

SECURITIES AND EXCHANGE COMMISSION
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October 1, 2013

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change Consisting of Proposed MSRB Rule G-47, on Time of Trade Disclosure Obligations, Proposed Revisions to MSRB Rule G-19, on Suitability of Recommendations and Transactions, Proposed MSRB Rules D-15 and G-48, on Sophisticated Municipal Market Professionals, and the Proposed Deletion of Interpretive Guidance

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 17, 2013 the Municipal Securities Rulemaking Board (the “MSRB” or “Board”) filed with the Securities and Exchange Commission (the “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 Commission a proposed rule change consisting of proposed MSRB Rule G-47, on time of trade disclosure obligations, proposed revisions to MSRB Rule G-19, on suitability of recommendations and transactions,³ proposed MSRB Rules D-15 and G-48, on sophisticated municipal market professionals, and the proposed deletion of interpretive guidance that is being superseded by these rule changes (the “proposed rule change”). The MSRB requests an effective date for the proposed rule change of 60 days following the date of SEC approval.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ This also includes proposed technical revisions to MSRB Rule G-8, on books and records, to conform Rule G-8 with the proposed revisions to Rule G-19.

The text of the proposed rule change is available on the MSRB's website at www.msrb.org/Rules-and-Interpretations/SEC-Filings/2013-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

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 MSRB 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

Summary of Proposed Rule Change

The MSRB has examined its interpretive guidance related to time of trade disclosures, suitability, and SMMPs and is proposing to consolidate this guidance and codify it into several rules: a new time of trade disclosure rule (proposed Rule G-47), a revised suitability rule (Rule G-19), and two new SMMP rules (proposed Rules D-15 and G-48). Additionally, the proposed revisions to Rule G-19 would harmonize the MSRB's suitability rule with Financial Industry Regulatory Authority's ("FINRA's") suitability rule as recommended by the SEC in its 2012 Report on the Municipal Securities Market.⁴

Rule G-47 on Time of Trade Disclosures

⁴ See <http://www.sec.gov/news/studies/2012/munireport073112.pdf>.

MSRB Rule G-17 provides that, in the conduct of its municipal securities or municipal advisory activities, each broker, dealer, municipal securities dealer (“dealer”), and municipal advisor must deal fairly with all persons and may not engage in any deceptive, dishonest or unfair practice. The MSRB has interpreted Rule G-17 to require a dealer, in connection with a municipal securities transaction, to disclose to its customer, at or prior to the time of trade, all material information about the transaction known by the dealer, as well as material information about the security that is reasonably accessible to the market.⁵ The MSRB has issued extensive interpretive guidance discussing this time of trade disclosure obligation in general, as well as in specific scenarios. Proposed Rule G-47 would consolidate most of this guidance⁶ into rule

⁵ See, e.g., MSRB Answers Frequently Asked Questions Regarding Dealer Disclosure Obligations Under MSRB Rule G-17 (November 30, 2011).

⁶ The time of trade disclosure guidance that has been consolidated and condensed into proposed Rule G-47 was derived from the following Rule G-17 interpretive notices: Guidance on Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities (July 14, 2009), MSRB Answers Frequently Asked Questions Regarding Dealer Disclosure Obligations Under MSRB Rule G-17 (November 30, 2011), Interpretive Notice Regarding Rule G-17, on Disclosure of Material Facts (March 18, 2002), MSRB Reminds Firms of their Sales Practice and Due Diligence Obligations When Selling Municipal Securities in the Secondary Market (September 20, 2010), Application of MSRB Rules to Transactions in Auction Rate Securities (February 19, 2008), Bond Insurance Ratings – Application of MSRB Rules (January 22, 2008), Interpretive Reminder Notice Regarding Rule G-17, on Disclosure of Material Facts -- Disclosure of Original Issue Discount Bonds (January 5, 2005), Notice of Interpretation of Rule G-17 Concerning Minimum Denominations (January 30, 2002), Transactions in Municipal Securities with Non-Standard Features Affecting Price/Yield Calculations (June 12, 1995), Educational Notice on Bonds Subject to "Detachable" Call Features (May 13, 1993), Notice Concerning Securities that Prepay Principal (March 19, 1991), Notice Concerning Disclosure of Call Information to Customers of Municipal Securities (March 4, 1986), Application of Board Rules to Transactions in Municipal Securities Subject to Secondary Market Insurance or Other Credit Enhancement Features (March 6, 1984), and Notice Concerning the Application of Board Rules to Put Option Bonds (September 30, 1985); the following Rule G-15 interpretive notice: Notice Concerning Stripped Coupon Municipal Securities (March 13, 1989); the following Rule G-17 interpretive letters: Description provided at or prior to the time of trade (April 30, 1986), and Put option bonds: safekeeping, pricing (February 18, 1983); and the following Rule G-15 interpretive letters: Disclosure of the investment of bond proceeds (August 16,

language which the MSRB believes would ease the burden on dealers and other market participants who endeavor to understand, comply with and enforce these obligations. The proposed codification of the interpretive guidance on time of trade disclosure obligations is not intended to, and would not, substantively change the current obligations. Rather, the codification is an effort to consolidate the current obligations into streamlined rule language.

The structure of proposed Rule G-47 (rule language followed by supplementary material) is the same structure used by FINRA and other self-regulatory organizations (“SROs”). The MSRB intends generally to transition to this structure for all of its rules going forward in order to streamline the rules, harmonize the format with that of other SROs, and make the rules easier for dealers and municipal advisors to understand and follow.

A summary of proposed Rule G-47 is as follows:

General Disclosure Obligation

Proposed Rule G-47(a) sets forth the general time of trade disclosure obligation as currently set forth in the MSRB’s interpretive guidance. The rule states that dealers cannot sell municipal securities to a customer, or purchase municipal securities from a customer, without disclosing to the customer, at or prior to the time of trade, all material information known about the transaction and material information about the security that is reasonably accessible to the market. The rule applies regardless of whether the transaction is unsolicited or recommended,

1991), Securities description: prerefunded securities (February 17, 1998), Callable securities: pricing to mandatory sinking fund calls (April 30, 1986), and Callable securities: pricing to call and extraordinary mandatory redemption features (February 10, 1984). As discussed in more detail below, the guidance discussing time of trade disclosure obligations in connection with 529 college savings plans (“529 plans”) has not been incorporated into proposed Rule G-47. The MSRB may create a separate rule regarding time of trade disclosure obligations for 529 plans or a rule consolidating dealer obligations related to 529 plans. Until the MSRB adopts a rule specific to 529 plans, proposed Rule G-47 and all such interpretive guidance will continue to apply to 529 plans.

occurs in a primary offering or the secondary market, and is a principal or agency transaction. The rule provides that the disclosure can be made orally or in writing.

Proposed Rule G-47(b) states that information is considered to be “material information” if there is a substantial likelihood that the information would be considered important or significant by a reasonable investor in making an investment decision. The rule defines “reasonably accessible to the market” as information that is made available publicly through “established industry sources.” Finally, the rule defines “established industry sources” as including the MSRB’s Electronic Municipal Market Access (“EMMA”⁷) system, rating agency reports, and other sources of information generally used by dealers that effect transactions in the type of municipal securities at issue.

Supplementary Material

In addition to stating the general disclosure obligation, proposed Rule G-47 includes supplementary material describing the disclosure obligation in more detail.

Supplementary material .01 provides general information regarding the manner and scope of required disclosures. Specifically, the supplementary material provides that dealers have a duty to give customers a complete description of the security which includes a description of the features that would likely be considered significant by a reasonable investor, and facts that are material to assessing potential risks of the investment. This section of the supplementary material further provides that the public availability of material information through EMMA, or other established industry sources, does not relieve dealers of their disclosure obligations. Section .01 of the supplementary material also provides that dealers may not satisfy the disclosure obligation by directing customers to established industry sources or through disclosure in general

⁷ EMMA is a registered trademark of the MSRB.

advertising materials. Finally, section .01 of the supplementary material states that whether the customer is purchasing or selling the municipal securities may be a consideration in determining what information is material.

Supplementary material .02 provides that dealers operating electronic trading or brokerage systems have the same time of trade disclosure obligations as other dealers.

Supplementary material .03 provides a list of examples describing information that may be material in specific scenarios and require disclosures to a customer. The guidance provides that the list is not exhaustive and other information may be material to a customer in these and other scenarios. This section describes the following scenarios: variable rate demand obligations; auction rate securities; credit risks and ratings; credit or liquidity enhanced securities; insured securities; original issue discount bonds; securities sold below the minimum denomination; securities with non-standard features; bonds that prepay principal; callable securities; put option and tender option bonds; stripped coupon securities; the investment of bond proceeds; issuer's intent to prerefund; and failure to make continuing disclosure filings.

Finally, supplementary material .04 provides that dealers must implement processes and procedures reasonably designed to ensure that material information regarding municipal securities is disseminated to registered representatives who are engaged in sales to and purchases from a customer.

Current Interpretive Guidance on Time of Trade Disclosure Obligations

The MSRB has identified two interpretive notices that were previously filed with the Commission and would be superseded in their entirety by the proposed time of trade disclosure

rule and the MSRB proposes deleting these two notices.⁸ Any statements in the remaining MSRB interpretative guidance referring to Rule G-17 for the time of trade disclosure principle should be read to refer to proposed Rule G-47.

Rule G-19, on Suitability of Recommendations and Transactions

The MSRB has conducted a review of Rule G-19, on suitability of recommendations and transactions, as well as the MSRB's interpretive guidance addressing suitability. As a result of this review, the MSRB is proposing the amendments described below to more closely harmonize Rule G-19 with FINRA's suitability rule,⁹ and to incorporate elements of the MSRB's current interpretive guidance on suitability into Rule G-19.¹⁰ The proposed revisions to Rule G-19 are

⁸ Interpretive Notice Regarding Rule G-17, on Disclosure of Material Facts (March 18, 2002) and Notice of Interpretation of Rule G-17 Concerning Minimum Denominations (January 30, 2002).

⁹ See FINRA Rule 2111.

