

# MSRB Notice

## 2018-10

### Publication Date

June 5, 2018

### Stakeholders

Municipal Securities  
 Dealers, Municipal  
 Advisors, Issuers,  
 Investors

### Notice Type

Request for Comment

### Comment Deadline

August 6, 2018

### Category

Fair Practice

### Affected Rules

[Rule G-17](#)

## Request for Comment: Retrospective Review of 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities

### Overview

As part of its ongoing review of its rules and published interpretations, the Municipal Securities Rulemaking Board (MSRB) is requesting comment on interpretive guidance it issued in 2012 on the application of MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities, to underwriters of municipal securities (“2012 Guidance”).<sup>1</sup> The 2012 Guidance established duties underwriters owe to issuers pursuant to their fair-dealing obligation. As part of its regulatory mission, the MSRB periodically revisits its rules and their interpretations over time to help ensure that they continue to achieve their intended purposes and reflect the current state of the municipal securities market. After receiving informal feedback from various market participants concerning the effectiveness and operation of the 2012 Guidance in practice, the MSRB now formally seeks comment from all interested parties on the benefits and burdens of, and possible alternatives to, the 2012 Guidance and the potential need for changes. The comments will assist the MSRB in determining whether and, if so, how to amend the 2012 Guidance and thereby modify underwriters’ duties to issuers pursuant to their fair-dealing obligation. The primary purpose of any potential amendments would be to improve market practices and address any unnecessary burdens on market participants.

Comments should be submitted no later than August 6, 2018, and may be submitted in electronic or paper form. [Comments may be submitted](#)

<sup>1</sup> The 2012 Guidance is incorporated into the MSRB Rule Book under Rule G-17. [Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities](#) (Aug. 2, 2012).



Receive emails about  
 MSRB Notices.

[electronically by clicking here](#). Comments submitted in paper form should be sent to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board, 1300 I Street NW, Suite 1000, Washington, DC 20005. All comments will be available for public inspection on the MSRB's website.<sup>2</sup>

Questions about this notice should be directed to Michael L. Post, General Counsel, or Carl E. Tugberk, Assistant General Counsel, at 202-838-1500.

## Background

Rule G-17 requires that, in the conduct of municipal securities activities, brokers, dealers and municipal securities dealers (collectively, “dealers”) must deal fairly with all persons and must not engage in any deceptive, dishonest or unfair practice. The MSRB has long held that this requirement extends to dealings with issuers in connection with the underwriting of their municipal securities.<sup>3</sup> In 2011, the MSRB sought to provide greater clarity to dealers’ fair-dealing obligation to issuers when acting as an underwriter and proposed to publish interpretive guidance on a number of issues, including representations, required disclosures and conflicts of interest.<sup>4</sup> Later that year, the MSRB filed a proposed rule change with the SEC to adopt the 2012 Guidance,<sup>5</sup> which, after notice and comment, the SEC ultimately approved, and the 2012 Guidance became effective on August 2, 2012.<sup>6</sup> The MSRB subsequently published a Regulatory Notice intended to assist dealers in revising their written supervisory procedures concerning their fair-practice obligations under Rule G-17 and to clarify certain aspects of the 2012 Guidance.<sup>7</sup> Finally, in March 2013, to further support compliance, the MSRB answered frequently-asked questions to address operational matters pertaining to the 2012 Guidance.<sup>8</sup>

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<sup>2</sup> Comments generally are posted on the MSRB’s website without change. For example, personal identifying information such as name, address, telephone number or email address will not be edited from submissions. Therefore, commenters should only submit information that they wish to make available publicly.

<sup>3</sup> See [Reminder Notice on Fair Practice Duties to Issuers of Municipal Securities](#), MSRB Notice 2009-54 (Sept. 29, 2009) (“[T]he rule requires dealers to deal fairly with issuers in connection with all aspects of the underwriting of their municipal securities, including representations regarding investors made by the dealer.”); [Rule G-17 Interpretive Letter – Purchase of new issue from issuer](#) (Dec. 1, 1997) (“Whether or not an underwriter has dealt fairly with an issuer is dependent upon the facts and circumstances of an underwriting and cannot be addressed simply by virtue of the price of the issue.”).

<sup>4</sup> [MSRB Notice 2011-12](#) (Feb. 14, 2011).

<sup>5</sup> See Securities Exchange Act of 1934 (“Exchange Act”) Rel. No. 65263 (Sept. 6, 2011), 76 FR 55989 (Sept. 9, 2011) (SR-MSRB-2011-09).

<sup>6</sup> See Exchange Act Rel. No. 66927 (May 4, 2012), 77 FR 27509 (May 10, 2012) (SR-MSRB-2011-09); [MSRB Notice 2012-25](#) (May 7, 2012).

<sup>7</sup> See [MSRB Notice 2012-38](#) (July 18, 2012).

<sup>8</sup> See [MSRB Notice 2013-08](#) (Mar. 25, 2013).

The 2012 Guidance was adopted to promote fair dealing by underwriters with issuers, in part, by requiring disclosures to issuers related to underwriters' relationships with them and the nature and risks of the transactions recommended by the underwriters. For example, the 2012 Guidance requires underwriters to disclose their role in the issuance of municipal securities, actual and potential material conflicts of interest concerning the issuance, whether their underwriting compensation will be contingent on closing the transaction, other conflicts related to payments to or from third parties, profit-sharing with investors, credit default swaps and incentives for recommending complex financing structures. Recently, the MSRB has received informal feedback from some market participants regarding their experience with these requirements and the effectiveness of the required disclosures.

Some market participants have, among other things, conveyed the following information and views:

- Dealers provide overly boilerplate disclosures to issuers when underwriting their municipal securities, which (in the opinion of such commenters) devalues the utility of those disclosures;
- Multiple underwriters for the same transaction will provide the exact same disclosures to the issuer, which commenters believe can inundate the issuer with duplicative information; and
- Underwriters serving frequent issuers must provide successive disclosures to their client, which are identical to disclosures that they recently already provided.

Some commenters have expressed that the combination of the duplication and the large volume of disclosures can create an overly burdensome review process, during which issuers may overlook key details related to their relationship with the underwriters and/or the transactions at issue. Moreover, some commenters also have expressed the view that the 2012 Guidance clearly should permit more tailored disclosures than the commenters believe are required currently.

Since it has been several years since the adoption of the 2012 Guidance and in view of the informal feedback received from various market participants, the MSRB believes a retrospective review of the 2012 Guidance is warranted to determine how effective the 2012 Guidance has been and whether amendments to the 2012 Guidance should be considered.

## Request for Comment

The MSRB seeks public comment on the following questions, as well as on any other topic relevant to the 2012 Guidance or this request. The MSRB particularly welcomes statistical, empirical and other data from commenters that may support their views and/or support or refute the views, assumptions or issues raised in this request for comment.

- 1) What is the typical process, as implemented as a practical matter, for a dealer to provide the disclosures to issuers as required by the 2012 Guidance?
- 2) The 2012 Guidance allows for syndicate managers to make the disclosures concerning the role of the underwriter and the underwriter's compensation on behalf of other syndicate members, as long as the other syndicate members make the other conflicts disclosures that are particular to them.
  - a. How often do syndicates utilize this option for making the disclosures? If it has been infrequent, please explain why.
  - b. To the extent it has been used, has this option been effective? If not, how could it be improved?
  - c. Does the senior manager or any other dealer explain the disclosures to the issuer client or are they simply provided without any further discussion?
- 2) Do dealers typically provide disclosures to both conduit issuers and conduit borrowers?
- 3) Has the 2012 Guidance, particularly relating to required disclosures, achieved its intended purpose of promoting fair dealing by underwriters with issuers? If no, what are the problems?
  - a. Are the disclosures too boilerplate and/or too voluminous? If so, what are the consequences?
  - b. Are issuers overly burdened?
  - c. Are any problems with the 2012 Guidance the same or different for issuers of different sizes?

- d. Are the disclosures required to be provided at appropriate points in time in the course of the transaction?
  - e. Is the issuer's acknowledgment of receipt of the disclosures necessary and meaningful?
- 4) Should the MSRB amend the 2012 Guidance? If so, what are alternative approaches that could better achieve the intended purpose?
- a. Should the requirements be reduced or otherwise modified for different classes of issuers?
    - i. If so, how should those classes be defined?
      1. Based on size?
      2. Based on frequency in the market?
      3. Relative to whether the issuer has an independent registered municipal advisor that is advising the issuer on the transaction?
      4. Based on the presence of dedicated issuer staff for debt management?
    - ii. If so, how should the requirements be modified? Should issuers of any particularly defined class be able to opt out of receiving the disclosures?
  - b. Should all issuers be able to opt out of receiving the disclosures?
  - c. Should the frequency of making the disclosures to issuers be reduced? If so, how (*e.g.*, once per year unless there are material changes to any of the information provided and/or other new information requiring additional disclosure)?
  - d. Could or should EMMA be a tool to improve the utility of disclosures and the process for providing them to issuers (*e.g.*, use EMMA to display more general disclosures but continue to require client- and deal-specific disclosures be provided directly to issuers by the dealers)?

- e. Has the level of detail provided by the MSRB in the disclosure requirements been useful in promoting compliance?
    - i. If so, would greater prescription for any of the requirements be beneficial?
    - ii. If not, should that prescription be modified? If so, how?
  - f. Have the sample disclosures provided by the MSRB in Exhibit A to [MSRB Notice 2013-08](#) been useful in facilitating compliance, and to what extent has the sample been adopted? Should it be revised?
- 5) What have been the costs or burdens, direct, indirect or inadvertent, of complying with the 2012 Guidance? Are there data or other evidence, including studies or research, that support commenters' cost or burden estimates?
- 6) Aside from the disclosure requirements, are there any other requirements addressed in the 2012 Guidance that should be modified or removed or new requirements that should be added?

June 5, 2018

**ALPHABETICAL LIST OF COMMENT LETTERS ON NOTICE 2018-10 (JUNE 5, 2018)**

1. Bond Dealers of America: Letter from Mike Nicholas, Chief Executive Officer, dated August 6, 2018
2. Government Finance Officers Association: Letter from Emily S. Brock, Director, Federal Liaison Center, dated August 6, 2018
3. National Association of Municipal Advisors: Letter from Susan Gaffney, Executive Director, dated August 6, 2018
4. Securities Industry and Financial Markets Association: Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, dated August 6, 2018
5. State of Florida, Division of Bond Finance: Letter from J. Ben Watkins III, Director, dated August 8, 2018



1909 K Street NW • Suite 510  
Washington, DC 20006  
202.204.7900  
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August 6, 2018

**Submitted Electronically**

Ronald W. Smith  
Corporate Secretary  
Municipal Securities Rulemaking Board  
1300 I Street NW  
Washington, DC 20005

**RE: MSRB Request for Comment: Retrospective Review of 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities**

Dear Mr. Smith:

On behalf of the Bond Dealers of America (“BDA”), I am submitting this letter to provide comments to the MSRB’s Regulatory Notice 2018-10 (Request for Comment: Retrospective Review of 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities) (the “Notice”). BDA is the only DC-based group representing the interests of securities dealers and banks exclusively focused on the U.S. fixed income markets. We welcome this opportunity to present our comments.

***The BDA strongly believes that the Rule G-17 Disclosures are important disclosures and Rule G-17 should continue to require them.***

The BDA strongly believes that the disclosures (the “Rule G-17 Disclosures”) required by the 2012 Guidance (as defined in the Notice) are important and valuable to the municipal securities market. The Rule G-17 Disclosures have established a critical, written communication that clarifies the nature of the role of the underwriter in municipal securities transactions and conflicts of interests, in addition to the other matters covered by the 2012 Guidance. The 2012 Guidance has created a needed formal platform through which underwriters clearly communicate these matters to issuers. Before the 2012 Guidance, many of these matters were relegated to either oral discussions or just underwriters assuming that issuers understood these matters. Accordingly, the BDA supports the continued requirement of the Rule G-17 Disclosures.

