.[144] The MSRB noted that it had indicated in the original proposed rule change that, if the proposed rule change is approved by the Commission, it will publish a regulatory notice within 90 days of the publication of such approval in the Federal Register and such notice would specify the compliance date for the amendments described in the proposed rule change, which in any case would be not less than 90 days, nor more than one year, following the date of the regulatory notice.[145] The MSRB stated that this is consistent with the commenter's request.[146] The MSRB will work with stakeholders, as needed, to determine reasonable compliance dates for the changes, recognizing the commenter's request for at least a one-year compliance timeline given that policy and procedures would need to be updated to conform to the proposed rule change.[147]

IV. Discussion and Commission Findings

The Commission has carefully considered the original proposed rule change, the comment letters received, the MSRB Response Letters, Amendment No. 1, and Amendment No. 2. The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the MSRB.

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143 See Second SIFMA Letter.

144 Id.

145 See Second Response Letter.

146 Id.

147 Id.

In particular, the proposed rule change, as modified by Amendment No. 1 and Amendment No. 2, is consistent with Section 15B(b)(2)(C) of the Act.[148] Section 15B(b)(2)(C) of the Act requires that the MSRB's rules 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.[149]

The Commission believes that the proposed rule change is consistent with the provisions of Section 15B(b)(2)(C) of the Act because it will protect municipal entities from fraudulent and manipulative acts and practices, remove impediments to and perfect the mechanism of a free and open market, and promote just and equitable principles of trade.

The Commission believes that the proposed rule change would promote the protection of municipal entities by protecting them from fraudulent and manipulative acts and practices. By (i) specifying which underwriters are obligated to deliver the "standard disclosures," "transaction-specific disclosures" and "dealer-specific disclosures";, (ii) requiring the separate identification and formatting of the standard disclosures by underwriters; and (iii) requiring that disclosures be clear and concise, the proposed rule change will enable issuers to more efficiently and carefully evaluate the information contained in the disclosures they do receive, which may result in better-

148 15 U.S.C. 78o-4(b)(2)(C).

149 Id.

informed issuers. Further, the Commission believes the addition by the proposed rule change of a new standard disclosure that the issuer may choose to engage the services of a municipal advisor with a fiduciary obligation to represent the issuer's interests in the transaction will promote the protection of municipal entities by expressly informing them that they may obtain the advice of a municipal advisor, who would serve as a fiduciary to the issuer.

The Commission believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market, and promote just and equitable principles of trade by clarifying and streamlining underwriters' disclosure obligations to municipal entity issuers, thereby facilitating more efficient compliance with those obligations. By incorporating certain provisions of the Implementation Guidance and FAQs, with certain revisions, into the Revised Interpretive Notice, the proposed rule change provides for a single consolidated document to which underwriters may look, facilitating the efficient identification of any applicable fair dealing obligations. By (i) specifying that the standard disclosures and many transaction-specific disclosures should be sent to issuers only from the syndicate manager or sole underwriter; (ii) clarifying that underwriters are not obligated to provide written disclosures regarding the conflicts of issuer personnel or other parties to the transaction; and (iii) providing that disclosures must be made in a clear and concise manner, the proposed rule change would remove impediments to and perfect the mechanism of a free and open market, and promote just and equitable principles of trade, by eliminating certain redundant and generic disclosures currently delivered by underwriters to issuers that provide little, if any, informational benefits to issuers, but do create non-trivial compliance and recordkeeping burdens on underwriters. By clarifying the definition of Complex Municipal Securities Financing Recommendation, and specifying the particular underwriter that must provide these particularized transaction-specific

disclosures to issuers, the proposed rule change would promote just and equitable principles of trade by eliminating legal ambiguity under the Revised Interpretive Notice, thereby reducing the compliance burden for underwriters without diminishing the protection of municipal entities. By specifying that the underwriter making a Complex Municipal Securities Financing Recommendation must provide the transaction-specific disclosure for that recommendation, the proposed rule change may improve the accuracy and usefulness of such disclosures to municipal entities.

The Commission further believes that proposed rule change would remove impediments to and perfect the mechanism of a free and open market by clarifying which potential material conflicts of interest must be disclosed by underwriters and at what time. This portion of the proposed rule change may reduce the volume of initial conflicts disclosures that must be provided, limiting such disclosures to those conflicts that are most concrete and probable, and therefore most useful to issuers at that time.