¹⁰ The suitability guidance that has been consolidated and condensed into the proposed revisions to Rule G-19 was derived from the following Rule G-17 interpretive notices: MSRB Reminds Firms of their Sales Practice and Due Diligence Obligations When Selling Municipal Securities in the Secondary Market (September 20, 2010); Guidance on Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities (July 14, 2009); Application of MSRB Rules to Transactions in Auction Rate Securities (February 19, 2008); Bond Insurance Ratings – Application of MSRB Rules (January 22, 2008); Reminder of Customer Protection Obligations in Connection with Sales of Municipal Securities (March 30, 2007); Interpretive Notice Regarding Rule G-17, on Disclosure of Material Facts (March 18, 2002); Notice Concerning Disclosure of Call Information to Customers of Municipal Securities (March 4, 1986); the following Rule G-19 interpretive notices: Notice Regarding Application of Rule G-19, on Suitability of Recommendations and Transactions, to Online Communications (September 25, 2002); Application of Suitability Requirements to Investment Seminars and Customer Inquiries Made in Response to a Dealer's Advertisements (April 25, 1985); the following Rule G-19 interpretive letters: Recommendations (February 17, 1998); and Recommendations: advertisements (February 24, 1994); the following Rule G-15 interpretive notice: Notice Concerning Stripped Coupon Municipal Securities (March 13, 1989); the following Rule G-15 interpretive letter: Securities description: prerefunded securities (February 17, 1998); the following Rule G-21 interpretive notice: Interpretation on General Advertising Disclosures, Blind Advertisements and Annual Reports Relating to Municipal Fund

aligned with a recommendation of the SEC in its 2012 Report on the Municipal Securities Market that the MSRB consider “amending Rule G-19 (suitability) in a manner generally consistent with recent amendments by FINRA to its Rule 2111, including with respect to the scope of the term ‘strategy’”¹¹ Given the extensive interpretive guidance surrounding FINRA Rule 2111 and the impracticality and inefficiency of republishing each iteration of such FINRA guidance, substantively similar provisions of Rule G-19 will be interpreted in a manner consistent with FINRA’s interpretations of Rule 2111. If the MSRB believes an interpretation should not be applicable to Rule G-19, it will affirmatively state that specific provisions of FINRA’s interpretation do not apply. Additionally, the MSRB is proposing technical amendments to Rule G-8(a)(xi)(F) to conform it to the proposed revisions to Rule G-19.

A summary of the proposed revisions to Rule G-19 is as follows:

Account Information

Current MSRB Rule G-19(a) requires dealers to obtain certain customer information prior to completing a transaction in municipal securities for that customer account. The required customer information consists of, by cross-reference, the customer information required under MSRB Rule G-8(a)(xi), on books and records. A provision equivalent to current Rule G-19(a) is not included in proposed Rule G-19 since MSRB Rule G-8 already independently requires dealers to make and keep a record of this information for each customer. Additionally, deleting

Securities under Rule G-21 (June 5, 2007); the following Rule G-21 interpretive letter: Disclosure obligations (May 21, 1998); and the following Rule G-32 interpretive notices: Notice Regarding Electronic Delivery and Receipt of Information by Brokers, Dealers and Municipal Securities Dealers (November 20, 1998); and Interpretation on the Application of Rules G-32 and G-36 to New Issue Offerings Through Auction Procedures (March 26, 2001).

¹¹ See <http://www.sec.gov/news/studies/2012/munireport073112.pdf> at 141.

this provision streamlines the rule and more closely aligns it with FINRA’s suitability rule, which does not have this specific requirement.¹²

Information Required for Suitability Determinations

The current MSRB suitability rule contains a list of customer information that dealers must obtain prior to recommending a transaction to a non-institutional account.¹³ The proposed revisions to Rule G-19 would expand this list to include additional items from FINRA’s suitability rule¹⁴ such as: age, investment time horizon, liquidity needs, investment experience and risk tolerance. The proposed revision also would delete Rule G-19(b) and replace it with rule language corresponding to FINRA’s suitability rule. The MSRB believes that the items added to the rule generally are directly relevant for recommendations involving municipal securities and having such items explicitly identified will promote more consistent application of the suitability rule. The list of customer information that dealers must assess in the proposed rule also includes “any other information the customer may disclose to the broker, dealer or municipal securities dealer in connection with such recommendation” which is taken from the FINRA rule.¹⁵ This is similar to the requirement in current MSRB Rule G-19(c)(ii) which states that, in recommending a transaction, a dealer shall have reasonable grounds “based upon the facts disclosed by such customer or otherwise known about such customer for believing that the recommendation is suitable.” Therefore, the proposal would delete section (c)(ii) of Rule G-19.

¹² See FINRA Rule 2111.

¹³ See MSRB Rule G-19(b).

¹⁴ See FINRA Rule 2111(a).

¹⁵ See FINRA Rule 2111(b).

The current MSRB suitability rule also requires dealers to consider information available from the issuer of the security or otherwise in making suitability determinations.¹⁶ Similarly, the supplementary material to FINRA's suitability rule establishes a reasonable-basis suitability obligation, which requires a broker-dealer to have a reasonable basis to believe, based on reasonable diligence, that the recommendation is suitable for at least some investors.¹⁷ In order to perform a reasonable-basis suitability analysis, dealers must necessarily consider information available from the issuer of the security. The proposed revisions to Rule G-19 incorporate the reasonable-basis suitability terminology from FINRA Rule 2111 in supplementary material .05(a) and delete section (c)(i) of Rule G-19.

Discretionary Accounts

The current MSRB suitability rule includes a provision on discretionary accounts which provides that dealers cannot effect transactions in municipal securities with or for a discretionary account unless permitted by the customer's prior written authorization which has been accepted in writing by a municipal securities principal.¹⁸ The MSRB proposes to delete this provision because there is a substantially similar provision already included in MSRB Rule G-8(a)(xi)(I) which requires that, for customer discretionary accounts, dealers must make and keep a record of the customer's written authorization to exercise discretionary power over the account, written approval of the municipal securities principal who supervises the account, and written approval of the municipal securities principal with respect to each transaction in the account stating the date and time of approval.

¹⁶ See MSRB Rule G-19(c)(i).

¹⁷ FINRA Rule 2111, Supplementary Material .05(a).

¹⁸ See MSRB Rule G-19(d)(i).

The current MSRB suitability rule also includes a provision stating that a dealer cannot effect a transaction in municipal securities with or for a discretionary account unless the dealer first determines that the transaction is suitable for the customer or the transaction is specifically directed by the customer and was not recommended by the dealer.¹⁹ Similarly, the proposed suitability rule provides that a dealer must have a reasonable basis to believe that a recommended transaction or investment strategy is suitable for the customer. The suitability obligation is the same for discretionary and non-discretionary accounts and there is no reason to restate the obligation as it specifically relates to discretionary accounts. In addition, there is no corresponding provision in FINRA Rule 2111. For these reasons, the MSRB proposes deleting Rule G-19(d)(ii).

Churning

The proposed revisions to Rule G-19 retain the substance of the existing MSRB prohibition on churning,²⁰ but recast it using the current terminology of “quantitative suitability” used in FINRA’s suitability rule.²¹ The quantitative suitability requirement is included in proposed Rule G-19, supplementary material .05(c).

Investment Strategies

The proposed amendments to Rule G-19 incorporate the application of suitability to “investment strategies.” Specifically, proposed supplementary material .03 defines the phrase “investment strategy involving a municipal security or municipal securities” by stating that it is

¹⁹ See MSRB Rule G-19(d)(ii).

²⁰ See MSRB Rule G-19(e).

²¹ See FINRA Rule 2111, Supplementary Material .05(c).

“to be interpreted broadly and would include, among other things, an explicit recommendation to hold a municipal security or municipal securities.” This definition is consistent with the definition of “investment strategy involving a security or securities” in FINRA’s suitability rule.²² The proposed MSRB suitability rule, like the FINRA rule, carves out communications of certain types of educational material as long as such communications do not recommend a particular municipal security or municipal securities.²³ The list of educational materials in proposed Rule G-19, supplementary material .03, differs in minor respects from the list of educational materials in FINRA’s suitability rule²⁴ to account for unique attributes of the municipal securities market.

Institutional Accounts

Provisions in guidance to MSRB Rule G-17 and proposed MSRB Rules D-15 and G-48 (discussed below) exempt dealers from the duty to perform a customer-specific suitability determination for recommendations to SMMPs.²⁵ FINRA’s suitability rule has similar provisions with respect to institutional accounts that is included as a provision in its suitability rule.²⁶ The MSRB SMMP exemption applies not only to Rule G-19, but also has applicability to MSRB Rules G-47, on time of trade disclosures, G-18, on transaction pricing, and G-13, on bona fide quotations. Therefore, the MSRB proposes to include the SMMP exemption in proposed Rules

²² See FINRA Rule 2111, Supplementary Material .03.

²³ Id.

²⁴ Id.

²⁵ See e.g., Interpretive Notice effective July 9, 2012, Restated Interpretive Notice Regarding the Application of MSRB Rules to Transactions with Sophisticated Municipal Market Professionals; see also MSRB Notice 2013-10, Request for Comment on Proposed Sophisticated Municipal Market Professional Rules (May 1, 2013).

²⁶ See FINRA Rule 2111(b).

D-15 and G-48 instead of incorporating it into Rule G-19 and the other rules to which the SMMP exemption applies.

Proposed Technical Revisions to Rule G-8, on Books and Records

MSRB Rule G-8(a)(xi)(F) includes references to MSRB Rule G-19(c)(ii) and G-19(b). These referenced provisions are not codified as such in the proposed revisions to MSRB Rule G-19, but the concepts would remain in the proposed rule. Therefore, the MSRB proposes revising MSRB Rule G-8(a)(xi)(F) simply to include a reference to the entire MSRB Rule G-19.