***The BDA does not believe that the 2012 Guidance should be changed to provide different requirements for different kinds of issuers.***

The BDA does not believe that the 2012 Guidance should be changed to provide different Rule G-17 Disclosures to different issuers for two reasons. First, while we understand that some large issuers who frequently issue municipal securities at times receive many Rule G-17 Disclosures, the personnel in those issuers do change regularly and continue to need full Rule G-17 Disclosures. Second, the requirement of the 2012 Guidance that underwriters send Rule G-17 Disclosures to all issuers allows for a consistent, standard process for dealers. If underwriters were required to deliver different disclosures to different issuers, it would impose a significant compliance burden on dealers to prepare those

disclosures. Accordingly, we do not support varying the kinds of disclosure depending on the kind of issuer.

***The BDA makes four suggestions to improve the Rule G-17 Disclosures and the 2012 Guidance.***

The BDA makes four suggestions regarding how the 2012 Guidance can improve Rule G-17 Disclosures, which we believe will make them more meaningful and also reduce the number of unnecessary Rule G-17 Disclosures:

- *The 2012 Guidance should be modified so that underwriters who secure the IRMA exception under the SEC's municipal advisor rule are not required to deliver Rule G-17 Disclosures.*

The BDA believes that if an underwriter is exempt under the SEC's municipal advisor rule by securing the exception for independent registered municipal advisors, then Rule G-17 Disclosures will be unnecessary and should not be required. The whole point of the Rule G-17 Disclosures is to ensure that issuers understand the role and responsibilities of the underwriter, and ensuring that the issuer understands the role and responsibilities of the underwriter falls within the responsibilities of a municipal advisor. Accordingly, the BDA believes that the Rule G-17 Disclosures would be unnecessary in these circumstances.

- *The 2012 Guidance should be modified to clarify that only material, actual conflicts of interests should be disclosed.*

The BDA believes that one of the factors that contributes to the length and complexity of Rule G-17 Disclosures is that underwriters disclose all potential conflicts of interests instead of known, actual conflicts of interests. The BDA believes that the MSRB should revise the 2012 Guidance so that it is clear that underwriters do not need to disclose a list of boilerplate conflicts of interests and, instead, should disclose known, actual conflicts of interests that could impact the underwriter in the municipal securities transaction. The BDA believes that the clearer that the MSRB can clarify which conflicts of interest really need to be disclosed, the more helpful and valuable those disclosures will be.

- *The 2012 Guidance should be modified to allow for the timing of some of the Rule G-17 Disclosures to vary depending on the circumstances.*

The 2012 Guidance overly prescribes when underwriters should deliver some of the Rule G-17 Disclosures – particularly the disclosures concerning complex municipal securities transactions. Underwriters should deliver some of the Rule G-17 Disclosures at the outset of any engagement – such as the disclosures concerning the role of the underwriter. But the BDA believes that the MSRB should revise the 2012 Guidance so that underwriters have more discretion concerning when to deliver some of the Rule G-17 Disclosures. Appropriate disclosures do evolve through the process of preparing municipal securities transactions. In particular, the BDA believes that the disclosures concerning complex municipal securities transactions are most helpful later on in the process once the characteristics and risks of those transactions are better defined.

- *The 2012 Guidance should be modified to clarify that co-managers usually have no requirement to deliver Rule G-17 Disclosures.*

One of the reasons why large, frequent issuers receive so many Rule G-17 Disclosures is that co-managers send entire Rule G-17 Disclosures which frequently have exactly the same content as the Rule G-17 Disclosures delivered by the senior manager. The BDA believes that the MSRB should revise the 2012 Guidance so that it is clear that co-managers have no requirement to deliver any Rule G-17 Disclosures except for the circumstance where the co-manager has a discrete conflict of interest that materially impacts its engagement with the issuer. Otherwise, the BDA believes it should be clear that co-managers have no requirement to deliver Rule G-17 Disclosures.

\* \* \*

Thank you for the opportunity to provide these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Mike Nicholas".

Mike Nicholas  
Chief Executive Officer



**Government Finance Officers Association**  
 660 North Capitol Street, Suite 410  
 Washington, D.C. 20001  
 202.393.8467 fax: 202.393.0780

August 6, 2018

Mr. Ronald W. Smith  
 Corporate Secretary  
 Municipal Securities Rulemaking Board  
 1300 I Street, NW Suite 1000  
 Washington, DC 20005

**RE: MSRB Notice 2018-10: Retrospective Review of 2012 Interpretive Notice  
 Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal  
 Securities**

Dear Mr. Smith:

The Government Finance Officers Association (GFOA) welcomes the opportunity to comment on MSRB Notice 2018-10. GFOA has commented in the past on Rule G-17 and subsequent interpretative guidance, as the MSRB's work in this area is very important to municipal securities issuers. Rule G-17, in particular, is representative of MSRB rulemaking that is done to fulfill its mission to protect issuers.

Below are our thoughts on the key issues raised in the Notice.

Required Disclosures

*Receipt of Disclosures is Appropriate.* Issuers receive G-17 disclosures from underwriters and must acknowledge receipt of those disclosures. As is common practice, the disclosures are sent at an appropriate time at the beginning of the debt issuance planning stage and prior to the release of the POS.

*Disclosures Are Often Boilerplate and Cumbersome.* In many cases the disclosures are voluminous and not focused on actual conflicts that may exist within the underwriting firm or the specific risks of a particular financing to the entity. Instead, the documents are full of non-material potential disclosures where key material disclosures are not highlighted nor flagged, and in many cases buried in the information provided. In these cases, the intent of the rulemaking – to ensure that issuers are aware of conflicts that exist with their underwriting team and risks associated with a financing – may be missing its mark.

*Key Material Disclosures Should be Highlighted as Already Required.* From a practical matter, while underwriters may wish to provide boilerplate disclosures to issuers of all types, sizes and levels of sophistication, it is imperative for the MSRB to advocate for the disclosures to be framed in a way that they can be well received and understood by the issuer. It would be helpful if large amounts of non-material disclosures are provided separately from key conflicts (including compensation and other fees earned on the transaction) and risk disclosures. Likewise, issuers would appreciate a notation that the underwriter does not have a fiduciary duty to the issuer. Given these conditions, the rulemaking may meet its intended expectations for underwriters to deal fairly with issuers, and protect issuers from deceptive,

dishonest or unfair practices. These disclosures should also be provided in a “plain English” manner versus legalese to maintain the spirit of the rulemaking to have the underwriter deal fairly with the issuer. The 2012 guidance already requires underwriters to “identify with sufficient clarity and ease of review the applicable portions of [boilerplate disclosures] to a particular transaction.” Therefore, the MSRB should emphasize this duty which is already required.

*Disclosures are Read and Reviewed by a Variety of Issuer Personnel.* As GFOA noted in its December 1, 2011 letter to the SEC on Application of Rule G-17<sup>1</sup>, there may be members of the financing team or the governing body who would like to be aware of and review underwriter disclosures. These issuer team members may hold differing levels of expertise about the financing than the “issuer personnel” for whom the underwriter is directed to provide the disclosures to under the Rule.

This reiterates the need for the underwriter to provide disclosures to the issuer, especially in “complex” transactions but also in routine transactions, in order to ensure that information is conveyed to those on the issuer’s internal financing team who have various levels of expertise about the municipal securities market. The process would be enhanced by having the underwriter specifically highlight key and material disclosures and include additional disclosures separately within the document as required by the 2012 guidance.

*Disclosure Obstacles for Large and Small issuers.* Small and large governments are burdened by the disclosures in different ways. Larger issuers who may be frequently in the market have to tackle and acknowledge the paperwork many times, while smaller and infrequent issuers, especially, may find all of the information overwhelming to review and understand how it relates to their specific transaction. Again, a key way of managing this may be to have non-material or boilerplate disclosures be provided separately within same document (e.g., such as Appendix A) from key conflicts and risks and notation that the underwriter does not have a fiduciary duty to the issuer. This would also assist some issuers where the key issuer representative may not require in depth information about routine financings, but others on the financing team or the governing body may wish to have and review that information.

*Variables to Determine Ways to Modify Requirements May Be Difficult.* Because issuers of municipal securities vary widely and may use multiple underwriters, it would seem to be nearly impossible to develop ways to modify the rulemaking for some issuers over others, and ensure fair dealing is taking place. Even for frequent issuers if certain disclosures were only sent once a year, it would take away from the intent of the rule which is to ensure that the issuer is aware of the fair dealing process for each transaction. Issuer sophistication with financings does not fall neatly into buckets associated with either the size of the issuer or the frequency of their transactions.

A possible way to better manage the process and highlight the important disclosures that are of interest to members of the issuer’s internal financing team for each transaction would be if boilerplate disclosures are provided separately but within the same document (e.g., such as Appendix A) or even routinely for frequent issuers (e.g., annual disclosures) while specific conflicts and risks associated with each transaction are sent and acknowledged by the issuer.

*Opting Out of Disclosures Should NOT Be an Option.* As many issuers learned with financings prior to the 2008 market crash, not getting their hands on or reading the fine print of their transaction documents, led to many problems with various types of financings, and created financial and administrative burdens for issuers. The MSRB should therefore not consider an opt-out provision since having the disclosures, and understanding them, is imperative for issuers. If these disclosures are not provided, it would also

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<sup>1</sup> <https://www.sec.gov/comments/sr-msrb-2011-09/msrb201109-22.pdf>

seem to go against the main tenets of Rule G-17 to ensure that underwriters are not engaged in any deceptive, dishonest or unfair practices.

*EMMA Should Not Be Used as a Repository for Underwriter Disclosure Documents.* EMMA is a system to assist investors with their investment decisions. Information produced specifically for issuers, of which the issuer must acknowledge receipt, would not be well served to be placed on EMMA, as underwriters may be concerned about investor use of this information. This could cause even further boilerplating of information important to issuers and the decisions they make about their financings.

*Further Consideration of Disclosures to Conduit Issuers and Borrowers is Needed.* Regarding disclosures to conduit issuers and borrowers, the MSRB should make clear in its Interpretative Notice that the information would best be utilized if it was sent to the party who is making decisions about the issuance and is liable for the debt, which in most case is the borrower and not the issuer.

*Underwriter Comments on the Use of Municipal Advisors.* The current guidance instructs underwriters to avoid telling issuers not to hire a municipal advisor. In the past GFOA has commented on the need for the guidance to be strengthened to include a requirement that underwriters affirmatively state 1) that issuers may choose to hire a municipal advisor to represent their interests in a transaction and 2) to take no actions to discourage issuers from engaging a municipal advisor. We once again encourage the MSRB to do so (see GFOA's December 1, 2011 letter). Our members continue to observe significant numbers of large negotiated transactions sold by inexperienced debt issuers where no municipal advisor has been engaged.

We appreciate the MSRB's review of its Interpretative Notice on Rule G-17. As we commented many times in 2011, we believe that there should be greater focus and effort to have underwriters provide key and material disclosures about conflicts, risks regarding the transaction, and their non-fiduciary duty to issuer clients in a clear manner. Unfortunately, since 2012 the G-17 disclosures are overwhelming in volume which causes issuers to either ignore or not understand the important information that is being provided to the issuer in these disclosures.

We would be happy to discuss our comments with you in greater detail as well as coordinate conference calls with various types and sizes of issuers to help the MSRB understand the concerns issuers have with the implementation of G-17 disclosures.

Sincerely,



Emily S. Brock  
Director, Federal Liaison Center

cc: Rebecca Olsen, Acting Director, Office of Municipal Securities, Securities and Exchange Commission



August 6, 2018

Mr. Ronald Smith, Corporate Secretary  
Municipal Securities Rulemaking Board  
1300 I Street, NW #1000  
Washington, DC 20005

**RE: MSRB Notice 2018-10**

Dear Mr. Smith:

NAMA appreciates the opportunity to comment on MSRB's Retrospective Review of 2012 Interpretative Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Notice 2018-10).

NAMA strongly believes that issuers should receive certain key disclosures from underwriters and municipal advisors. These disclosures are important for issuers to gain a deeper understanding of the risks of any particular financing and of the various conflicts that may exist with parties that provide them professional services. Additionally, issuers should understand the different role professionals play in the transaction and of the various duties that these professionals owe to the issuer. Rule G-17 related to municipal advisors' and underwriters' responsibilities to deal fairly with issuers and avoid deceptive, unfair, and dishonest practice is an important and fundamental rule to protect issuers. Therefore, its significance in the suite of MSRB rulemaking should not be understated.