The Commission further believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market, and facilitate transactions in municipal securities, by permitting an e-mail read receipt to serve as the issuer's acknowledgement of receipt of the applicable disclosures under the Revised Interpretive Notice. This provision of the proposed rule change would improve the efficiency of the disclosure process by allowing underwriters to seek, and issuers to provide, acknowledgement electronically through the built-in, automatic process of an e-mail system. The Commission believes that municipal entities would continue to be protected under the Revised Interpretive Notice because the underwriter would have a fair dealing obligation to receive the e-mail read receipt from a specific official identified as the issuer's primary contact for the receipt of such

disclosures or from an issuer official that the underwriter reasonably believes has authority to bind the issuer by contract with the underwriter. In addition, the proposed rule change would not permit an underwriter to rely on an e-mail read receipt as an issuer's 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. Further, the recipient of such an automatic e-mail read receipt request would still have the option to not provide this form of acknowledgement.

In approving the proposed rule change, the Commission also has considered the impact of the proposed rule change, on efficiency, competition, and capital formation.[150] The Commission believes that the proposed rule change clarifies underwriter disclosure obligations and will streamline certain obligations specified in the 2012 Interpretive Notice and, thereby, reduce the burdens associated with those obligations, including the obligation of underwriters to make, and the burden on issuers to acknowledge and review, written disclosures that are duplicative, itemize risks and conflicts that are not reasonably likely to materialize during the course of a transaction, and/or are not unique to a particular transaction or underwriting engagement. The Commission further believes that the proposed rule change may increase the efficiency of certain market practices, such as enhancing the ability of issuers to efficiently and properly evaluate the risks associated with a given transaction (thereby improving the protection of issuers), including by separately identifying the different categories of disclosures, providing additional clarity to underwriters regarding the scope of their regulatory obligations to municipal entity issuers, and permitting an e-mail read receipt to serve the issuer's acknowledgment of receipt of disclosures

150 15 U.S.C. 78c(f).

in certain circumstances, thereby reducing the burdens of obtaining acknowledgment in those cases.

As noted above, the Commission received three comment letters on the Notice of Filing and three comment letters on Amendment No. 1. The Commission believes that the MSRB, through its responses and through Amendment No. 1 and Amendment No. 2, has addressed commenters' concerns.

For the reasons noted above, the Commission believes that the proposed rule change is consistent with the Act.

V. Solicitation of Comments on Amendment No. 2

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 2 to the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use of 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-2019-10 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-MSRB-2019-10. 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 the filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change; we do 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-2019-10 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VI. Accelerated Approval of Proposed Rule Change

The Commission finds good cause for approving the original proposed rule change, as modified by Amendment No. 1 and Amendment No. 2, prior to the 30th day after the date of publication of the Notices of Amendment No. 1 and Amendment No. 2 in the Federal Register. As discussed above, Amendment No. 1 proposes to revise the original proposed rule change to state that (1) the underwriter making a recommendation to the issuer regarding a financing structure, including, when applicable, a Complex Municipal Securities Financing Recommendation, has the fair dealing obligation to deliver the applicable transaction-specific disclosures and (2) the notice does not apply to a dealer acting as a primary distributor in a continuous offering of municipal fund securities. Amendment No. 1 and Amendment No. 2 otherwise propose to revise the original proposed rule change with technical modifications intended to more precisely define the scope of its application and/or to promote clarity in its

interpretation. The MSRB has stated that it believes that the modifications to the original proposed rule change are responsive to commenters, and are consistent with the original proposed rule change.[151]

For the foregoing reasons, the Commission finds good cause for approving the original proposed rule change, as modified by Amendment No. 1 and Amendment No. 2, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.

VII. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[152] that the proposed rule change (SR-MSRB-2019-10) be, and hereby is, approved on an accelerated basis.

For the Commission, pursuant to delegated authority.[153]

Jill M. Peterson
Assistant Secretary

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151 See Amendment No. 1, Amendment No. 2.

152 15 U.S.C. 78s(b)(2).

153 17 CFR 200.30-3(a)(12).