Current Interpretive Guidance on Suitability

Over the years, the MSRB has issued guidance on suitability in connection with other issues under MSRB Rule G-17. This guidance provides that a dealer must take into account all material information that is known to the dealer or that is available through established industry sources in meeting its suitability obligations.²⁷ This is the same type of information that dealers are required to disclose to customers at the time of trade.²⁸ The Rule G-17 guidance also describes material information that dealers should consider in making suitability determinations in specific scenarios such as credit or liquidity enhanced securities,²⁹ auction rate securities,³⁰

²⁷ See, e.g., Interpretive Notice dated September 20, 2010, MSRB Reminds Firms of their Sales Practice and Due Diligence Obligations when Selling Municipal Securities in the Secondary Market.

²⁸ See, e.g., Interpretive Notice dated July 14, 2009, Guidance on Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities.

²⁹ Id.

³⁰ Interpretive Notice dated February 19, 2008, Application of MSRB Rules to Transactions in Auction Rate Securities.

and insured bonds.³¹ Rather than listing information in the supplementary material to Rule G-19 that may be material to an investor, proposed Rule G-19, supplementary material .05(a) includes a general requirement for dealers to understand information about the municipal security or strategy and contains an explicit cross-reference to a dealer's obligations under proposed MSRB Rule G-47, on time of trade disclosure.³² The remaining suitability obligations currently described in the Rule G-17 guidance³³ are incorporated into revised Rule G-19.³⁴

The MSRB also has issued interpretive guidance under Rule G-19 that has been previously filed with the Commission and addresses online communications, investment seminars, and customers contacting a dealer in response to an advertisement.³⁵ This guidance would be superseded by revised Rule G-19 and the MSRB proposes deleting the guidance. The

³¹ Interpretive Notice dated January 22, 2008, Bond Insurance Ratings – Application of MSRB Rules.

³² FINRA Rule 2111 does not include a comparable provision.

³³ Interpretive Notice dated March 30, 2007, Reminder of Customer Protection Obligations in Connection with Sales of Municipal Securities; Interpretive Notice dated March 18, 2002, Interpretive Notice Regarding Rule G-17, on Disclosure of Material Facts; and Interpretive Notice dated March 4, 1986, Notice Concerning Disclosure of Call Information to Customers of Municipal Securities.

³⁴ This does not include suitability obligations with respect to 529 plans. The MSRB may create a separate rule regarding the suitability obligations for 529 plans. Until the MSRB adopts a rule specific to 529 plans, MSRB Rule G-19 and any related interpretive guidance will continue to apply to 529 plans.

³⁵ Interpretive Notice dated September 25, 2002, Notice Regarding Application of Rule G-19, on Suitability of Recommendations and Transactions, to Online Communications and Interpretive Notice dated April 25, 1985, Application of Suitability Requirements to Investment Seminars and Customer Inquiries Made in Response to a Dealer's Advertisements; see SEC Release No. 34-21990 (April 25, 1985), 50 FR 18602 (May 1, 1985) (File No. SR-MSRB-85-6). The latter notice, as currently published on the MSRB website, was non-substantially revised to reflect amendments to Rule G-19 that became effective on April 7, 1994 (File No. SR-MSRB-94-01), and those revisions were not made part of a rule filing.

MSRB also has issued interpretations under Rules G-15,³⁶ G-21,³⁷ and G-32³⁸ that nominally reference suitability obligations. Since these interpretations address areas other than suitability and are not inconsistent with the proposed revisions, the MSRB will leave these interpretations intact.

Rules D-15 and G-48 on SMMPs

Proposed Rules D-15 and G-48 on SMMPs (the “proposed SMMP rules”) would streamline and codify the existing MSRB Rule G-17 guidance regarding the application of MSRB rules to transactions with SMMPs. The proposed SMMP rules would consist of a new definitional rule, D-15, defining an SMMP and a new general rule, G-48, on the regulatory obligations of dealers to SMMPs.

On May 25, 2012, the SEC approved an interpretive notice to Rule G-17 revising prior guidance on the application of MSRB rules to transactions with SMMPs.³⁹ The proposed SMMP

³⁶ Interpretive Notice dated March 13, 1989, Notice Concerning Stripped Coupon Municipal Securities; and Interpretive Letter dated February 17, 1998, Securities description: prerefunded securities.

³⁷ Interpretive Notice dated June 5, 2007, Interpretation on General Advertising Disclosures, Blind Advertisements and Annual Reports Relating to Municipal Fund Securities under Rule G-21; and Interpretive Letter dated May 21, 1998, Disclosure obligations.

³⁸ Interpretive Notice dated November 20, 1998, Notice Regarding Electronic Delivery and Receipt of Information by Brokers, Dealers and Municipal Securities Dealers; and Interpretive Notice dated March 26, 2001, Interpretation on the Application of Rules G-32 and G-36 to New Issue Offerings Through Auction Procedures.

³⁹ Interpretive Notice effective July 9, 2012, Restated Interpretive Notice Regarding the Application of MSRB Rules to Transactions with Sophisticated Municipal Market Professionals (the “restated SMMP notice”). At the time of issuance of the restated interpretive guidance, the MSRB noted that FINRA adopted Rule 2111, which included revised treatment of customer-specific suitability for institutional accounts, and that it generally considered it desirable from the standpoint of reducing the cost of dealer compliance to maintain consistency with FINRA rules.

rules preserve the substance of this guidance but codify it into two proposed rules that define an SMMP and describe the application of the following obligations to SMMPs: (1) time of trade disclosure; (2) transaction pricing; (3) suitability; and (4) bona fide quotations. The proposed SMMP rules do not change the substance of the restated SMMP notice except that the proposed definition of SMMP includes a reference to the term “investment strategies” to be consistent with inclusion of that term in the proposed suitability rule described above. The MSRB believes that the proposed definitional rule, together with the proposed general rule that describes the regulatory obligations of dealers working with SMMPs, will underscore the differences between dealers’ obligations to non-SMMPs and SMMPs, while highlighting the eligibility standards for being an SMMP.

A summary of proposed Rules D-15 and G-48 is as follows:

Proposed Rule D-15 defines the term “sophisticated municipal market professional” or “SMMP” as a customer of a dealer that is a bank, savings and loan association, insurance company, or registered investment company; or an investment adviser registered with the Commission under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or any other entity with total assets of at least \$50 million. Additionally, the dealer must have a reasonable basis to believe that the customer is capable of evaluating investment risks and market value independently, both in general and with regard to particular transactions and investment strategies in municipal securities, and affirmatively indicates that it is exercising independent judgment in evaluating the recommendations of the dealer.

The supplementary material to proposed Rule D-15 addresses the reasonable basis analysis and the customer affirmation. Section .01 states that as part of the reasonable basis

analysis, the dealer should consider the amount and type of municipal securities owned or under management by the customer. Section .02 states that a customer may affirm that it is exercising independent judgment either orally or in writing, and such affirmation may be given on a trade-by-trade basis, on a type-of-municipal-security basis, or on an account-wide basis.

Proposed Rule G-48 describes the application of certain obligations to SMMPs. More specifically, the proposed rule provides that a dealer's obligations to a customer that it reasonably concludes is an SMMP are modified as follows: (1) with respect to the time of trade disclosure obligation in proposed Rule G-47, the dealer does not have any obligation to disclose material information that is reasonably accessible to the market; (2) with respect to transaction pricing obligations under Rule G-18, the dealer does not have any obligation to take action to ensure that transactions meeting certain conditions set forth in the proposed rule are effected at fair and reasonable prices; (3) with respect to the suitability obligation in Rule G-19, the proposed rule provides that the dealer does not have any obligation to perform a customer-specific suitability analysis; and (4) with respect to the obligation regarding bona fide quotations in Rule G-13, the dealer disseminating an SMMP's quotation which is labeled as such shall apply the same standards described in Rule G-13(b) for quotations made by another dealer.

Current Interpretive Guidance on SMMPs

There are two interpretive notices that were previously filed with the Commission that would be superseded in their entirety by the SMMP rule⁴⁰ and the MSRB proposes to delete these interpretive notices.

⁴⁰ Interpretive Notice effective July 9, 2012, Restated Interpretive Notice Regarding the Application of MSRB Rules to Transactions with Sophisticated Municipal Market Professionals and Interpretive Notice dated April 30, 2002, Interpretive Notice Regarding the Application of MSRB Rules to Transactions with Sophisticated Municipal Market Professionals.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act,⁴¹ which provides that the MSRB's rules 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)(C) of the Act. The disclosure of material information about a transaction to investors and the performance of a meaningful suitability analysis is central to the role of a dealer in facilitating municipal securities transactions. Proposed Rule G-47, on time of trade disclosures, codifies current interpretive guidance and protects investors by requiring dealers to make disclosures to customers in connection with purchases and sales of municipal securities. These required disclosures are designed to prevent fraudulent and manipulative acts and practices by dealers, and promote just and equitable principles of trade, by requiring dealers to disclose information about a security and transaction that would be considered significant or important to a reasonable investor in making an investment decision. Similarly, the proposed revisions to Rule G-19, on suitability, furthers these purposes by requiring dealers and their associated persons to make only suitable recommendations to customers and fosters cooperation and coordination by harmonizing the rule with FINRA's suitability rule. Finally, the proposed SMMP rules codify current interpretive

⁴¹ 15 U.S.C. 78o-4(b)(2)(c).

guidance that was approved by the SEC in 2012⁴² and these proposed rules do not change the substance of that guidance.

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

The MSRB does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, the proposed time of trade disclosure rule and proposed SMMP rules codify current interpretive guidance, therefore, they do not add any burden on competition. The proposed revisions to the suitability rule codify current interpretive guidance and add new requirements that are largely harmonized with FINRA’s suitability rule in response to a recommendation by the Commission to harmonize MSRB Rule G-19 with FINRA Rule 2111.⁴³ The MSRB believes that these changes will, in fact, ease burdens on dealers and promote competition by clarifying certain core dealer obligations and the relief available when transacting business with SMMPs.

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

Rule G-47 on Time of Trade Disclosures

On February 11, 2013, the MSRB requested comment on a draft of Rule G-47, on time of trade disclosures.⁴⁴ The time of trade disclosure notice generated eight comment letters.⁴⁵

⁴² See SEC Release No. 34-67064 (May 25, 2012).