In its May 2012 Rule G-17 Interpretive Guidance, the MSRB mandated that underwriters provide certain disclosures to issuers. The disclosures relate to the underwriters' actual and potential material conflicts of interest, the nature and risks of the transactions recommended by the underwriter and of the nature of the underwriter's role. We do not believe that the standards established in the 2012 Interpretive Guidance should be diminished, although there are ways to make them more meaningful.

Below are some significant areas of the Notice that we wish to address. Our comments are based on previous NAMA (then NAIPFA - National Association of Independent Public Finance Advisors) comments related to the Interpretive Guidance and observations that our members have had over the past few years. More importantly, our comments reflect the significance of having the MSRB instill in its rulemaking and interpretative guidance the principal of protecting issuers, as that is a key piece of the MSRB's statutorily defined mandate with respect to the rules governing activity of broker-dealers and municipal advisors.

### **Volume and Types of Disclosures**

NAMA believes that the current types of disclosures that the underwriter provides to the issuer as currently stated in the Interpretive Guidance should remain intact. However, for many issuers, these disclosures are buried within lengthy documents that contain hypothetical potential conflicts and risks.

NAMA believes that there are two potential fixes for this. First, syndicate members should not be allowed to provide long form boilerplate disclosure if that disclosure has already been provided by the syndicate manager. Syndicate members should only be allowed to provide conflict disclosures that are particular to them. Second, the MSRB should highlight its existing guidance about “omnibus disclosures” to ensure that underwriters provide material transaction risks and conflicts disclosures in a manner that is easily identifiable by the issuer (including various members of the issuing entity’s internal finance team and governing body). This information should be presented in a straight forward manner, with other general disclosures presented separately from the statements and discussions of material transaction risks and conflicts disclosures (including statement that the underwriter does not have a fiduciary duty to the issuer). We understand that for practical purposes an underwriter may draft boilerplate language regarding various potential conflicts and transaction risks and include all of those in a form G-17 letter; however, the existing MSRB guidance on omnibus disclosures already requires them to make some sort of indication as to which of those omnibus risk disclosures or conflicts actually apply to the immediate transaction. Emphasizing this existing guidance as well as better enforcement would help to achieve the stated aim of making these disclosures more useful to issuers.

### **Issuer Acknowledgment of Disclosures**

Issuers currently acknowledge receiving disclosures from underwriters. This practice should continue, and should allow for issuers to execute acknowledgements as they see fit.

### **Minimizing Content and Frequency of Disclosures for Different Classes of Issuers**

The MSRB asks if they should consider alternative approaches to guidance implementation which may include different requirements for different classes of issuers. NAMA does not support lessening the responsibilities of underwriter disclosures to issuers due to different variables that may be at play (e.g., issuer size, frequency of issuances, dedicated staff). This includes not supporting the idea of annual disclosures. Since the disclosures must reflect conflicts of interest and risks associated with the transaction, it is difficult to understand how this could be done on an annual basis without the need for supplementary material throughout the year. Therefore, the easiest manner of disclosure delivery would be to have it remain as is.

### **Using EMMA for UW Enhancements to the Guidance**

The MSRB asks if EMMA could or should be used to disseminate underwriter disclosures to issuers. Because these disclosures are from the underwriter and to the issuer about their relationship, they may be presented in a way that causes confusion to investors (who will be receiving many of the same disclosures in the context of the official statement where the information is presented in a manner material to investors). We do not think creating an additional public disclosure document separate from the official statement is an idea worth exploring. Furthermore, it is difficult to imagine how an underwriter would appropriately tailor such disclosures by issuer and transaction. Therefore, you would undermine the purpose of the rule by requiring issuers to have to seek out these even more boilerplate disclosures online instead of having them provided directly to the issuer.

If the MSRB is looking at ways to address “general” disclosures separately from those of client and deal specific disclosures, separating boilerplate disclosures from material and client/deal specific disclosures (and making the latter more easily identifiable) would be a better way to achieve this goal. In any event, EMMA should not be used for these disclosures.

**Underwriter Statements that an Issuer Should Not Hire a Municipal Advisor**

An area our members continue to be concerned with is when underwriters circumvent their duty noted in the statement in the Interpretive Guidance that “The underwriter also must not recommend that the issuer not retain a municipal advisor.”

We would request that the statement be updated and strengthened to say that “The underwriter may not make direct or indirect statements to the issuer that the issuer not hire a municipal advisor or otherwise make statements to deter the use of a municipal advisor or blur the distinction between the underwriting and municipal advisor functions and/or duties.”

Please let us know if we may answer any questions or provide other assistance related to the Interpretive Guidance. Thank you again for the opportunity to comment on this Notice.

Sincerely,

A handwritten signature in black ink that reads "Susan Gaffney". The signature is written in a cursive, flowing style.

Susan Gaffney  
Executive Director



August 6, 2018

Ronald W. Smith  
Corporate Secretary  
Municipal Securities Rulemaking Board  
1300 I Street NW  
Suite 1000  
Washington, DC 20005

**Re: MSRB Notice 2018-10: Request for Comment: Retrospective Review of 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities**

Dear Mr. Smith:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> appreciates this opportunity to respond to Notice 2018-10 (the “Notice”)<sup>2</sup> issued by the Municipal Securities Rulemaking Board (the “MSRB”) in which the MSRB is requesting comment in connection with its retrospective review of its Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities, which became effective on August 2, 2012 (the “2012 Guidance”).<sup>3</sup> The

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<sup>1</sup> SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s nearly 1 million employees, we advocate on legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

<sup>2</sup> MSRB Notice 2018-10 (June 5, 2018).

<sup>3</sup> Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Aug. 2, 2012), available at <http://msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-17.aspx?tab=2> and originally published in MSRB Notice 2012-25 (May 7, 2012). The 2012 Guidance was approved by the Securities and Exchange Commission (the “SEC”) in Release No. 34-66927 (File No. SR-MSRB-2011-09) (May 4, 2012), 77 FR 27509 (May 10, 2012).

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2012 Guidance established a series of mostly new duties owed by underwriters<sup>4</sup> to issuers under MSRB Rule G-17 applicable solely to negotiated issues except where explicitly made applicable to competitive offerings.

The MSRB adopted the 2012 Guidance in the wake of the financial crisis and the significant changes brought to the regulatory landscape by the Dodd-Frank Wall Street Reform and Consumer Protection Act, which among other things introduced for the first time a federal fiduciary duty and a regulatory regime for the newly created category of municipal advisors.

In that context, the 2012 Guidance served to reinforce the fair dealing obligations of underwriters to issuers under MSRB Rule G-17, to expand upon those obligations by ensuring that issuers understood the financing structures that underwriters might recommend and any conflicts of interest that might exist on the part of underwriters, and to provide much needed clarity regarding the role of underwriters, as compared to municipal advisors, in connection with new issue offerings.<sup>5</sup>

SIFMA and its members believe that the 2012 Guidance served as an important and timely tool in the successful transformation to today's municipal marketplace. We offer below our comments on the 2012 Guidance as part of the MSRB's retrospective review process and in response to the specific questions posed by the MSRB with the goal of strengthening the effectiveness of the 2012 Guidance in light of today's more mature regulatory context.

## **I. Support for Retrospective Review**

SIFMA and its members are pleased that the MSRB is engaged in this review of the 2012 Guidance as part of its broader commitment to engaging in retrospective review of its rules to assure that they are responsive to changes in the municipal

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<sup>4</sup> The 2012 Guidance also applies to placement agents in private placements, subject to certain adjustments due to differences in the nature of the placement agent role as compared to the underwriter role, as described in the Implementation Guidance discussed below. Except as otherwise noted in this letter, our use of the term underwriter includes placement agent to the extent applicable under the 2012 Guidance. *See* footnote 11 *infra*.

<sup>5</sup> With regard to the role of underwriter as compared to municipal advisor, the MSRB also took the important step of amending Rule G-23 to more fully address the conflict that arises from serving in both roles on the same transaction and adopting its Guidance on the Prohibition on Underwriting Issues of Municipal Securities for Which a Financial Advisory Relationship Exists Under Rule G-23 (Nov. 27, 2011), available at <http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-23.aspx?tab=2> and originally published in MSRB Notice 2011-29 (May 31, 2011) (the "Rule G-23 Interpretation").

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securities market and in the policymaking, economic, stakeholder and technological environment.<sup>6</sup> A retrospective review process with the full participation of market participants is critical in understanding the intended and unintended effects of the MSRB's existing rules and should represent the beginning of a conversation about whether rulemaking or additional guidance is called for in order to make existing rules more effective and efficient in support of a free and open market and the protection of investors, municipal entities, obligated persons and the public interest. As such, SIFMA understands that the Notice does not represent a formal rulemaking proposal and that any rule proposals would be subject to an MSRB exposure draft seeking comment on specific rule or interpretative language prior to the formal submission of such proposal with the SEC.

The MSRB's Retrospective Review Process recognizes that there are many means to retrospective review, acknowledging that an effective review process should extend beyond formal written responses to also include meetings with relevant stakeholders. SIFMA urges the MSRB to engage in face-to-face discussions with SIFMA members and other market participants affected by the 2012 Guidance as a critical element of the retrospective review.

## **II. 2012 Guidance and Related MSRB Guidance**

In recognition that much of the 2012 Guidance represented significant new requirements on underwriters and to assist them in implementing the 2012 Guidance, the MSRB published Guidance on Implementation of Interpretive Notice of Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (the "Implementation Guidance") shortly before the 2012 Guidance became effective<sup>7</sup> and Frequently Asked Questions (FAQs) Regarding an Underwriter's Disclosure Obligations to State and Local Government Issuers Under Rule G-17 (the "FAQs") a short time after the 2012 Guidance had become effective.<sup>8</sup> The Implementation Guidance provides a deeper understanding of the 2012 Guidance by including statements made by the MSRB in its filings with the SEC and its formal responses to comments that were included in the rulemaking record generated during the extended rulemaking process for the 2012 Guidance, as well as including additional "practical considerations" akin to staff guidance on how the 2012 Guidance was

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<sup>6</sup> The MSRB's process for undertaking retrospective reviews is set out at <http://www.msrb.org/About-MSRB/Programs/Market-Regulation/Retrospective-Rule-Review> (the "Retrospective Review Process").

<sup>7</sup> MSRB Notice 2012-38 (July 18, 2012).

<sup>8</sup> MSRB Notice 2013-08 (Mar. 25, 2013).

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intended to be implemented.<sup>9</sup> The FAQs provided additional staff guidance responsive to questions raised by underwriters based on their experience with initial implementation of the 2012 Guidance.<sup>10</sup> If the MSRB were to ultimately make any changes through a formal rulemaking process to the 2012 Guidance, SIFMA and its members believe that it would be critical to incorporate or otherwise preserve the guidance included in the Implementation Guidance and FAQs, with any modifications appropriate in light of the changes to the 2012 Guidance.

### **III. Summary of SIFMA's Views on 2012 Guidance**

As a general matter, SIFMA and its members believe that significant portions of the 2012 Guidance have been beneficial to the marketplace and to the protection of issuers. As noted in the Implementation Guidance, the 2012 Guidance can be divided into three broad categories: prohibitions on misrepresentations, fairness of financial aspects of an underwriting, and required disclosures to issuers. SIFMA and its members believe that the aspects of the 2012 Guidance relating to prohibitions on misrepresentations (including the prohibition on discouraging the use of a municipal advisor) and the fairness of financial aspects of an underwriting (including the prohibitions on excessive compensation, guidance on fairness of new issue pricing, guidance on profit sharing arrangements, and prohibition on treating excessive or lavish personal expenses as expenses of a new issue) should be preserved. Given that the 2012 Guidance may often be associated solely with its disclosure requirements, the marketplace would benefit from the MSRB ensuring that these other aspects of 2012 Guidance are well understood.