⁴³ See <http://www.sec.gov/news/studies/2012/munireport073112.pdf> at 141.

⁴⁴ See MSRB Notice 2013-04 (February 11, 2013) (the “time of trade disclosure notice”).

⁴⁵ Comment letters were received from: (1) Bond Dealers of America (“BDA”); (2) Charles Schwab & Co., Inc. (“Schwab”); (3) Lumesis, Inc. (“Lumesis”) (Lumesis sent two separate comment letters, one on March 11, 2013 and a second letter on July 17, 2013 after the comment period was closed); (4) R.W. Smith & Associates, Inc. (“RWSA”) (RWSA’s comment letter simply states that they contributed to and support the SIFMA

The comment letters are summarized by topic as follows:

- Support for the Proposal

COMMENTS: All of the commenters generally support the MSRB's initiative to clarify and codify the time of trade disclosure requirements. BDA states that the incorporation of interpretive notices into rules should help provide much desired clarity to market participants. Lumesis indicates that the proposed rule would provide greater clarity to market participants and support enhanced transparency and disclosure for the retail investor. Lumesis further states that the proposed rule is a significant step in clarifying the requirements for time of trade disclosures to retail investors. Schwab states that, generally speaking, it supports the MSRB's effort to consolidate years of interpretive guidance related to time of trade disclosure obligations into a rule. SIFMA comments that it generally supports the concept behind the MSRB's initial effort to provide clarity to regulated entities by reorganizing or eliminating certain interpretive guidance associated with MSRB Rule G-17 into new or revised rules highlighting core principles. TMC states that it supports the MSRB's efforts to more clearly define Rule G-17. Finally, WFA commends the MSRB's efforts to simplify dealer compliance with time of trade disclosure guidance and to harmonize the MSRB's rule structure with FINRA's rule structure.

MSRB RESPONSE: The MSRB believes these comments support the MSRB's statement on the burden on competition.

comment letter and its positions in relation to codifying the time of trade disclosure obligation); (5) Securities Industry and Financial Markets Association ("SIFMA"); (6) TMC Bonds, L.L.C. ("TMC"); and (7) Wells Fargo Advisors, LLC ("WFA").

- Handling of Current Notices

COMMENT: SIFMA suggests that the MSRB should consolidate the existing time of trade disclosure guidance into a user friendly format similar to the format used when the MSRB reorganized guidance on Rule G-37, on political contributions and prohibitions on municipal securities business. SIFMA proposes preserving the text of the time of trade disclosure guidance, but consolidating it in one place since the guidance contains nuances that are easily lost in a short bullet point format.

MSRB RESPONSE: The MSRB believes the supplementary material incorporates the necessary information from the interpretive guidance and that it is not necessary to preserve the text of the current guidance or create a set of questions and answers similar to Rule G-37 at the present time. Moreover, to codify the existing interpretative guidance into a rule but preserve the text of the guidance would not advance the MSRB's goal to streamline its rulebook.

- SMMP Guidance

COMMENT: SIFMA states that, since the current SMMP guidance primarily relates to time of trade disclosures, Rule G-47 should affirm such guidance.

Similarly, BDA states that the Rule G-17 SMMP guidance should apply to Rule G-47 and a reference to the exception should be added to the proposed rule or, at a minimum, the SMMP guidance should be revised to reference Rule G-47.

MSRB RESPONSE: The SMMP guidance does not primarily relate to time of trade disclosures as it addresses four separate areas: time of trade disclosures, transaction pricing, suitability, and bona fide quotations. The MSRB has proposed

a draft SMMP rule that references proposed Rule G-47 and does not believe it is necessary or appropriate to reference this new SMMP rule in proposed Rule G-47 (and the other rules to which the SMMP guidance applies). Because the proposed SMMP rule references proposed Rule G-47, the MSRB has effectively addressed the comment that the SMMP guidance should, at a minimum, reference proposed Rule G-47.

- Electronic Trading Platforms

COMMENT: Schwab and SIFMA are concerned about the proposed deletion of the Interpretive Notice dated March 18, 2002 entitled “Interpretive Notice Regarding Rule G-17, on Disclosure of Material Facts” (the “March 18, 2002 Notice”). Specifically, Schwab and SIFMA are concerned about deleting the following sentence:

The MSRB believes that the provision of electronic access to material information to customers who elect to transact in municipal securities on an electronic platform is generally consistent with a dealer's obligation to disclose such information, but that whether such access is effective disclosure ultimately depends upon the particular facts and circumstances present.

SIFMA⁴⁶ states that its members have relied on this language in developing policies and procedures to provide time of trade disclosures to customers using electronic trading platforms. Similarly, Schwab states that dealers providing online access to customers have relied on this language for years and the absence of specific language that recognizes a dealer's ability to meet their time of trade

⁴⁶ SIFMA states that the March 18, 2002 Notice should not be deleted because it is one of the few MSRB notices discussing a dealer's time of trade disclosure obligations that has been approved by the SEC. Proposed Rule G-47 and the related supplementary material which would supersede that Notice, however, are likewise being submitted to the SEC for approval.

disclosure obligations via electronic access could lead to confusion among dealers and disruption of disclosure processes across the industry. Additionally, BDA indicates that dealers believe access equals disclosure for online trading.

MSRB RESPONSE: The sentence quoted above was intentionally excluded from the proposed rule because the ability to use electronic disclosure is now so widely accepted and the qualifying phrase “whether such access is effective disclosure ultimately depends upon the particular facts and circumstances present” renders the guidance less definitive. Moreover, based on the comments received, some industry members appear to have misinterpreted this sentence to mean that “access” equals disclosure for online trading. This apparent misunderstanding of the guidance supports deletion of the sentence and highlights the importance of clarifying the time of trade disclosure guidance by codifying it into a short and easy to understand rule.

COMMENT: BDA encourages the MSRB to establish a separate section of the proposed rule addressing disclosure obligations in connection with online trading to provide more clarity.

MSRB RESPONSE: The codification of interpretive guidance in this rulemaking initiative is not intended to substantively change the time of trade disclosure obligation. The MSRB can consider adding provisions addressing online trading if the Board undertakes to amend the rule substantively in the future.

- Electronic Trading Systems – Institutional Customers

COMMENT: TMC suggests that the proposed rule exempt institutional market professionals from the disclosure requirement.

MSRB RESPONSE: The proposed rule, in conjunction with the SMMP guidance and proposed SMMP rule, should address TMC's concerns by exempting dealers from the requirement to disclose to SMMPs material information that is reasonably accessible to the market. Therefore, the MSRB is not proposing any changes to the proposed rule based on these comments.

- Minimum Denominations

COMMENT: SIFMA believes that the Interpretive Notice dated January 30, 2002 entitled "Notice of Interpretation of Rule G-17 Concerning Minimum Denominations" should not be deleted because it is the only guidance concerning the disclosure obligation for securities sold below minimum denominations.

SIFMA states that its members believe the background information in this notice is important.

MSRB RESPONSE: The proposed rule addresses disclosure obligations related to minimum denominations as described in the current Rule G-17 guidance. The MSRB does not believe that it is necessary to include the background information included in the guidance; however, in response to this comment, the MSRB has proposed a revision to Rule G-47, supplementary material .03(g), clarifying that the disclosure obligation relates to minimum denominations authorized by bond documents.

- Disclosure Obligations for Sales to Customers vs. Purchases from Customers

COMMENT: SIFMA argues that the rule should make a distinction between a dealer's disclosure obligation for sales to customers, as opposed to purchases from customers, and that the rule's failure to do so is inconsistent with current

guidance. SIFMA states that existing guidance primarily focuses on disclosure obligations when a dealer is selling a bond to a customer and very limited guidance has been issued covering situations when a dealer is purchasing. SIFMA states that this proposed extension of the disclosure obligation is not warranted, as arguably the selling customer knows the features of the security that it owns and the potentially purchasing dealer is about to assume the risks of those features. SIFMA acknowledges, however, that knowledge professionally available to dealers, such as a ratings change that has not yet been noticed to EMMA, or a call at par announced minutes ago via a recognized information vendor, is material and should be disclosed. However, SIFMA argues that this new requirement could be harmful to customers and would also be unnecessarily burdensome for dealers.⁴⁷ SIFMA states that the MSRB should explicitly recognize that a substantially different time of trade disclosure obligation exists in these circumstances and that the specific scenarios in the proposed rule may not be applicable when a customer is selling. Finally, SIFMA states that, if the MSRB extends an undifferentiated obligation to customer sale transactions, a thorough cost benefit analysis should be undertaken. BDA also argues that the burden of applying this rule to sales of securities by customers outweighs any tangential value to customers. BDA urges the MSRB to apply the proposed rule to sales by

⁴⁷ For example, SIFMA states that a particular dealer may not have recommended or even sold the bond to the customer so researching and disclosing all material facts about the bond will delay the trade. Additionally, SIFMA states that when an estate has given a dealer instructions to liquidate an entire portfolio, the disclosure obligation could decrease liquidity while the dealer does its own diligence and increase the cost of the trade.

customers in a narrow set of instances, such as when an issuer has made a tender offer for the bonds at a price that is higher than what the dealer is offering.

MSRB RESPONSE: Although recent time of trade disclosure guidance focuses on sales of municipal securities to customers, certain earlier guidance requires dealers to make disclosures in connection with both sales to and purchases from customers, and that guidance remains in effect. The MSRB believes, from a fair dealing perspective, that it is difficult to categorically exclude purchases from customers. Significantly, both SIFMA and BDA have pointed out instances where disclosure to a customer selling a bond would be appropriate. Therefore, the MSRB proposes to retain the disclosure requirement for purchases from customers. However, in response to this comment, the MSRB proposes to add the following sentence to the rule to clarify that whether the customer is purchasing or selling is a factor that can be considered in making the materiality determination: “Whether the customer is purchasing or selling the municipal securities may be a consideration in determining what information is material.”

- Material, Non-Public Information

COMMENT: SIFMA and BDA propose that the MSRB modify the definition of “material” to exclude material non-public information.

MSRB RESPONSE: As discussed above, the MSRB is not proposing substantively to revise the current time of trade disclosure obligations but simply to codify them. While the MSRB understands the issue raised by the commenters, the MSRB can consider this comment if the Board undertakes to amend the rule substantively in the future.

- Access Equals Delivery for Time of Trade Disclosures

COMMENT: SIFMA states that the proposed rule seems to eviscerate recent MSRB access equals delivery initiatives. SIFMA states that, in connection with marketing new issues of municipal securities to customers, dealers have relied on MSRB guidance that providing a preliminary official statement (“POS”) to a customer “can serve as a primary vehicle for providing the required time-of-trade disclosures under Rule G-17, depending upon the accuracy and completeness of the POS as of the time of trade.” SIFMA believes that providing access to a POS, whether on EMMA or some other electronic platform, should continue to satisfy a dealer’s time of trade obligation for new issues of municipal securities. SIFMA states that proposed Rule G-47, supplementary material .01(b) and (c), seem to prohibit activity recently championed by the MSRB and that the proposed new obligation could create a risk of having dealers misinterpret or inadequately summarize information in a POS.

MSRB RESPONSE: This comment does not sufficiently differentiate between Rule G-32, on disclosures in connection with primary offerings, and Rule G-17, which are two separate and distinct obligations. The guidance cited by SIFMA states that a POS can serve as a primary vehicle for providing the required time-of-trade disclosures but does not state that providing access to a POS would be sufficient. The MSRB has not stated that access to a POS, or to all material information regarding a security and transaction, is sufficient to satisfy the Rule G-17 time of trade disclosure obligation. Rather, the MSRB has explained that whether providing access to material information is effective disclosure is

determined by the specific facts and circumstances. Supplementary material .01 (b) and (c) does not preclude the disclosure of material information by delivery of a POS to the customer, assuming the POS contains all material information and assuming the means of disclosure are effective.

- General Advertising Materials

COMMENT: SIFMA requests further clarification of the types of “disclosure of general advertising materials” as referenced in proposed Rule G-47, supplementary material .01(c).

MSRB RESPONSE: The MSRB does not propose to provide further clarification on general advertising materials at this time since the Rule G-17 interpretive notices do not elaborate on this concept. The MSRB can consider providing additional guidance if the Board undertakes to amend proposed Rule G-47 substantively in the future.

- Established Industry Sources

COMMENT: Lumesis suggests that requiring market participants to disclose “material information about the security that is reasonably accessible to the market” should contemplate more than “established industry sources” as currently defined. Lumesis states that this would make the definition broad enough to encompass current or future technology and/or dissemination systems. Lumesis suggests that the MSRB remove the term “established industry sources” from the proposed rule or provide clarity to ensure that market participants focus on disclosing material information about the security that is reasonably accessible to

the market. Similarly, TMC suggests that the proposed rule clarify what information is considered “reasonably accessible to the market.”

MSRB RESPONSE: The proposed rule provides that dealers must disclose “all material information known about the transaction, as well as material information about the security that is reasonably accessible to the market.” The proposed rule further provides that “[r]easonably accessible to the market’ shall mean that the information is made available publicly through established industry sources” and “[e]stablished industry sources’ shall include [EMMA], rating agency reports, and other sources of information relating to municipal securities transactions generally used by brokers, dealers, and municipal securities dealers that effect transactions in the type of municipal securities at issue.” [Emphasis added] The definition of established industry sources is not limited to the particular sources listed, and the definition allows for evolving technologies and systems so long as such “other sources” are related and generally used as delineated by the proposed rule.

COMMENT: WFA states that the rule should acknowledge the role of information vendors in helping a dealer monitor established industry sources.

WFA cites the Interpretive Notice dated November 30, 2011, MSRB Answers Frequently Asked Questions Regarding Dealer Disclosure Obligations under MSRB Rule G-17, which states:

[T]he MSRB has noted that information vendors and other organizations may provide industry professionals with access to information that is generally used by dealers to effect transactions in municipal securities. The MSRB expects that, as technology evolves and municipal securities information becomes more readily available, new ‘established industry sources’ are likely to emerge.

More specifically, WFA requests that the final rule clarify that dealers may rely on vendors to help aggregate material information from established industry sources and monitor for “emerging” sources. Additionally, WFA states that the rule and guidance should recognize that established industry sources remain reliant on the quality of continuing and material event notifications provided by issuers.

MSRB RESPONSE: The MSRB believes the role that information aggregators may play in assisting dealers in compliance with the rule is widely known and recognized and that specifically addressing the use of aggregators in the proposed rule may imply that use of such services is encouraged or required.

- Rating Agency Reports

COMMENT: SIFMA requests that the MSRB clarify “rating agency reports” within the definition of “established industry sources” in the proposed rule.

SIFMA states that the use of the term “reports” implies that dealers must distribute credit event-driven reports and that disclosure of the rating action alone is insufficient. SIFMA requests that the MSRB clarify that firms are under no obligation to distribute such reports.

Lumesis suggests that the definition of “established industry sources” should not include “rating agency reports.” Lumesis states that inclusion of the reference may be inconsistent with a focus on material information that is timely since these reports may be issued months or more before the trade triggering disclosure.

Additionally, Lumesis states that the inclusion of reports may be construed as an implicit endorsement of a private, for-profit enterprise’s offering as fulfilling the

requirement. Lumesis also states that the inclusion of rating agency reports seems inconsistent with the Dodd-Frank Act which indicates that market participants using ratings or rating reports should not rely on them alone.

MSRB RESPONSE: As discussed previously, the MSRB is simply codifying the existing guidance in this rulemaking initiative. The current guidance does not address the meaning of the reference to “rating agency reports” for purposes of time of trade disclosure and, as discussed above, the definition of established industry sources is not limited to the particular sources listed. Therefore, the MSRB does not propose adding any additional interpretation to the meaning of “rating agency reports” or deleting this reference. However, the MSRB can consider revisions in this area if the Board undertakes to amend proposed Rule G-47 substantively in the future.

- Unsolicited Orders

COMMENT: TMC suggests that the requirement for dealers to disclose reasonably accessible information to a client placing an unsolicited order is unnecessary regulation given the ease of access to the internet.

MSRB RESPONSE: Current guidance provides that the time of trade disclosure obligation is the same whether the order is unsolicited or solicited. The goal of this rulemaking initiative is to codify current guidance in the new proposed Rule G-47.

- Location of Rule

COMMENT: TMC suggests that it might be beneficial to codify the time of trade disclosure rule as a subsection of Rule G-17 as opposed to creating a new rule so

that participants would only have to view a single rule for fair dealing, as opposed to having to cross-reference similar rules and their corresponding comments.

MSRB RESPONSE: The MSRB does not propose to codify the provisions as suggested because, as a result of this rulemaking initiative, there will no longer be any time of trade disclosure guidance in Rule G-17.⁴⁸

- Material Event Filings

COMMENT: SIFMA states that it would be helpful for the MSRB to explicitly address the concept that an event disclosed by an issuer or obligated person pursuant to an SEC Rule 15c2-12 continuing disclosure agreement does not necessarily constitute “material information” that would be required to be disclosed to investors and that, even if such information was material at the time it was disclosed, it does not remain material forever. SIFMA states that long-past credit ratings changes, or substitutions of trustees, or a continuing disclosure filing that was a few days late five years ago should not automatically be deemed material at the time of trade merely because they triggered a disclosure obligation at the time of occurrence. SIFMA suggests that a six-month look back would be a reasonable time limit for disclosing past information.

MSRB RESPONSE: There is nothing in the proposed rule indicating that events disclosed by an issuer or obligated person pursuant to Rule 15c2-12 are automatically material at the time of trade. The proposed rule states the well

⁴⁸ Rule G-17 will continue to include interpretive guidance related to time of trade disclosures for 529 plans. As indicated above, however, the MSRB may create a separate rule regarding time of trade disclosure obligations for 529 plans, in which case this guidance would likely be codified in a rule and deleted as part of any such rulemaking initiative.

established definition that “[i]nformation is considered to be material if there is a substantial likelihood that the information would be considered important or significant by a reasonable investor in making an investment decision.” Therefore, the MSRB does not believe that any revisions are necessary or appropriate in response to this comment. In addition, there is no safe-harbor look back period under the existing guidance and thus a look back period is not included in the proposed rule, the purpose of which is only to codify existing obligations.

- Disclosure Obligations in Specific Scenarios

COMMENT: SIFMA states that the list of scenarios in the proposed rule that may be material under certain circumstances and require disclosure is too prescriptive for a principles-based rule and will become a de facto enforcement checklist for regulators. SIFMA also states that dealers may rely on the four corners of the notice and not consider other factors that may become material in the future. SIFMA suggests that the existing interpretive notices be reorganized by specific scenarios, as many of the listed specific scenarios are the subject of more than one interpretive notice.

MSRB RESPONSE: The proposed rule provides that the examples describe information that may be material in specific scenarios and that the list is not exhaustive. The MSRB does not propose to reorganize the existing interpretive guidance by specific scenarios since the MSRB plans to delete the Rule G-17 time of trade disclosure guidance.

COMMENT: Similarly, WFA states that a final rule should provide dealers with more clarity about the specific scenarios that trigger time of trade disclosure obligations for the types of information identified in the supplementary material.

MSRB RESPONSE: The MSRB believes that the supplementary material in the proposed rule provides dealers with sufficient clarity regarding time of trade disclosure obligations by providing a non-exhaustive list of examples describing information that may be material.

- Credit Risks and Ratings

COMMENT: SIFMA states that unlike many of the other specific scenarios addressed in the proposed rule, credit ratings are potentially more fluid.

Therefore, SIFMA argues that it would be helpful to define a material look-back period for credit ratings changes.

MSRB RESPONSE: The MSRB does not propose making these changes since they are not in the current guidance but the MSRB can consider them if the Board undertakes to amend the proposed rule substantively in the future.

- Securities with Non-Standard Features

COMMENT: SIFMA states that the prior uses of the term “non-standard features” have been related to situations where the bonds pay interest annually, rather than semi-annually, a fact that affects yield calculations. SIFMA argues that this new usage seems to have no bounds, and adds the traditional interpretation as an afterthought. SIFMA states that it would be helpful to know what the MSRB considers to be standard features.