SIFMA and its members also support the appropriateness of providing the types of disclosures required under the 2012 Guidance. These disclosures consist of disclosure of the underwriter's role, disclosure of conflicts of interests, and transaction disclosure. Except with respect to potential refinement of the nature of conflicts required to be disclosed as described below, SIFMA and its members generally support the content of the disclosures required to be made under the 2012 Guidance. While we

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<sup>9</sup> SIFMA notes that the MSRB included in the Implementation Guidance extensive guidance regarding transitioning to the 2012 Guidance for financings in process on the effective date. SIFMA commends the inclusion of such formal transition guidance and believes that similar transition guidance should be provided as a standard practice in connection with the MSRB's future rulemaking.

<sup>10</sup> SIFMA commends the MSRB for having provided such additional guidance shortly after the effective date to respond to practical issues that arose as underwriters first implemented the 2012 Guidance. We believe that guidance responsive to implementation issues published shortly after the effective date of future rule changes, in instances where the MSRB is made aware of implementation issues, should also be included as a standard practice in connection with the MSRB's future rulemaking.

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support these disclosures, the MSRB should be cognizant of the substantial compliance burden on underwriters and complaints expressed by some issuers regarding excessive documentation resulting from the 2012 Guidance, and any efforts to more precisely define the content of and the process for providing the disclosures required by the 2012 Guidance would be highly beneficial to the marketplace. Thus, SIFMA and its members believe that certain changes with respect to the timing and manner of providing disclosures, as well as circumstances where certain disclosures may not be required, should be made, as described more fully below.

SIFMA provides below its specific comments and recommendations with regard to the 2012 Guidance, followed by answers to the specific questions posed by the MSRB in the Notice.

#### **IV. Guidance on Prohibitions on Misrepresentations**

The 2012 Guidance provides that an underwriter must not misrepresent or omit the facts, risks, potential benefits, or other material information about municipal securities activities undertaken with an issuer, and that an underwriter must not recommend that an issuer not retain a municipal advisor. The 2012 Guidance provides specific examples, including but not limited to with respect to representations in issue price certificates, information provided to an issuer for use in the official statement, information included in a response to a request for proposals, representations during negotiation of a new issue (such as representations regarding the price negotiated and the nature of orders or investor demand), and representations regarding investors (such as whether they meet the issuer's definition of retail or other representations relating to retail order periods). Further, the Implementation Guidance lays out certain practical considerations in implementing these prohibitions. SIFMA and its members believe that this portion of the 2012 Guidance has been beneficial to the marketplace and to the protection of issuers and therefore should be preserved.

#### **V. Guidance on Fairness of Financial Aspects of an Underwriting**

The 2012 Guidance prohibits underwriters from charging or collecting excessive compensation (including certain separate but related payments from the issuer or third parties), provides guidance on fairness of new issue pricing for both negotiated and competitive offerings,<sup>11</sup> notes that profit sharing arrangements between

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<sup>11</sup> SIFMA observes that the MSRB recently adopted amendments to Rule G-34 relating to duties of municipal advisors to obtain CUSIP numbers for competitive sales. With respect to that rule change, the MSRB has been providing informal guidance to the marketplace regarding what constitutes a competitive sale for purposes of the new municipal advisor obligation that is not consistent with how the notion of competitive

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underwriters and new issue investors may violate Rule G-17 depending on the facts and circumstances, and reminds underwriters of prior interpretive guidance prohibiting the treatment of excessive or lavish personal expenses as expenses of a new issue. SIFMA and its members believe that this portion of the 2012 Guidance has been beneficial to the marketplace and to the protection of issuers and therefore should be preserved.

## **VI. Required Disclosures**

### **A. Content of Role Disclosure**

The 2012 Guidance requires the underwriter in a negotiated offering to make a series of disclosures to the issuer about the role and duties of an underwriter, with the MSRB having provided a sample disclosure document in the FAQs.<sup>12</sup> We note that some or all of these role disclosures required under the 2012 Guidance are intertwined with other regulatory guidance provided by the MSRB in the Rule G-23 Interpretation<sup>13</sup> and guidance provided by SEC staff under SEC Rule 15Ba1-1.<sup>14</sup>

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sale has been defined and generally otherwise understood under MSRB rules, including Rules G-17, G-32 and G-37, as well as in Rule G-34 itself prior to such amendments. With respect to the 2012 Guidance, the Implementation Guidance (referring to MSRB statements in the rulemaking record) treats private placements as negotiated sales subject to the 2012 Guidance but with certain disclosure obligations not being applicable due to the agency status of the placement agent. SIFMA and its members agree that the treatment of placements in the 2012 Guidance is appropriate and that they should not, absent highly unusual circumstances, be characterized as competitive sales.

<sup>12</sup> The role disclosures relate to the fair dealing duty of underwriters, the arm's-length nature of the underwriter-issuer relationship, the lack of a fiduciary duty, the duty to balance pricing between the interests of the issuer and investors, and the underwriter's duty with respect to the official statement.

<sup>13</sup> The arm's-length nature of the underwriter-issuer relationship is a component of the Rule G-23 Interpretation. *See* footnote 5 *supra*.

<sup>14</sup> The arm's-length nature of the underwriter-issuer relationship is a component of the SEC staff's Question 1.2: Treatment of Business Promotional Materials Provided By Potential Underwriters Under the General Information Exclusion from Advice, Registration of Municipal Advisors, Frequently Asked Questions, Office of Municipal Securities (last updated Sept. 20, 2017), available at <https://www.sec.gov/info/municipal/mun-advisors-faqs.shtml> (the "SEC Staff FAQs"), while the full set of role disclosures is a component of Question 5.1: Engagement to Serve as Underwriter, SEC Staff FAQs. Note that the underwriter exclusion under Exchange Act Section 15B(e)(4)(C) does not require such disclosure; rather, SEC staff reads into the exclusion, as a basic component, the role disclosures required under Rule G-17, effectively viewing the underwriter's compliance with its obligations under Rule G-17 as an underwriter as evidence of the requisite relationship with the issuer with respect to a particular issue of municipal securities for purposes of the underwriter exclusion.

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As noted above, SIFMA and its members believe that, during the early stages of the new municipal advisor regulatory structure being constructed at the time the 2012 Guidance was adopted, the role disclosures provided much needed clarity regarding the role of underwriters, as compared to municipal advisors, in connection with new issue offerings. In that context, even the most seasoned issuers benefited from being reminded of the distinction in the roles of underwriters and municipal advisors. It can fairly be argued that at this juncture, issuers generally have come to understand the different natures of these roles. Nonetheless, while repeated provision to issuers of these unchanging role disclosures is increasingly becoming less relevant given that the marketplace has adjusted to the new municipal advisor regulatory regime, we believe that, subject to the suggestions below in Section VI(F) of this letter, such disclosure requirement should not be changed, at least not without coordinated changes to the comparable requirements under the Rule G-23 Interpretation or the SEC Staff FAQs.

### **B. Content of Conflicts of Interest Disclosure**

The 2012 Guidance requires the underwriter in a negotiated offering to make a series of disclosures to the issuer about potential or actual material conflicts of interest, including but not limited to those relating to contingent compensation, certain payments to or from third parties, third-party marketing arrangements, certain profit-sharing arrangements with investors, certain credit default swap activities, and incentives to recommend a complex municipal securities financing.

While SIFMA and its members believe that meaningful disclosures to issuers of conflicts of interest on the part of underwriters is appropriate, we also believe that issuers in many cases are receiving excessive amounts of disclosures of potential and often remote conflicts that are of little or no practical relevance to issuers or the particular issuances and would benefit from more focused disclosure on conflicts that actually matter to them. Thus, we believe that the disclosure requirement should be limited to actual, and not merely potential, material conflicts of interest on the part of the underwriter.<sup>15</sup> We believe this change could reduce substantially the volume of ordinary course or “boilerplate” conflicts disclosures received by issuers and therefore

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<sup>15</sup> We also note that, in some cases, it appears that regulators conflate conflicts of interest that might exist on the part of other parties to a financing, including in particular conflicts on the part of issuer personnel, with conflicts on the part of the underwriter, and therefore regulators appear to expect that the conflicts disclosure under the 2012 Guidance should include these conflicts of other parties. SIFMA and its members request that the MSRB clarify that the 2012 Guidance does not require the underwriter to disclose conflicts on the part of parties other than the underwriter.

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ensure that issuers do not inadvertently overlook meaningful disclosures of actual material conflicts.

Furthermore, we believe that certain categories of potential conflicts identified in the 2012 Guidance do not merit being specifically called out for disclosure. For example, given the effectively universal practice – and often the necessity – of underwriting compensation being contingent in nature, we see no benefit to issuers in receiving repeated disclosure of the conflict that can be presented by contingent compensation. Instead, the MSRB can instead provide educational materials emphasizing this and any other similar conflicts that make up the bulk of boilerplate conflicts disclosure through its Electronic Municipal Market Access (EMMA) website or its Education Center webpage. SIFMA believes such an approach would strengthen this aspect of the 2012 Guidance.

While issuers may want to be made aware of third-party marketing arrangements in connection with their new issues, we do not believe that the conflicts disclosure requirement under the 2012 Guidance is the appropriate mechanism for ensuring that issuers understand the participation of such third-parties. For example, the existence of selling group members is not typically disclosed in this way. Currently, such information is most effectively conveyed through the syndicate formation process,<sup>16</sup> or could be part of any changes to syndicate formation practices under new MSRB rulemaking, and market practice has evolved to include disclosure in the official statement of such distribution/marketing relationships. The use of retail distribution agreements is not an activity involving suspicious payments to a third party and does not increase costs to issuers; rather, it simply passes on a discounted rate to a motivated dealer, which is commonly available to dealers after the bonds have become free to trade in any event, notwithstanding any agreement. If the MSRB believes that it is important to continue to require disclosure of these agreements, we request that the MSRB explain why such arrangements are seen as a material conflict of interest and why the requirement does not apply to selling group arrangements. Eliminating this disclosure would greatly reduce the need for disclosure letters under the 2012 Guidance by co-managers in large syndicates because the existence of third party distribution agreements is typically the only catalyst for co-manager disclosure under the 2012 Guidance.

In addition, the required disclosure regarding credit default swaps was included in the 2012 Guidance based on limited pre-financial crisis and pre-Dodd-Frank Act activities affecting a vanishingly small number of municipal issuers. The level of credit

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<sup>16</sup> See, e.g., MSRB Rule G-11(f); MSRB Rule G-14 RTRS Procedures Section (d)(vii) and (viii).

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default swap activity in the marketplace today is significantly smaller, calling into question whether this provision focused on a single type of financial product will become increasingly archaic. We believe this specific reference to credit default swaps should be deleted from the 2012 Guidance, acknowledging that such deletion does not mean that practices in connection with credit default swaps could never constitute a disclosable conflict, such as where an actual material conflict may arise from serving as underwriter to an issuer while also engaging in credit default swap activities related to such issuer.

### **C. Content of Transaction Disclosure**

The 2012 Guidance requires the underwriter in a negotiated offering that recommends to the issuer a so-called “complex municipal securities financing” to disclose the material financial characteristics of the financing, as well as the known or reasonably foreseeable material financial risks of the financing. The 2012 Guidance provides certain examples of complex municipal securities financings, such as variable rate demand obligation offerings or financings involving derivatives, and the types of matters disclosable with respect thereto. In addition, under certain circumstances, the 2012 Guidance also requires disclosure of the material aspects of the financing structure for financings that are routine and do not constitute complex municipal securities financings.

While SIFMA and its members would defer to the issuer community on the ultimate usefulness of the required transaction disclosures, we generally believe that the content of these transaction disclosures as described in the 2012 Guidance is appropriate and does not need to be changed, subject to the suggestions below in Section VI(F) of this letter. We note that the MSRB recently provided guidance on the meaning of recommendation under Rule G-42 with respect to municipal advisory activities, describing a two-prong analysis for determining whether advice is a recommendation for purposes of the rule.<sup>17</sup> SIFMA and its members request guidance as to whether this same two-prong analysis would apply for determining whether an underwriter has recommended a complex municipal securities financing.

### **D. Timing for Disclosures**

The 2012 Guidance establishes three distinct timeframes for delivering different portions of the required disclosure: for disclosure of the arm’s-length nature

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<sup>17</sup> FAQs Regarding MSRB Rule G-42 and Making Recommendations (June 2018); MSRB Notice 2018-12 (June 20, 2018).

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of the underwriter-issuer relationship, the earliest stages of the relationship (*e.g.*, in a response to a request for proposals or in promotional materials provided to an issuer); for other role disclosures and conflicts disclosures, when the underwriter is engaged to perform underwriting services (*e.g.*, in an engagement letter, not solely in a bond purchase agreement); and for transaction disclosure, in sufficient time before the execution of a contract with the underwriter to allow the issuer to evaluate the recommendation.<sup>18</sup> In the context of the establishment of an initial underwriter-issuer relationship, SIFMA believes that, subject to the suggestions below in Section VI(F) of this letter, these timeframes are generally appropriate, with the understanding that the notion of a formal engagement to serve as underwriter for an offering does not match the normal process by which underwriters are brought on to underwrite most issuers' offerings and therefore underwriters often use the communication by issuer personnel that they will participate in an offering as indicative of the timing for such disclosures.

SIFMA and its members wish to note their appreciation for the MSRB's recognition in the Implementation Guidance that not all transactions proceed on the same timeline or pathway so that sometimes precise compliance with the timeframes may be infeasible, and the MSRB's statement that such timeframes are not intended to establish hair-trigger tripwires resulting in technical rule violations so long as underwriters act in substantial compliance with the timeframes and have met the key objectives for providing the disclosures. We urge the MSRB to reconfirm this guidance, as well as to provide further recognition of alternative timeframes for meeting these obligations as suggested below.

In connection with underwriters that engage in one or more negotiated underwritings with a particular issuer, we believe that repeated identical disclosures provided in each transaction by the same underwriter to the same issuer may often only serve to inundate the issuer with useless information. SIFMA and its members recommend that an underwriter engaged in a negotiated offering with an issuer be permitted by the MSRB to fulfill its disclosure requirements under the 2012 Guidance with respect to such offering by reference to, or by reconfirming to the issuer, its disclosures provided within the preceding twelve (12) month period (*e.g.*, disclosures provided in connection with a prior offering during such period or provided on an annual basis in anticipation of serving as underwriter on offerings during the next twelve (12) months). Such reference or reconfirmation must be provided by no later

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<sup>18</sup> While the timing requirements include three distinct deadlines, the MSRB should make clear that underwriters can collapse the fulfillment of these requirements without awaiting each applicable deadline. For example, the inclusion of role disclosures, conflicts disclosures and/or transaction disclosures in a response to a request for proposals should be viewed as satisfying the applicable disclosure requirements so long as the content is complete and no subsequent changes occur.

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than execution of the bond purchase agreement and could be fulfilled in a representation contained in the bond purchase agreement. If during the course of such subsequent offering new or different disclosures become applicable (*e.g.*, if a new conflict of interest arises, or if the structure of a complex municipal securities transaction materially changes in a manner not previously disclosed), the underwriter would be required to provide such new or additional disclosures as contemplated by the 2012 Guidance – that is, in sufficient time before the execution of the bond purchase agreement to allow the issuer to evaluate the new disclosure. This or a similar alternative to transaction-by-transaction disclosure would be consistent with the more flexible approach permitted by the Commodity Futures Trading Commission (the “CFTC”) in connection with disclosures required by a swap dealer to a counterparty in counterparty relationship documentation or in an otherwise agreed upon writing.<sup>19</sup> Of course, an underwriter could still choose to provide its disclosures on a transaction-by-transaction basis as currently required under the 2012 Guidance.

#### **E. Trigger for Transaction Disclosures**

Under the 2012 Guidance, transaction disclosure for a routine financing (*i.e.*, not a complex municipal securities financing) is required only if the underwriter reasonably believes that issuer personnel lack knowledge or experience with such routine financing structure that the underwriter has recommended. In contrast, transaction disclosure for a complex municipal securities financing recommended by the underwriter is always required regardless of issuer personnel’s knowledge, expertise or experience in such complex municipal securities financing, although the level of disclosure required may vary according to the issuer’s knowledge or experience with the proposed financing structure or similar structures, capability of evaluating the risks of the recommended financing, and financial ability to bear the risks of the recommended financing.

SIFMA and its members believe that all transaction disclosures should be triggered based on the standard for triggering disclosures regarding routine financings, subject to the suggestions below in Section VI(F) of this letter. Thus, disclosures regarding a recommended financing would be required if the underwriter believes that issuer personnel lack knowledge or experience with the financing structure recommended by the underwriter. The underwriter’s belief would be based on the same factors described in the 2012 Guidance for determining the level of disclosure required, so that the trigger for providing transaction disclosure, and the level of disclosure required to be provided, would be based on personnel’s knowledge or experience with

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<sup>19</sup> See CFTC Rule 23.402(e) and (f). See also CFTC Rule 23.431.

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the proposed financing structure or similar structures, capability of evaluating the risks of the recommended financing, and financial ability of the issuer to bear the risks of the recommended financing.

#### **F. Disclosure Opt-In and Opt-Out**

Except with respect to the more targeted disclosures of actual material conflicts we recommend in this letter, which we believe should be delivered in all transactions (subject to our recommendations in the last paragraph of Section VI(D) above), SIFMA and its members believe that the invocation by an underwriter of the exemption under SEC Rule 15Ba1-1(d)(3)(vi) for an independent registered municipal advisor (“IRMA”) wherein the issuer would be relying on the advice of its IRMA in connection with the transaction should be deemed to satisfy any remaining disclosures under the 2012 Guidance due on or after the date the IRMA exemption is invoked. Thus, if an underwriter invokes the IRMA exemption in the earliest stages of a financing, such underwriter’s role disclosures and any otherwise required transaction disclosure would not be required,<sup>20</sup> unless the issuer opts in to receiving such disclosures notwithstanding its engagement of an IRMA to advise it.<sup>21</sup>

Furthermore, we believe that an issuer should be able to opt out of receiving the disclosures required under the 2012 Guidance, other than the conflicts disclosures, in a written election based on its knowledge, expertise, experience and financial ability, upon which the underwriter should be permitted to conclusively rely. Alternatively, the issuer could elect to provide its written opt-out to such disclosures without affirmatively stating the basis for such opt-out, provided that if (i) the underwriter has reason to believe that issuer personnel lack knowledge or experience with the structure of a recommended financing<sup>22</sup> and (ii) the issuer does not employ a municipal advisor

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<sup>20</sup> To the extent the role disclosures are fulfilled by invocation of the IRMA exemption, the MSRB should deem such disclosures as having been provided for purposes of Rule G-23 Interpretation. *See* footnote 13 *supra*. The invocation of the IRMA exemption would obviate the need to address the disclosures described in Questions 1.2 and 5.1 of the SEC Staff FAQs. *See* footnote 14 *supra*.

<sup>21</sup> For example, an issuer that posts an IRMA notice on its website could include in such notice opt-in language stating that it wishes to receive role disclosures and/or transaction disclosures notwithstanding the issuer’s engagement of an IRMA. The issuer’s opt-in could also be provided in a separate writing.

<sup>22</sup> The underwriter should be permitted to rely on issuer personnel’s prior experience with the same or similar financing structure in establishing that it does not have reason to believe that such personnel lacks the requisite knowledge or experience.

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for such financing,<sup>23</sup> the underwriter must nonetheless provide the required transaction disclosure.

### **G. Manner of Providing Disclosures and Seeking Acknowledgement**

SIFMA and its members find that the manner for providing required disclosures to the issuer under the 2012 Guidance is generally workable, even though the division of responsibility among syndicate members has contributed to the large amounts of disclosures issuers receive on new issues. We believe that our proposed modifications as described elsewhere in this letter will substantially reduce the volume of such disclosures overall and therefore also reduce the pressure to find additional means of consolidating disclosures by the various members of underwriting syndicates.

However, we believe the requirement for the underwriter to attempt to receive issuer acknowledgement and the efforts to document cases where the issuer does not provide such acknowledgement create a significant degree of non-productive work on the part of underwriter personnel and provide no value to the issuer, but often produce unwanted follow-up inquiries from the underwriter. The MSRB should eliminate the acknowledgement requirement and should instead rely on the same principles for delivery of notices otherwise applied to its other rules. More specifically, underwriters should be permitted to provide the disclosures in a manner consistent with the delivery of other documentation during the course of the transaction, and receipt of an e-mail return receipt should be conclusive proof of delivery if other transaction documentation has also been provided to the same e-mail address.

## **VII. Responses to Questions Posed in the Notice**

SIFMA provides below its answers to the specific questions posed by the MSRB in the Notice.

### **(1) What is the typical process, as implemented as a practical matter, for a dealer to provide the disclosures to issuers as required by the 2012 Guidance?**

In broad strokes, the disclosure aspects of the 2012 Guidance involve the making of disclosures at three stages, each of which triggers a series of activities relating to preparation of the required disclosures, identifying the appropriate issuer

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<sup>23</sup> For this purpose, the underwriter need not formally invoke the IRMA exemption so long as the issuer in fact is using a municipal advisor for the financing.

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personnel to receive each disclosure, providing the disclosure to such personnel, obtaining (or seeking to obtain) such personnel's acknowledgement of receipt, monitoring and providing any supplemental disclosures that may be required during the course of the financing, and properly documenting all of these activities, in each case for financings that may present different circumstances and different groupings of syndicate members. As such, there is no single process followed by underwriters throughout the market that can reasonably be described as typical. In connection with the adoption of the 2012 Guidance, a SIFMA committee drafted model disclosure documents designed to serve as a starting point for underwriters in preparing their disclosures concerning the underwriter's role, compensation, and conflicts, as well as regarding the material financial characteristics and risks inherent in certain complex transactions commonly recommended by underwriters.<sup>24</sup> Any underwriter using the model documents makes such modifications as it deems appropriate, and other underwriters have produced their own versions of disclosure documents.

**(2) The 2012 Guidance allows for syndicate managers to make the disclosures concerning the role of the underwriter and the underwriter's compensation on behalf of other syndicate members, as long as the other syndicate members make the other conflicts disclosures that are particular to them.**

**a. How often do syndicates utilize this option for making the disclosures? If it has been infrequent, please explain why.**

We believe that there are many cases where the syndicate manager may make the disclosures concerning the role of the underwriter on behalf of other members of the syndicate, but there are also many cases where some or all syndicate members will also provide these disclosures to the issuer themselves. One reason this may be the case is that each syndicate member is obligated to provide its own disclosure of actual or potential conflicts of interest, and it is often procedurally easier to combine role disclosures and conflicts disclosures into a single document. Another reason may be that a particular underwriter has determined not to rely on another firm's actions to meet the underwriter's own regulatory obligations, or only permits such reliance upon confirmation that the syndicate manager has provided the required disclosure and has found that providing its own disclosure may be administratively easier than obtaining confirmation of the syndicate manager's disclosure.

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<sup>24</sup> SIFMA model documents for the municipal securities market, including model disclosure documents under the 2012 Guidance, are available at <https://www.sifma.org/resources/general/municipal-securities-markets>.

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Note that, because the disclosure regarding the arm's-length nature of the issuer-underwriter relationship must be provided at the earliest stage of the relationship and serves purposes beyond just the 2012 Guidance, many underwriting firms have included this disclosure (and in many cases the other role disclosures) on a wide range of communications with potential issuers that might be viewed as constituting an initial contact with such potential issuers as a prophylactic approach to avoiding inadvertently violating the 2012 Guidance or inadvertently being deemed a municipal advisor. Thus, while this particular disclosure may also be included in the set of role disclosures provided by a syndicate manager or individual syndicate members, in many cases that wider set of disclosures will occur later than the deadline for providing the disclosure on the arm's-length relationship.

**b. To the extent it has been used, has this option been effective? If not, how could it be improved?**

While this option may, in a subset of offerings, be effective in partially reducing the amount of duplicative disclosures that would otherwise have been provided, it is unlikely that this option could result in significant further reduction in duplicative disclosures without instituting modifications of the type suggested above, including in particular the narrowing of the scope of conflicts disclosure as described in Section VI(B) above and the rationalization of the frequency of disclosures for multiple underwritings with a particular issuer as described in Section VI(D) above.