MSRB RESPONSE: The MSRB does not propose making any revisions to the proposed rule in response to this comment. The requirement in the proposed rule is drawn from current interpretive guidance on time of trade disclosure obligations, and while the discussion of non-standard features arose in the context of price/yield calculations, the basic principle, when limited by a materiality threshold, is appropriate for the proposed rule change.

- Issuer's Intent to Prerefund

COMMENT: SIFMA states that, unless an issuer's intent to prerefund has been publicly announced, it will not be known to established industry sources and would likely be material non-public information. (See the discussion above regarding the disclosure of material non-public information.)

MSRB RESPONSE: This requirement is drawn from the current interpretive guidance and the MSRB does not propose any changes in response to this comment.

- Failure to Make Continuing Disclosure Filings

COMMENT: WFA suggests that the proposed rule should provide guidance about how to interpret the potential materiality of issuer event reporting deficiencies.

WFA believes that the rule should make clear that an issuer's failure to make continuing disclosure filings is a factor but is not determinative of the materiality of the issuer's disclosure deficiency. WFA also believes the MSRB should make clear that a dealer may consider subsequent disclosures and the curing of late filings as relevant in determining the significance of a prior or less severe disclosure deficiency. Finally, WFA believes the supplementary material should

specify a window of time in which an issuer's late continuing disclosure filing would be regarded as a clerical or ministerial issue and thus not a material deficiency.

MSRB RESPONSE: Proposed Rule G-47, supplementary material .03(o) provides that discovery that an issuer has failed to make filings required under its continuing disclosure agreements may be material in specific scenarios and require time of trade disclosures to a customer. Therefore, this does not indicate that such a failure is always material requiring disclosure. The proposed rule, as noted, states the well established definition that "[i]nformation is considered to be material if there is a substantial likelihood that the information would be considered important or significant by a reasonable investor in making an investment decision." Additionally, the MSRB does not propose to add the information requested by WFA relating to curing of late filings and a time window where it would be considered clerical. As discussed previously, the MSRB is simply codifying the existing guidance in this rulemaking initiative and the existing guidance does not provide for such a bright-line look back.

COMMENT: SIFMA states that the rule should make it clear that for secondary market trades the "discovery" by a dealer that an issuer has failed to make filings required by its continuing disclosure agreements is limited to a dealer's review of "failure to file" notices on EMMA pursuant to Rule 15c2-12.

MSRB RESPONSE: The interpretive guidance states that, "if a firm discovers through its Rule 15c2-12 procedures or otherwise that an issuer has failed to make filings required under its continuing disclosure agreements, the firm must take this

information into consideration in meeting its disclosure obligations under MSRB Rule G-17...”⁴⁹ [Emphasis added]. Therefore, this requirement is not as narrow as SIFMA appears to interpret it and the MSRB does not propose to make any changes in response to this comment.

- Processes and Procedures

COMMENT: SIFMA argues that proposed Rule G-47, supplementary material .04 is an expansion of current regulatory requirements, is too narrow, and omits critical guidance as set forth in the Interpretive Notice dated November 30, 2011,

MSRB Answers Frequently Asked Questions Regarding Dealer Disclosure

Obligations under MSRB Rule G-17. The proposed rule states:

Brokers, dealers, and municipal securities dealers must implement processes and procedures reasonably designed to ensure that material information regarding municipal securities is disseminated to registered representatives who are engaged in sales to and purchases from a customer.

The proposed rule does not include the following sentence contained in the guidance:

It would be insufficient for a dealer to possess such material information, if there were no means by which a registered representative could access it and provide such information to customers.

SIFMA argues that a dealer that provides its registered representatives access to such information satisfies current MSRB guidance under Rule G-17 and should similarly be sufficient under the proposed rule. SIFMA also argues that incorporating this guidance into the proposed rule is an expansion of existing

⁴⁹ Interpretive Notice dated September 20, 2010, MSRB Reminds Firms of their Sales Practice and Due Diligence Obligations When Selling Municipal Securities in the Secondary Market.

regulatory obligations as currently approved by the SEC and is not merely a codification of existing regulations. Therefore, SIFMA states that any enforcement against dealers for failing to disseminate or provide access to their registered representatives of material information regarding municipal securities should be applied solely prospectively.

MSRB RESPONSE: SIFMA appears to interpret the sentence in the guidance to mean that merely providing access is sufficient. The sentence states that dealer possession of information is insufficient if registered representatives lack access to it. This does not mean that the converse is true – that mere access to the information is sufficient. Beyond providing access, dealers must implement processes and procedures reasonably designed to ensure that material information is disseminated to registered representatives. The potential for misinterpretation of this sentence supports the MSRB’s determination that it should not be included in the proposed rule. Additionally, proposed Rule G-47, supplementary material .04 is not an expansion of current regulatory requirements since this obligation is fairly and reasonably implied by current MSRB rules, as enunciated by the MSRB since November 30, 2011.⁵⁰

COMMENT: WFA suggests that the proposed rule should make clear that a dealer with a reasonably designed system for the detection and disclosure of material information will be presumed to have complied with its time of trade disclosure obligations.

⁵⁰ See Interpretive Notice dated November 30, 2011, [MSRB Answers Frequently Asked Questions Regarding Dealer Disclosure Obligations under MSRB Rule G-17](#); see also Interpretive Notice dated July 14, 2009, [Guidance on Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities](#).

MSRB RESPONSE: The current guidance does not provide that a dealer will be presumed to have complied with its time of trade disclosure obligations by having a reasonably designed system. To do so in the proposed rule would significantly narrow dealers' current obligations.

- Ambiguity of Rule

COMMENT: BDA states that the proposed rule, like the interpretive guidance, is unnecessarily ambiguous. BDA believes that there should be at least a safe harbor or some additional clarity that allows dealers to comply with concrete rules rather than broad-based principles.

MSRB RESPONSE: The MSRB believes the new rule will be clear and easier for dealers to follow. As discussed above, the MSRB is simply codifying the guidance and can consider revisions to the proposed rule in the future.

- Harmonizing with FINRA Notice 10-41

COMMENT: BDA suggests that the MSRB should reconcile how the new proposed rule will be harmonized with FINRA Regulatory Notice 10-41 and exactly how the market should read the two in conjunction with one another.

MSRB RESPONSE: The MSRB's rules and guidance should be followed for all municipal securities transactions as FINRA's notice is simply its interpretation of MSRB rules and guidance.

- Enforcement

COMMENT: Lumesis comments that providing dealers that have made good faith efforts to comply with proposed Rule G-47 with ample notice and sufficient direction to take corrective actions would support the spirit and intent of the rule.

MSRB RESPONSE: The MSRB appreciates this comment; however, the approach to enforcement is beyond the scope of the proposal.

- Form of Disclosure

COMMENT: Lumesis suggests that as the MSRB contemplates refinements and changes to the proposed rule in the future the subject of “form of disclosure” be more fully addressed as many market participants struggle with what actions satisfy the time of trade disclosure obligation.

MSRB RESPONSE: The MSRB can consider this suggestion if the Board undertakes to revise the proposed rule in the future.

Rule G-19 on Suitability of Recommendations and Transactions

On March 11, 2013, the MSRB requested comment on proposed revisions to Rule G-19.⁵¹ The suitability notice generated seven comment letters.⁵²

The comment letters are summarized by topic as follows:

⁵¹ See MSRB Notice 2013-07 (March 11, 2013) (the “suitability notice”).

⁵² Comment letters were received from: BDA; College Savings Foundation (“CSF”) (although CSF sent its own letter, the letter simply states that CSF endorses the comments made by the Investment Company Institute); College Savings Plans Network (“CSPN”) (although CSPN sent its own letter, the letter simply states that CSPN is supportive of the comments relating to 529 Plan suitability requirements submitted by the Investment Company Institute); Financial Services Institute (“FSI”); Investment Company Institute (“ICI”); SIFMA; and WFA. In addition to these seven comment letters submitted in response to the proposed revisions to Rule G-19, an additional comment letter was submitted by an investor on August 25, 2013. The substance of this letter is more germane to the MSRB’s request for comment on adopting a “best execution” standard and this retail investor submitted a similar letter in response to that request for comment. See, MSRB Notice 2013-16, Request for Comment on Whether to Require Dealers to Adopt a “Best Execution” Standard for Municipal Securities Transactions (August 6, 2013). Therefore, this letter will be discussed in detail in connection with the best execution request for comment.

- Support for the Proposal

COMMENTS: All of the commenters generally support the MSRB's initiative to harmonize MSRB Rule G-19 with FINRA Rule 2111. BDA states that it is encouraged by many of the changes in proposed Rule G-19. FSI states that it supports the harmonization of MSRB Rule G-19 with FINRA Rule 2111 and that it is a positive development that will provide significant benefits for broker-dealers and financial advisors.⁵³ ICI states that it supports the MSRB's proposal to harmonize its suitability rule with FINRA's suitability rule because it is in the best interests of investors and registrants. SIFMA comments that it supports the MSRB's efforts to harmonize MSRB Rule G-19 with FINRA Rule 2111 since such harmonization will promote more effective business practices and efficient compliance. Finally, WFA states that it applauds the MSRB's continuing effort to promote regulatory efficiency.

MSRB RESPONSE: These comments support the MSRB's statement on burden on competition.

- Application to SMMPs

COMMENTS: SIFMA comments that its members would prefer the MSRB to explicitly include the SMMP exemption in the proposed rule as with the institutional account exemption in FINRA Rule 2111(b) even though the MSRB is proposing separate rules codifying SMMP guidance. SIFMA states that the suitability rule should, at a minimum, cross reference the SMMP rules.

⁵³ FSI also notes that it has concerns with FINRA's suitability rule, but did not specify those concerns.

Similarly, WFA requests that the MSRB reconsider its plan to handle the SMMP exemption separately from the proposed rule. WFA requests that the MSRB adopt a structure parallel to FINRA's suitability rule to make clear that, under certain circumstances, a dealer has limited suitability obligations to institutional customers.