**c. Does the senior manager or any other dealer explain the disclosures to the issuer client or are they simply provided without any further discussion?**

Practices in regard to any explanation of role disclosures likely vary considerably depending on the particular underwriter, the particular issuer and the prior experience between the issuer and the underwriter. It should be noted that the statements that make up the role disclosures (as well as whether compensation is contingent) are not difficult to understand on their face and normally are well understood by issuer personnel without further explanation or were well understood before the 2012 Guidance became effective.

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**(3)<sup>25</sup> Do dealers typically provide disclosures to both conduit issuers and conduit borrowers?**

The 2012 Guidance by its terms does not require disclosures to conduit borrowers. However, it is common (although perhaps not universal) for underwriters to provide to a conduit borrower a copy of the disclosures provided to the issuer.

**(4) Has the 2012 Guidance, particularly relating to required disclosures, achieved its intended purpose of promoting fair dealing by underwriters with issuers? If no, what are the problems?**

SIFMA and its members believe that the 2012 Guidance has been, for the most part, successful at achieving its purpose of promoting fair dealing by underwriters with issuers. Certain weaknesses undermining the effectiveness of the disclosure aspects of the 2012 Guidance and potential modifications that could achieve meaningful improvements to the 2012 are discussed above in this letter and in our further responses below.

**a. Are the disclosures too boilerplate and/or too voluminous? If so, what are the consequences?**

SIFMA and its members believe that some aspects of the required disclosures have become boilerplate and too voluminous, which creates additional burdens to underwriters with no countervailing benefit, serve to obscure particularized disclosures that are material and should be well understood, and create confusion, frustration and unnecessary administrative activities for underwriters and many issuers.

**b. Are issuers overly burdened?**

While we defer to issuers on the question of whether they are overly burdened by the disclosures required under the 2012 Guidance, we do believe that excessive meaningless disclosures could not reasonably be viewed as beneficial to issuers and, as noted above, creates confusion, frustration and unnecessary administrative activities for many issuers.

**c. Are any problems with the 2012 Guidance the same or different for issuers of different sizes?**

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<sup>25</sup> This and the following questions have been renumbered for continuity.

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While size of issuer may have some indirect bearing on any problems with the 2012 Guidance, it is more appropriate to focus on the knowledge, expertise and experience of issuer personnel, as well as the issuer's access to the advice of a municipal advisor, as the basis for determining whether more or less disclosure is appropriate in regard to an offering with such issuer.

**d. Are the disclosures required to be provided at appropriate points in time in the course of the transaction?**

SIFMA and its members believe that the points in time during the course of a particular transaction for the delivery of disclosures as provided in the 2012 Guidance are generally appropriate, subject to the observations and suggestions described in Section VI(D) above.

**e. Is the issuer's acknowledgment of receipt of the disclosures necessary and meaningful?**

For the reasons described in Section VI(G) above, SIFMA and its members strongly believe that the issuer's acknowledgement of receipt of disclosures do not provide any benefit, create significant burdens and should be eliminated. Underwriters should be permitted to provide the disclosures in a manner consistent with the delivery of other documentation during the course of the transaction, and receipt of an e-mail return receipt should be conclusive proof of delivery if other transaction documentation has also been provided to the same e-mail address.

**(5) Should the MSRB amend the 2012 Guidance? If so, what are alternative approaches that could better achieve the intended purpose?**

SIFMA and its members outline above in this letter certain limited modifications to the 2012 Guidance that the MSRB should make that would greatly enhance the effectiveness of the disclosure aspects of the 2012 Guidance while significantly reducing the burden on compliance.

**a. Should the requirements be reduced or otherwise modified for different classes of issuers?**

**i. If so, how should those classes be defined?**

**1. Based on size?**

As noted above, while size of issuer may have some indirect bearing on any problems with the 2012 Guidance, it is more appropriate to focus on the knowledge,

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expertise and experience of issuer personnel, as well as the issuer's access to the advice of a municipal advisor, as the basis for determining whether more or less disclosure is appropriate in regard to an offering with such issuer.

**2. Based on frequency in the market?**

As described in Section VI(D) above, we believe that frequent issuers would greatly benefit from the 2012 Guidance being modified to allow underwriters that participate in multiple offerings for such issuers to rationalize their disclosures by making an initial set of full disclosures and thereafter disclosing any material changes that may occur during the course of subsequent offerings.

**3. Relative to whether the issuer has an independent registered municipal advisor that is advising the issuer on the transaction?**

As described in Section VI(F) above, we believe that, the requirement to provide role and transaction disclosures should be deemed satisfied if the underwriter has invoked the IRMA exemption, with certain exceptions described above, and can otherwise be affected if the issuer engages a municipal advisor.

**4. Based on the presence of dedicated issuer staff for debt management?**

As described in Section VI(E) above, SIFMA and its members believe that the 2012 Guidance should focus on the knowledge, expertise and experience of such dedicated issuer staff for debt management as the basis for determining whether disclosure, and what level of such required disclosure, is appropriate in regard to an offering by such issuer.

**ii. If so, how should the requirements be modified? Should issuers of any particularly defined class be able to opt out of receiving the disclosures?**

As described in Section VI(F) above, we believe that an issuer should be able to opt out of receiving role disclosures and transaction disclosures, subject to certain conditions described therein.

**b. Should all issuers be able to opt out of receiving the disclosures?**

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While SIFMA and its members believe that all issuers could presumably be able to opt out of receiving role disclosures and transaction disclosures, transaction disclosures may still be required under certain circumstances described in Section VI(F) above.<sup>26</sup> We further believe that issuers should not be able to opt out of receiving disclosures of the more targeted universe of actual material conflicts, as described in Sections VI(B) and VI(F) above.

**c. Should the frequency of making the disclosures to issuers be reduced? If so, how (e.g., once per year unless there are material changes to any of the information provided and/or other new information requiring additional disclosure)?**

As described in Section VI(D) above, where an underwriter engages in one or more negotiated underwritings with a particular issuer, the underwriter should be permitted to fulfill its disclosure requirements with respect to an offering by reference to, or by reconfirming to the issuer, its disclosures provided within the preceding twelve (12) month period (*e.g.*, disclosures provided in connection with a prior offering during such period or provided on an annual basis in anticipation of serving as underwriter on offerings during the next twelve (12) months). Such reference or reconfirmation must be provided by no later than execution of the bond purchase agreement and could be fulfilled in a representation contained in the bond purchase agreement. If during the course of such subsequent offering new or different disclosures become applicable (*e.g.*, if a new conflict of interest arises, or if the structure of a complex municipal securities transaction materially changes in a manner not previously disclosed), the underwriter would be required to provide such new or additional disclosures as contemplated by the 2012 Guidance – that is, in sufficient time before the execution of the bond purchase agreement to allow the issuer to evaluate the new disclosure.<sup>27</sup> An underwriter could, alternatively, still choose to provide its disclosures on a transaction-by-transaction basis as currently required under the 2012 Guidance.

**d. Could or should EMMA be a tool to improve the utility of disclosures and the process for providing them to issuers (e.g., use EMMA to display**

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<sup>26</sup> As described above in Section VI(F), role disclosures and transaction disclosures for any issuer, regardless of type or size, should be deemed satisfied if the IRMA exemption is invoked, unless the issuer has opted-in to receive such disclosures.

<sup>27</sup> This approach would be consistent with the more flexible approach permitted by the CFTC in connection with swap disclosures under CFTC Rule 23.402(e) and (f) and Rule 23.431. *See* footnote 19 *supra*.

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**more general disclosures but continue to require client- and deal-specific disclosures be provided directly to issuers by the dealers)?**

As described in Section VI (B) above, we believe that certain categories of potential conflicts of interest do not merit being specifically called out for disclosure to issuers on a transaction-by-transaction basis. Since many potential conflicts (as opposed to actual conflicts) apply broadly to the marketplace, we believe that such information would most effectively and efficiently be made available to issuers through educational materials provided by the MSRB through the EMMA website or on the MSRB's Education Center webpage.

**e. Has the level of detail provided by the MSRB in the disclosure requirements been useful in promoting compliance?**

**i. If so, would greater prescription for any of the requirements be beneficial?**

**ii. If not, should that prescription be modified? If so, how?**

Subject to suggested changes described in this letter, we believe that the 2012 Guidance, together with the Implementation Guidance and the FAQs, generally provides the level of detail needed to promote compliance. As described in Section II above, if the MSRB were to ultimately make any changes through a formal rulemaking process to the 2012 Guidance, SIFMA and its members believe that it would be critical to incorporate or otherwise preserve the guidance included in the Implementation Guidance and FAQs, with any modifications appropriate in light of the changes to the 2012 Guidance.

**f. Have the sample disclosures provided by the MSRB in Exhibit A to MSRB Notice 2013-08 been useful in facilitating compliance, and to what extent has the sample been adopted? Should it be revised?**

We believe that the sample disclosure provided in Exhibit A to the FAQs has been useful in facilitating compliance and is used by many underwriters.

**(6) What have been the costs or burdens, direct, indirect or inadvertent, of complying with the 2012 Guidance? Are there data or other evidence, including studies or research, that support commenters' cost or burden estimates?**

SIFMA has not calculated the costs or burdens of complying with the 2012 Guidance, and is not aware of any such calculation by any other party. Nonetheless, it

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is clear that such costs or burdens are substantial and reasonable efforts to curtail them, as described in this letter, would be appropriate.

**(7) Aside from the disclosure requirements, are there any other requirements addressed in the 2012 Guidance that should be modified or removed or new requirements that should be added?**

As described in Sections IV and V above, SIFMA and its members believe that the portions of the 2012 Guidance relating to prohibitions on misrepresentations and the fairness of financial aspects of an underwriting have been beneficial to the marketplace and to the protection of issuers and therefore should be preserved.

**VIII. Conclusion**

SIFMA and its members appreciate the MSRB's commitment to retrospective review of the 2012 Guidance. We believe that, as a general matter, significant portions of the 2012 Guidance have been beneficial to the marketplace and to the protection of issuers and that the disclosure aspects of the 2012 Guidance would be enhanced by focusing the range of required conflicts disclosures. We also believe that certain changes with respect to the timing and manner of providing disclosures, as well as circumstances where certain disclosures may not be required, would be appropriate and would improve the effectiveness of the 2012 Guidance. We would be pleased to discuss any of these comments in greater detail, or to provide any other assistance that

Mr. Ronald W. Smith  
Corporate Secretary  
Municipal Securities Rulemaking Board  
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would be helpful. If you have any questions, please do not hesitate to contact the undersigned at (212) 313-1130.

Sincerely yours,

A handwritten signature in black ink, appearing to be 'L. Norwood', written over a faint, light-colored signature line.

Leslie M. Norwood  
Managing Director and Associate  
General Counsel

cc: ***Municipal Securities Rulemaking Board***  
Lynnette Kelly, President and Chief Executive Officer  
Lanny Schwartz, Chief Regulatory Officer  
Michael Post, General Counsel  
Carl Tugberk, Assistant General Counsel



**J. BEN WATKINS III**  
DIRECTOR

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**ADAM H. PUTNAM**  
COMMISSIONER OF AGRICULTURE

August 8, 2018

Ronald W. Smith  
Corporate Secretary  
Municipal Securities Rulemaking Board  
1300 I Street NW, Suite 1000  
Washington, DC 20005

Re: Comment on 2012 Interpretive Guidance on the Application of MSRB Rule G-17

Dear Mr. Smith:

This letter is in response to the request for comments on the 2012 Interpretive Guidance on the application of MSRB Rule G-17. As a frequent issuer and market participant, we believe that current market practices miss the mark on successfully fulfilling the purpose of the rule. Frequently, the required disclosures by underwriters function as a "check-the-box" item more than a meaningful communication with issuers.

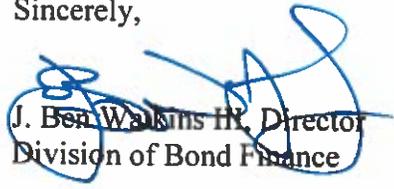
Since the issuance of the interpretive guidance, underwriters have devoted substantial time and effort to craft the required disclosures and obtain issuer acknowledgment of receipt of the disclosures. From the issuer perspective, these efforts offer little value because they are too long and complicated. The disclosures provided to issuers are boilerplate, and may inadvertently bury disclosures of specific conflicts and risks within pages of nonmaterial information and legalese. Also, such disclosures are duplicative when multiple underwriters are involved in the same transaction. More sophisticated issuers do not need the boilerplate disclosures and infrequent or unsophisticated issuers may not understand their import, particularly as it relates to the nature of the underwriter's obligations to its issuer clients. A "one size fits all" approach to such disclosures is not effective, and instead issuers could benefit from underwriters tailoring such disclosures based on issuer size and sophistication.

We believe the interpretive guidance should be modified to encourage the use of plain language to clearly and concisely communicate with issuers the required disclosures, including the nature of the underwriter's relationship with the issuer, material conflicts of interest, and risks of the proposed transaction to the issuer. This will ensure that pertinent information is

meaningfully and clearly communicated to issuers, without creating unnecessary administrative compliance burdens for underwriters and confusion for unsophisticated issuers.

These are our thoughts based on our experiences. Thank you for your consideration.

Sincerely,



J. Ben Watkins III, Director  
Division of Bond Finance

# MSRB Notice

## 2018-29

### Publication Date

November 16, 2018

### Retrospective Rule Review



### Stakeholders

Municipal Securities  
Dealers, Municipal  
Advisors, Issuers,  
Investors

### Notice Type

Request for Comment

### Comment Deadline

January 15, 2019

### Category

Fair Practice

### Affected Rules

[Rule G-17](#)

## Request for Comment on Draft Amendments to 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities

### Overview

As part of its ongoing retrospective review of its rules and published interpretations, the Municipal Securities Rulemaking Board (MSRB) is requesting comment on draft amendments to interpretive guidance it issued in 2012 on the application of MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities, to underwriters of municipal securities (“2012 Guidance”).<sup>1</sup> This request for comment (“Request for Comment”) is intended to elicit views and input from all interested parties on the benefits and burdens of, and possible alternatives to, the draft amendments. The comments will assist the MSRB in determining whether to adopt the draft amendments. The primary purpose of the draft amendments would be to clarify certain fair-dealing obligations of underwriters, improve market practices, better protect issuers and reduce the burdens on market participants.

Comments should be submitted no later than January 15, 2019, and may be submitted in electronic or paper form. [Comments may be submitted electronically by clicking here.](#) Comments submitted in paper form should be sent to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board, 1300 I Street NW, Suite 1000, Washington, DC 20005. All comments will be available for public inspection on the MSRB’s website.<sup>2</sup>

<sup>1</sup> The 2012 Guidance is incorporated into the MSRB Rule Book under Rule G-17. [Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities](#) (Aug. 2, 2012).

<sup>2</sup> Comments generally are posted on the MSRB’s website without change. For example, personal identifying information such as name, address, telephone number, or email address will not be edited from submissions. Therefore, commenters should only submit information that they wish to make available publicly.



Receive emails about  
MSRB Notices.

Questions about this notice should be directed to Lanny A. Schwartz, Chief Regulatory Officer, or Carl E. Tugberk, Assistant General Counsel, at 202-838-1500.

## Background

Rule G-17 requires that, in the conduct of municipal securities activities, brokers, dealers and municipal securities dealers (collectively, “dealers”) deal fairly with all persons, including issuers, and shall not engage in any deceptive, dishonest or unfair practice. The 2012 Guidance describes certain fair-dealing obligations to issuers when acting as an underwriter. The MSRB supplemented the 2012 Guidance with implementation guidance (the “Implementation Guidance”)<sup>3</sup> and answers to frequently-asked questions (the “FAQs”)<sup>4</sup> to assist dealers in revising their written supervisory procedures, to clarify certain aspects of the 2012 Guidance and to address certain operational concerns.

The 2012 Guidance was adopted to promote fair dealing by underwriters with issuers, in part, by requiring disclosures to issuers related to underwriters’ relationships with them, and the nature and risks of the transactions recommended by the underwriters. In response to feedback from some market participants regarding their experience with these requirements and the effectiveness of the required disclosures, the MSRB initiated a retrospective review of the 2012 Guidance and published a request for comment (the “Initial Request for Comment”) to determine whether amendments to the 2012 Guidance should be considered to help ensure that it continues to achieve the intended purpose and reflects the current state of the municipal securities market.<sup>5</sup>

The MSRB received five comment letters in response to the Initial Request for Comment,<sup>6</sup> all of which supported the retrospective review and

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<sup>3</sup> [MSRB Notice 2012-38](#) (July 18, 2012).

<sup>4</sup> [MSRB Notice 2013-08](#) (Mar. 25, 2013).

<sup>5</sup> [MSRB Notice 2018-10](#) (June 6, 2018).

<sup>6</sup> See Letters from: [Mike Nicholas, Chief Executive Officer, Bond Dealers of America](#) (BDA), dated August 6, 2018; [Emily S. Brock, Director, Federal Liaison Center, Government Finance Officers Association](#) (GFOA), dated August 6, 2018; [Susan Gaffney, Executive Director, National Association of Municipal Advisors](#) (NAMA), dated August 6, 2018; [Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association](#) (SIFMA), dated August 6, 2018; and [J. Ben Watkins III, Director,](#)

suggested modifications to the 2012 Guidance. The comments received, in addition to continuing dialogue with industry stakeholders, formed the foundation for this Request for Comment.

## Draft Amendments<sup>7</sup>

This section describes draft amendments to the 2012 Guidance, including the MSRB's analysis of the relevant comments. Each subsection includes questions relevant to the draft amendments addressed specifically therein, and more general questions are included at the end of this Request for Comment. If adopted by the MSRB and approved by the Securities and Exchange Commission (SEC), the 2012 Guidance, as modified by the draft amendments (the "Amended Guidance"), would incorporate the practical considerations contained in the Implementation Guidance and the content of the FAQs that remain applicable, and would supersede the 2012 Guidance, the Implementation Guidance and the FAQs. If the MSRB were to propose amending the 2012 Guidance formally with the SEC, the MSRB would propose that the 2012 Guidance remain in effect with respect to underwriting engagements commenced prior to the date that is three months after the date of publication of an MSRB notice, announcing the adoption of the Amended Guidance, at which time, underwriters would then be required to comply with the new requirements for all of their underwriting engagements beginning on or after that date.<sup>8</sup>

### I. Nature, Timing and Manner of Disclosures of Conflicts of Interest

In general, the 2012 Guidance requires disclosures concerning the following: (1) the role of the underwriter; (2) the underwriter's compensation (collectively, with the disclosures concerning the role of the underwriter, as described below, the "standard disclosures"); (3) other actual and potential material conflicts disclosures (the "dealer-specific disclosures"); and (4) the material aspects of such structures that the underwriter recommends (the "transaction-specific disclosures"). The Amended Guidance would use these defined terms to clarify the requirements for the various types of disclosures.

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[State of Florida, Division of Bond Finance of the State Board of Administration](#) ("Florida Division of Bond Finance"), dated August 8, 2018.

<sup>7</sup> The costs and benefits of each of the draft amendments are considered in the Economic Analysis, *infra*.

<sup>8</sup> For purposes of the Amended Guidance, an underwriting engagement would begin at the time the first disclosure requirement is triggered (*i.e.*, the earliest stages of the underwriter's relationship with the issuer with respect to an issue).

### **A. Disclosures Concerning the Underwriter's Compensation**

The 2012 Guidance requires underwriters to disclose whether their compensation is contingent on the closing or size of their recommended transactions. SIFMA suggested eliminating this requirement because contingent underwriting compensation effectively is a universal practice. The MSRB does not believe it is appropriate to eliminate the requirement, as the contingent nature of underwriting compensation continues to present an inherent conflict of interest. Instead, in recognition of the fact that contingent compensation applies to virtually all underwriting engagements, the MSRB is proposing that it be included with the disclosures concerning the role of the underwriter in the standard disclosures. However, if a dealer underwrites an issuer's offering with an alternative compensation structure that is not contingent on the closing or size of the transaction, the dealer would need to indicate that the standard disclosure on underwriter compensation does not apply and explain the alternative structure as part of the transaction-specific disclosures to the extent that such alternative structure also presents a conflict of interest.

#### **Question(s)**

1. Are there variations to contingent underwriting compensation that would make it burdensome for underwriters to disclose them as part of the standard disclosures?
2. Are there alternatives to contingent underwriting compensation that are in common use in the municipal securities market? If so, what are they, how often and why are they used, and do they present material conflicts of interest?

### **B. Potential Material Conflicts of Interest**

As noted above, the dealer-specific disclosures include actual and potential material conflicts of interest. SIFMA believes the dealer-specific disclosures should be limited to actual material conflicts of interest to reduce the volume of disclosures, particularly those that SIFMA considers to be "boilerplate," and to ensure that issuers do not inadvertently overlook meaningful disclosures. GFOA noted that the 2012 Guidance may not be achieving its

intended purpose because, in GFOA's view, underwriters currently provide voluminous general disclosures that are not focused on the actual conflicts.<sup>9</sup>

SIFMA's and GFOA's concerns appear to be based on the belief that lengthy disclosure of remote conflicts of interest unlikely to occur dilute from more important disclosures required by the 2012 Guidance. The MSRB concurs that a long list of generic boilerplate disclosures may provide little actionable information and potentially could distract issuers' attention from conflicts of interest that are more concrete in relation to the specific transaction and the specific parties, facts and circumstances at hand. The MSRB believes the 2012 Guidance can be refined to avoid the unnecessary disclosure of such boilerplate conflicts of interest and still capture potential material conflicts of interest that likely could have an impact on the issuer. Accordingly, the Amended Guidance would clarify that a potential material conflict of interest must be disclosed if, but only if, it is reasonably foreseeable that it will mature into an actual material conflict of interest during the course of the transaction between the issuer and the underwriter.

### Question(s)

1. Is limiting what constitutes a potential material conflict of interest to only those material conflicts of interest that are reasonably foreseeable to mature into actual material conflicts of interest during the course of the transaction an appropriate standard, and is it sufficiently clear to be implemented by underwriters?
2. Should the standard require a greater likelihood than "reasonable foreseeability" that a potential material conflict of interest will mature into an actual material conflict of interest (*e.g.*, "high probability")?
3. Are there alternative standards that would better avoid or limit the unnecessary disclosure of boilerplate conflicts of interest and still capture potential material conflicts of interest that likely could have an impact on the issuer?
4. Does the ongoing obligation requiring underwriters to provide disclosures of actual material conflicts of interest discovered or arising after the underwriter has been engaged eliminate or reduce

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<sup>9</sup> For example, Section III of the [SIFMA Model Underwriter Disclosures Pursuant to MSRB Rule G-17](#) includes a long, non-exhaustive list of potential material conflicts of interest, such as possible conflicts associated with distribution agreements, profit-sharing agreements with investors, credit default swaps, and other issuer securities or loans held by the underwriter.

the need to disclose potential material conflicts of interest? What if such a material conflict of interest is not discovered or does not arise until after the execution of a contract with the underwriter or otherwise does not allow an issuer sufficient time to evaluate the underwriter's recommendation?

**C. Syndicate Manager Disclosure of Standard and Transaction-Specific Disclosures on Behalf of Syndicate Members**

Under the 2012 Guidance, a syndicate manager may make the standard disclosures on behalf of other syndicate members. BDA commented that large, frequent issuers receive so many disclosures because co-managers of a syndicate do not exercise their ability to make the required disclosures collectively in this manner and recommends that the MSRB amend the 2012 Guidance to clarify that underwriters are only required to provide dealer-specific disclosures. The Florida Division of Bond Finance also recognized the issue of duplication when there is a syndicate, and NAMA believes syndicate members should not be allowed to provide boilerplate disclosures when they are provided by the syndicate manager. Finally, SIFMA noted that dealers do not consistently utilize the option of having a syndicate manager make the standard disclosures on behalf of other syndicate members and suggested that may be because it is procedurally easier for them to provide these disclosures with their dealer-specific disclosures or because it may be more difficult or risky to rely on the syndicate manager.