Additionally, WFA is concerned that the SMMP exemption continues to impose additional suitability requirements on dealers transacting with institutional clients beyond those required under FINRA's suitability rule. WFA states that dealers considering whether an institutional account is an SMMP must assess the factors required under Rule 2111(b) as well as additional criteria such as the institutional customer's ability to independently evaluate the "market value" of municipal securities and the "amount and type of municipal securities owned [by] or under management" of the institutional customer. WFA states that since some institutional clients may satisfy FINRA's exemptive criteria but not MSRB's, dealers will likely need to invest in costly technology enhancements and will likely be required to maintain separate policies and procedures. WFA is also concerned that the difference in rule structure will lead to regulatory confusion for clients and regulators.

BDA believes that omitting any reference to the SMMP exemption in the proposed rule undermines the goal of harmonizing it with FINRA's suitability rule. BDA is concerned that FINRA examiners will not be able to consistently apply the FINRA suitability rule as contrasted with the MSRB suitability rule, potentially causing confusion for application of the rules by FINRA examiners.

BDA states that, if the MSRB includes an exemption for SMMPs in the proposed rule, the supplementary material should be updated to make certain corresponding changes.

MSRB RESPONSE: The MSRB does not believe that it is appropriate or necessary to reference the SMMP exemption in Rule G-19. The SMMP exemption addresses four separate areas: time of trade disclosures, transaction pricing, suitability, and bona fide quotations and the exemption is not referenced in any of these separate rules. In connection with the proposed suitability rule, the MSRB has not proposed any revisions to the SMMP exemption and addresses WFA's comments in this area separately in response to the request for comment on the proposed SMMP rules set out below.⁵⁴

- Exclusions from Recommended Strategies

COMMENTS: SIFMA states that the proposed rule omits important exclusions from recommended strategies that are present in FINRA's suitability rule including with respect to: descriptive information about an employee benefit plan; asset allocation models such as investment analysis tools; and other interactive investment materials. SIFMA states that these omissions solely with respect to municipal securities will result in confusion. SIFMA believes that materials and output of this nature provide investors with valuable information when considering investment decisions and should be recognized by the MSRB as exclusions from Rule G-19. SIFMA notes that the SEC, in its 2012 Report on the Municipal Securities Market, expressly discusses amending Rule G-19 to be

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MSRB Notice 2013-10, Request for Comment on Proposed Sophisticated Municipal Market Professional Rules (May 1, 2013).

consistent with FINRA's Rule 2111 "including with respect to the scope of the term strategy."

SIFMA also recommends listing 529 plan education savings calculators and tools as a type of excluded "general investment information."

MSRB RESPONSE: The proposed rule does not include the following general financial and investment information from FINRA's suitability rule: (1) dollar cost averaging; (2) compounded return; (3) tax deferred investment; (4) descriptive information about an employer-sponsored retirement or benefit plan, participation in the plan, the benefits of plan participation, and the investment options available under the plan; (5) asset allocation models that are (i) based on generally accepted investment theory, (ii) accompanied by disclosures of all material facts and assumptions that may affect a reasonable investor's assessment of the asset allocation model or any report generated by such model, and (iii) in compliance with Rule 2214 (Requirements for the Use of Investment Analysis Tools) if the asset allocation model is an "investment analysis tool" covered by Rule 2214; and (6) interactive investment materials that incorporate the above. These items are not included in the proposed rule because the MSRB chose to include the concepts that are most pertinent to the municipal securities market. With respect to the suggestion to add 529 calculators and tools to the list, the MSRB may create a separate rule or guidance to specifically address suitability obligations for 529 plans in the future and the MSRB can consider this comment at that time.

- 529 Plans

COMMENTS: ICI states that it is not clear whether the proposed rule is intended to apply to MSRB registrants selling 529 plans. However, ICI states that, from talking to MSRB staff, they understand that the proposed rule is intended to apply to such registrants' recommendations. ICI recommends that the MSRB revise the current proposal to add supplementary material to Rule G-19 that sets forth all additional suitability obligations imposed on registrants' recommendations of 529 plan securities. ICI also recommends that the MSRB rescind all suitability requirements and guidance that have been issued under other MSRB rules relating to recommendations involving 529 plan securities. If the MSRB follows this recommendation, ICI recommends that the MSRB publish a revised request for comment that includes any provisions designed to address 529 plans.

SIFMA states that the request for comment creates confusion about the applicability of the proposed rule to firms selling 529 plan securities and, in lieu of a separate suitability rule for 529 plans, SIFMA suggests that the MSRB consider incorporating existing interpretive guidance related to suitability assessments for 529 plans into the proposed rule, either by adding a sentence to the proposed rule specific to assessing the suitability of a 529 plan security, or by incorporating existing interpretive guidance into the supplementary material.

MSRB RESPONSE: The proposed rule is intended to apply to 529 plans. All MSRB rules and guidance apply to 529 plans unless specifically excluded, and the proposed rule does not exclude 529 plans. Additionally, the current guidance addressing suitability requirements for 529 plans continues to apply. The MSRB may decide to create a separate rule addressing 529 plans in the future; however,

the proposed suitability rule and related guidance will apply to 529 plans until any such separate 529 plan rule is created.

- Applicability of FINRA's Guidance

COMMENT: ICI recommends that the MSRB confirm in the notice adopting the proposed revisions to Rule G-19 the MSRB's intent to interpret its rule in a manner that is consistent with FINRA's interpretation.

MSRB RESPONSE: The MSRB will interpret proposed Rule G-19 in a manner consistent with FINRA's interpretations of Rule 2111 except to the extent that the MSRB affirmatively states that specific provisions of FINRA's interpretations do not apply.

- Explicit vs. Passive Hold Recommendations

COMMENTS: WFA comments that the MSRB should provide guidance similar to FINRA's guidance that suitability obligations concerning hold recommendations cover only explicit hold recommendations.

BDA is concerned that there is a potential for confusion with respect to explicit versus passive hold recommendations. Specifically, proposed Rule G-19, supplementary material .03, Recommended Strategies, would apply the suitability obligation to investment strategies that include an explicit recommendation to hold a municipal security or municipal securities. BDA is concerned that this might lead to unnecessary and burdensome compliance documentation in certain instances. BDA encourages the MSRB to provide further guidance as to what constitutes an explicit hold recommendation for purposes of the rule and believes that the MSRB should have guidance, as FINRA does in Regulatory Notice 12-

55, that “implicit” hold recommendations are not within the scope of the suitability rule.

MSRB RESPONSE: As noted, the MSRB will interpret Rule G-19 in a manner that is consistent with FINRA’s interpretation of its suitability rule except to the extent that the MSRB affirmatively states that specific provisions of FINRA’s interpretations do not apply.

- Effective Date

COMMENTS: SIFMA appreciates that the MSRB intends to file the time of trade disclosure, suitability, and SMMP proposals with the SEC at the same time.

SIFMA further requests that these three rules be implemented simultaneously with the same effective date.

SIFMA states that FINRA Rule 2111 was the result of a multi-year process, including an implementation period of approximately 19 months and that any regulatory scheme takes time to implement properly. SIFMA further states that municipal securities dealers that are not FINRA members, as well as FINRA members that only buy and sell municipal securities, will need a reasonable time to allow for a sufficient implementation period to develop, test, and implement supervisory policies and procedures, systems and controls, as well as training.

SIFMA also states that municipal securities dealers that are FINRA members will also need time, albeit less than non-FINRA members, to implement the proposed changes. SIFMA recommends an implementation period of no less than one year from approval by the SEC before the proposal becomes effective.

MSRB RESPONSE: The MSRB contemplated implementing the time of trade disclosure, suitability, and SMMP rules simultaneously with the same effective date. However, the MSRB believes that an implementation period of one year is unnecessary. The time of trade disclosure and SMMP rules simply codify existing guidance and the suitability rule is largely consistent with FINRA's suitability rule. Therefore, the MSRB proposes an effective date for the proposed rule change of 60 days following the date of SEC approval.

- Changes to Supplementary Material

COMMENTS: BDA suggests striking the word "retirement" from supplementary material .03, Recommended Strategies, item (iv). BDA suggests that the section should be rewritten to read "estimates of future income needs" as this would better align to FINRA's "liquidity needs" criteria to recognize that when purchasing a position, one might be looking for a period to help bridge income needs until they reach retirement and not solely for "retirement income needs."

MSRB RESPONSE: The language in the proposed rule regarding estimates of future retirement income needs is identical to the parallel language in FINRA's suitability rule relating to general financial and investment information. The MSRB does not propose to delete the word "retirement" since there is no unique aspect of the municipal securities market that would support adopting different language from FINRA's rule. Moreover, the MSRB does not believe that the phrase should be aligned to the non-parallel "liquidity needs" criterion in FINRA's rule relating to a customer's investment profile.

Rules D-15 and G-48 on SMMPs

On May 1, 2013, the MSRB requested comment on proposed Rules D-15 and G-48 on SMMPs.⁵⁵ The SMMP notice generated three comment letters.⁵⁶

The comment letters are summarized by topic as follows:

- Support for the Proposal

COMMENTS: All of the commenters generally support the MSRB's initiative to codify the SMMP guidance into Rules D-15 and G-48. BDA states that, while it is supportive of the proposed rules, it seeks clarity on some items. SIFMA comments that it continues to support the efforts by the MSRB to provide clarity to regulated entities by reorganizing or eliminating certain interpretive guidance associated with Rule G-17 into new or revised rules. WFA states that it supports the MSRB's continued commitment to "streamline" its rules and guidance and its ongoing effort to align its rule format with that of other regulators.

MSRB RESPONSE: The MSRB believes these comments support the MSRB's statement on the burden on competition.

- SMMP Definition

COMMENTS: SIFMA comments that there is one group of customers that may be experienced municipal market participants yet does not fall within the current SMMP definition: hedge funds with assets under management of less than \$50 million. SIFMA states that the MSRB and FINRA should consider expanding the definition of institutional account holders and SMMPs in future rulemaking to include this type of customer.

⁵⁵ See MSRB Notice 2013-10 (May 1, 2013) (the "SMMP notice").

⁵⁶ Comment letters were received from: BDA; SIFMA; and WFA.

Last year the MSRB harmonized (with slight distinctions) the SMMP definition and the process by which dealers confirm a customer's SMMP status with FINRA's suitability rule and institutional account definition. SIFMA suggests that hedge funds managing less assets than required by the MSRB and FINRA are nevertheless sophisticated and, therefore, should be covered by the MSRB and FINRA rules. By contrast, BDA indicated in its comment letter that it is comfortable with the \$50 million threshold.

MSRB RESPONSE: As discussed in the SMMP notice, the codification of the interpretive guidance on SMMPs that is currently in Rule G-17 is intended to preserve the substance of the guidance approved by the Board. No substantive changes are intended. It would be beyond the scope of this initiative to determine whether small hedge funds are sufficiently sophisticated to warrant the relief to dealers in proposed Rule G-48.

- Cross References to SMMP Rules

COMMENTS: SIFMA and WFA comment that the rules under which a dealer's obligations to SMMPs are modified (proposed Rule G-47, and Rules G-19, G-13, and G-18)⁵⁷ should specifically include a reference to the definition of and the modified obligations to SMMPs delineated in the proposed rules.

MSRB RESPONSE: One of the benefits of adopting stand-alone rules is to make them more prominent and easier for dealers and other market participants to locate. The MSRB believes that a stand-alone SMMP definition and a stand-alone rule describing the relief available to dealers who do business with SMMPs will

⁵⁷ Although not listed in SIFMA's letter, Rule G-18 obligations related to transaction pricing are also modified by proposed Rule G-48.

provide ample clarity to dealers regarding their obligations. Cross-references, therefore, are unnecessary. Moreover, if cross-references were used for rules impacting SMMPs, a consistent practice of including cross-references in other rules would tend to make the rulebook unmanageable. This comment was also made in response to the requests for comment on proposed Rule G-47 and the proposed revisions to Rule G-19. In response to the previous comments, the MSRB indicated that it does not believe it is necessary to reference the new SMMP rules in each of the rules to which the SMMP guidance applies.

- Effective Dates

COMMENT: SIFMA requests that the proposed revisions to Rule G-19, and proposed Rules G-47, G-48, and D-15 be implemented simultaneously with the same effective date.

MSRB RESPONSE: The MSRB agrees that it is appropriate to file these proposed rules simultaneously and for them to become effective together on the same date.

- Customer Affirmation

COMMENT: With regard to proposed Rule D-15, supplementary material .02, Customer Affirmation, BDA requests that the MSRB consider permitting alternate methods of affirming SMMP status in lieu of specifically obtaining customer affirmations under the proposed rule.⁵⁸

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As an example, BDA states that a dealer who has a process for and conducts a regular credit review of its SMMP customers should be able to use such credit review instead of obtaining an affirmation by the SMMP as long as the dealer determines there has been no change in the status of the SMMP based on the internal review of the customer's portfolio or other similar evaluation.

MSRB RESPONSE: As BDA points out, the rule already provides flexibility with regard to the affirmation process, which is substantially similar to (and can be combined with) FINRA's process. It can be done orally or in writing, on a trade by trade, type of municipal security or account-wide basis. BDA's request to use the credit review process in lieu of an affirmation would be a substantial change in the process. The customer affirmation requirement in proposed Rule D-15, supplementary material .02 is taken directly from the 2012 SMMP Interpretation.⁵⁹ The proposed SMMP rules simply codify the existing guidance and it would be beyond the scope of this rulemaking initiative to make any substantive changes to the existing guidance.

- Reasonable Basis Analysis

COMMENTS: BDA expresses concern regarding the more stringent requirement in proposed Rule D-15, supplementary material .01, Reasonable Basis Analysis, which goes beyond FINRA's rules to state that a "...dealer should consider the amount and type of municipal securities owned or under management by the customer." BDA states that FINRA does not require a consideration of the type of securities held by the customer for qualification under FINRA's institutional investor exemption. BDA also states that it is unaware of any feature unique to the municipal securities market that would justify the more burdensome requirement to consider both the amount and type of municipal securities owned or under management by the customer. BDA further states that this requirement

⁵⁹ Restated Interpretive Notice Regarding the Application of MSRB Rules to Transactions with Sophisticated Municipal Market Professionals (July 9, 2012) (the "2012 SMMP Interpretation").

might confuse examiners and allow for an uneven application of the proposed rule. BDA believes a determination by the dealer that the customer has total assets of at least \$50 million and that the dealer has a reasonable basis to believe the customer is capable of evaluating investment risk and market value independently should be given deference.

MSRB RESPONSE: The MSRB believes this additional requirement that a dealer consider the amount and type of municipal securities owned or under management by the customer is appropriate since it provides some assurance that the dealer considered the investor's experience as a municipal securities investor in forming a reasonable basis for believing that the customer is capable of evaluating investment risks and market value independently. The MSRB believes the concern about misapplication in the regulatory examination process is misplaced, since the dealer need only evidence that it considered the municipal securities holdings of the customer in its analysis. The customer affirmation requirement in proposed Rule D-15, supplementary material .01 is taken directly from the 2012 SMMP Interpretation.⁶⁰ The proposed SMMP rules simply codify the existing guidance and do not make any changes to the guidance.

- Agency Transactions

COMMENTS: BDA requests further clarification as to how the MSRB defines "agency transactions" for purposes of Rule G-48(b)(1). Additionally, BDA states that, with respect to transaction pricing, the 2012 SMMP Interpretation included guidance that was particularly relevant to dealers operating alternative trading

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Id.

systems. BDA requests the MSRB to consider the application of this provision in the context of alternative trading systems and whether it would be appropriate to expand this exemption for transaction pricing under the proposed rule to include an alternative trading system “which functions on a riskless principal basis disclosing all commissions in the same manner as it would if it were acting as agent.”

MSRB RESPONSE: The agency concept is taken directly from the current Rule G-17 guidance and relates to agency transactions as described in Rule G-18. The restated SMMP guidance in 2012 did not change this concept from the original notice in 2002. It has always been the case that fair pricing relief was limited to non-recommended secondary market agency trades. BDA suggests that the MSRB expand the relief to riskless principal transactions executed by alternative trading systems. While some such systems effect trades with their institutional customers on an agency basis, the MSRB understands that some are executed on a riskless principal basis and include a markup or markdown. The MSRB views BDA’s requested change as substantive and worthy of consideration at a later date. As for the request for clarification of the definition of an agency transaction, we believe the concept is well-settled and understood by the market. Finally, the reference in the 2012 notice to commissions charged by ATSS was meant to remind dealers operating ATSS that their obligation to charge a fair and reasonable commission under Rule G-30(b) is independent of the fair and reasonable price obligation under Rule G-18 (and corresponding SMMP relief).

- Bona Fide Quotations

COMMENTS: BDA states that proposed Rule G-48(d), on bona fide quotations, provides that a "...dealer disseminating an SMMP's 'quotation' as defined in Rule G-13, which is labeled as such, shall apply the same standards...." BDA states that it is unclear whether the MSRB intends that a quotation from an SMMP needs to be labeled as an "SMMP quotation" or if the MSRB is simply referring to a quotation that meets the requirements set forth under MSRB Rule G-13. BDA states that under the 2012 SMMP Interpretation it was clear that, if an SMMP makes a "quotation" and it is labeled as such, then it is presumed not to be a quotation made by the disseminating dealer. BDA states that, if proposed Rule G-48(d) is intended to codify the language from the 2012 SMMP Interpretation, they request that the MSRB consider modifying the language in the proposed rule to clarify that the clause "which is labeled as such" does not require the quotation to be specifically labeled as an SMMP quotation.

MSRB RESPONSE: BDA suggests that the proposed rule changes the standard for identifying quotes from SMMPs. Such is not the case. Since the original interpretation in 2002, dealers have been required to identify the quote as from an SMMP to take advantage of the relief in the guidance. To read the rule any other way would not make sense. BDA suggests it would be sufficient to simply label the SMMP quote as a quote, rather than an SMMP quote. This would not alert the disseminating dealer that the quote was from an SMMP. The MSRB does not propose to make any revisions in response to this comment. The language in the

proposed rule tracks the language in the current Rule G-17 guidance⁶¹ and, therefore, the clarification requested by BDA is not necessary.

- SMMP Definition vs. FINRA Institutional Investor Definition

COMMENTS: WFA expresses concern that dealers considering whether an institutional account is an SMMP must assess not only the factors required under FINRA Rule 2111(b), but also additional criteria such as the institutional customer's ability to independently evaluate the "market value" of municipal securities and the "amount and type of municipal securities owned [by] or under management" of the institutional customer. WFA states that the differences in duties owed under the SMMP rules and FINRA Rule 2111(b) may confuse clients and regulators. WFA believes that proposed Rule D-15 should not include these additional criteria.

MSRB RESPONSE: The second additional criterion regarding the amount and type of municipal securities was discussed previously. As for the first additional criterion, the MSRB believes that the phrase "market value" should be retained, since the relief goes beyond FINRA's suitability relief and extends to fair pricing. Although the SMMP definition does impose some obligations beyond those required by FINRA's suitability rule, proposed Rule D-15 simply codifies the current Rule G-17 SMMP guidance. The MSRB does not propose making any substantive changes to the proposed rules in response to this comment.

⁶¹ The current Rule G-17 guidance states: "If an SMMP makes a 'quotation' and it is labeled as such, then it is presumed not to be a quotation made by the disseminating dealer." Similarly, proposed Rule G-48(d) states "The . . . dealer disseminating an SMMP's 'quotation' as defined in Rule G-13, which is labeled as such, shall apply the same standards regarding quotations described in Rule G-13(b) as if such quotations were made by another . . . dealer. . . ."

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 of up to 90 days (i) as the Commission may designate 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 Act. 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-2013-07 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-2013-07. 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, D.C. 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the MSRB. 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-2013-07, 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.⁶²

Kevin M. O'Neill
Deputy Secretary

⁶² 17 CFR 200.30-3(a)(12).