Given the position of most of the commenters that disclosures provided by a syndicate often are duplicative and, therefore, voluminous, the MSRB believes that requiring, rather than permitting, the standard disclosures to be made by a syndicate manager on behalf of the other syndicate members would promote consistent and complete disclosure to issuers, while reducing the likelihood of issuers receiving multiple duplicative standard disclosures in potentially inconsistent manners. The MSRB believes these same benefits would accrue if such a requirement also were extended to the transaction-specific disclosures, which should not vary, as all the syndicate members are party to the same transaction with the issuer. Ultimately, the MSRB believes such a requirement would simplify issuers' review of transaction-specific disclosures and allow them to focus more closely on any dealer-specific disclosures, which would continue to be required for each underwriter in the syndicate. Accordingly, the MSRB is proposing to require the senior manager to provide the standard and transaction-specific disclosures on behalf of the other members of the syndicate.

The MSRB also believes that this mandate in the Amended Guidance would make the process procedurally easier for dealers participating in an

underwriting syndicate because they would be able to uniformly rely on syndicate managers for all disclosures but their dealer-specific disclosures. Under the Amended Guidance, syndicate managers would have sole responsibility for providing the standard and transaction-specific disclosures, including, but not limited to, determining the level of disclosure required based on the type of financing recommended and a reasonable belief of the issuer's knowledge and experience regarding that type of financing.<sup>10</sup>

### Question(s)

1. If the 2012 Guidance is amended to require a syndicate manager to provide the standard and transaction-specific disclosures on behalf of the syndicate, should the syndicate manager be solely responsible for the content of those disclosures or failing to deliver them, or should the other syndicate members have regulatory liability for any non-compliance? If yes, what would be an effective mechanism or process to help ensure that syndicate members will agree on the content of the standard and transaction-specific disclosures?
2. If the 2012 Guidance is amended to require a syndicate manager to provide the standard and transaction-specific disclosures on behalf of a syndicate, should the other syndicate members continue to be required to obtain acknowledgement of receipt from the issuer? Should the other syndicate members be required to make and preserve records of the standard and transaction-specific disclosures provided to, and the acknowledgement of receipt of those disclosures received from, the issuer?
3. If the 2012 Guidance is amended to require a syndicate manager to provide the standard and transaction-specific disclosures on behalf of a syndicate, should the MSRB require the syndicate manager to bifurcate its disclosures to provide the standard and transaction-specific disclosures on behalf of the entire syndicate separately from its own dealer-specific disclosures?

### D. Optional Alternative Manner of Providing Standard Disclosures

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<sup>10</sup> As the dealer delivering the standard and transaction-specific disclosures to the issuer, only the syndicate manager would be required to obtain the required acknowledgement of issuer receipt, and to maintain and preserve records of the disclosures made on behalf of the syndicate in accordance with MSRB rules.

Currently, underwriters are required to provide issuers all of the disclosures on a transaction-by-transaction basis. SIFMA suggested an alternative manner of providing the required disclosures to address the issues of volume and duplication, and to reduce the burdens on both dealers and issuers. Specifically, SIFMA proposed that, when an underwriter engages in one or more negotiated underwritings with a particular issuer, the underwriter should be able to fulfill its disclosure requirements with respect to an offering by reference to, or by reconfirming to the issuer, its disclosures provided in the previous 12 months (*e.g.*, disclosures provided in connection with a prior offering during such period or provided on an annual basis in anticipation of serving as underwriter on offerings during the next 12 months). Under this construct, SIFMA explained that the underwriter would be required to provide any new disclosures or changes to previously disclosed information when they arise. SIFMA recommended that this manner of providing disclosures would be an alternative and that an underwriter could continue to provide its disclosures on a transaction-by-transaction basis. GFOA indicated that providing non-material or boilerplate disclosures annually might improve the disclosure process, but NAMA believes it would be difficult to make disclosures on an annual basis without the need for supplementary material throughout the year and, therefore, commented that the easiest manner of disclosure delivery is to leave the relevant portions of the 2012 Guidance unchanged.

The MSRB believes there is merit to SIFMA's suggestion and proposes amending the 2012 Guidance to allow for an optional alternative to transaction-by-transaction standard disclosures. Specifically, the MSRB is proposing to permit sole underwriters or syndicate managers (when there is a syndicate) to provide standard disclosures to an issuer one time and then to provide them subsequently by reference to and reconfirmation of those initial standard disclosures, in writing, unless the issuer requests that the standard disclosures be made on a transaction-by-transaction basis. If the initial standard disclosures needed to be amended, the syndicate manager would be required to deliver such amended standard disclosures on behalf of the syndicate. In cases where syndicate members were, themselves, subsequently sole underwriters or syndicate managers for the same issuer, they could refer to and reconfirm the initial or amended standard disclosures provided by the syndicate manager of the prior offering in the manner provided below. The initial standard disclosures and amended standard disclosures (as described in note 12 below) would need to comply with the various timing requirements currently established in the 2012 Guidance (*e.g.*, disclosure concerning the underwriter's relationship with the issuer must be made in the earliest stages of the underwriter's relationship with the issuer with respect to an issue), and then the timing of the reference back to and

reconfirmation of those disclosures also would need to be consistent with those same requirements vis-à-vis the subsequent offerings.<sup>11</sup>

To be effective and compliant with the proposed alternative, the reference back and reconfirmation would need to identify clearly when the standard disclosures were made previously and make them readily accessible to the issuer in a hard copy or electronic format (*e.g.*, including a functional hyperlink to the original disclosure).<sup>12</sup> Additionally, a sole underwriter or syndicate manager (when there is a syndicate) must retain an original of the standard disclosures for the period of time required by MSRB Rule G-9, on preservation of records,<sup>13</sup> but that retention period would reset each time the letter is referenced and reconfirmed.<sup>14</sup>

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<sup>11</sup> SIFMA urged the MSRB to reconfirm language included in the Implementation Guidance that acknowledged that not all transactions proceed on the same timeline or pathway so that sometimes precise compliance with the timeframes may be infeasible, and additional language that such timeframes are not intended to establish hair-trigger tripwires resulting in technical rule violations so long as underwriters act in substantial compliance with the timeframes and have met the key objectives for providing the disclosures. The MSRB continues to acknowledge that not all transactions proceed along the same timeline or pathway; however, the Implementation Guidance was never intended to diminish the obligations established by the timing requirements or to suggest non-compliance with those requirements was acceptable as an ordinary course of business. Accordingly, the incorporation of the Implementation Guidance on this point modifies the relevant language to clarify the requirements accordingly.

<sup>12</sup> A dealer acting as a sole underwriter or syndicate manager that previously participated as a syndicate member in an offering for which the previous syndicate manager provided the standard disclosures on behalf of the other syndicate members would be able to reference back to and reconfirm the standard disclosures provided by the previous syndicate manager, as long as that dealer otherwise satisfies any applicable requirements, including to make those standard disclosures readily accessible to the issuer. In this scenario, the standard disclosures from a prior offering with the issuer referenced and reconfirmed by the syndicate manager would be provided on behalf of, and operative for, all of the syndicate members, even if they were not a part of the syndicate for the prior offering. Alternatively, the dealer could supply the standard disclosures to the issuer on behalf of the new syndicate as further discussed herein.

<sup>13</sup> Rule G-9(b)(viii)(C) requires “all written and electronic communications received and sent, including inter-office memoranda, relating to the conduct of the activities of such municipal securities broker or municipal securities dealer with respect to municipal securities” to be retained for not less than four years (or three years for each dealer that is a bank or subsidiary or department or division of a bank).

<sup>14</sup> For example, if a sole underwriter, which is not a bank or subsidiary or department or division of a bank, provided an issuer with initial standard disclosures in a letter on June 14, 2020, Rule G-9 would require the underwriter to retain that original letter until June 14, 2024. However, if the underwriter engages with the same issuer in a subsequent

By allowing underwriters to use this alternative manner of providing issuers the standard disclosures (unless an issuer requests otherwise), the volume and frequency of disclosures should decrease significantly, and the ongoing disclosure process between underwriters and issuers that work together repeatedly should be more streamlined and efficient, reducing the current burdens on both issuers and underwriters. As noted above, this is an optional, alternative manner of providing the disclosures; underwriters could continue to provide standard disclosures on a transaction-by-transaction basis. Additionally, the use of this alternative would not alter the obligations to deliver dealer-specific disclosures and transaction-specific disclosures on a transaction-by-transaction basis.

The following chart is intended to illustrate how the alternative to provide standard disclosures would work in practice, including in conjunction with the proposed requirement that syndicate managers make the standard and transaction-specific disclosures on behalf of the other syndicate members.

ISSUANCE #1 FOR ISSUER X			
Dealer	Standard Disclosures	Transaction-Specific Disclosures	Dealer-specific disclosures
<b>A Syndicate Manager (SM)</b>	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer A, on behalf of itself
<b>B</b>	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer B, on behalf of itself
<b>C</b>	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer C, on behalf of itself
ISSUANCE #2 FOR ISSUER X			
Dealer	Standard Disclosures	Transaction-Specific Disclosures	Dealer-specific disclosures
<b>B Syndicate Manager (SM)</b>	Reference back to and reconfirmation of the standard disclosures provided by Dealer A in Issuance #1 permitted	Provided by Dealer B, as SM, on behalf of the syndicate	Provided by Dealer B, on behalf of itself
<b>C</b>	Provided by Dealer B, as SM, on behalf of the syndicate	Provided by Dealer B, as SM, on behalf of the syndicate	Provided by Dealer C, on behalf of itself
<b>D</b>	Provided by Dealer B, as SM, on behalf of the syndicate	Provided by Dealer B, as SM, on behalf of the syndicate	Provided by Dealer D, on behalf of itself
ISSUANCE #3 FOR ISSUER X			
Dealer	Standard Disclosures	Transaction-Specific Disclosures	Dealer-specific disclosures

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underwriting, and refers back to and reconfirms that June 14, 2020, letter on February 21, 2024, a new retention obligation would be triggered and the underwriter would need to retain the original letter until February 21, 2028. See note 10 *supra*.

<b>D Syndicate Manager (SM)</b>	Reference back to and reconfirmation of the standard disclosures provided by Dealer B in Issuance #2 permitted	Provided by Dealer D, as SM, on behalf of the syndicate	Provided by Dealer D, on behalf of itself
<b>E</b>	Provided by Dealer D, as SM, on behalf of the syndicate	Provided by Dealer D, as SM, on behalf of the syndicate	Provided by Dealer E, on behalf of itself
<b>ISSUANCE #1 FOR ISSUER Y</b>			
<b>Dealer</b>	<b>Standard Disclosures</b>	<b>Transaction-Specific Disclosures</b>	<b>Dealer-specific disclosures</b>
<b>A Syndicate Manager (SM)</b>	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer A, on behalf of itself
<b>E</b>	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer A, as SM, on behalf of the syndicate	Provided by Dealer E, on behalf of itself

### Question(s)

1. Would the alternative manner of providing the standard disclosures, as described above, reduce the volume and frequency of disclosures and make the disclosure process more streamlined and efficient as anticipated by the MSRB?
2. Would there be any unintended consequences to utilizing this alternative to provide the standard disclosures?
3. Should an underwriter acting as a sole underwriter or syndicate manager be able to provide the standard disclosures to an issuer by referring back to and reconfirming disclosures made in a previous underwriting with the same issuer when that underwriter was a member of the syndicate but not the syndicate manager that actually provided the disclosures for the previous issuance?
4. Should an underwriter acting as a sole underwriter or syndicate manager be able to provide the standard disclosures to an issuer by referring back to and reconfirming disclosures made in a previous underwriting with the same issuer when that underwriter was a member of a syndicate for which the syndicate manager satisfied the standard disclosure requirement by referring back to and reconfirming the standard disclosures provided to the issuer for an even earlier issuance, in which the underwriter at issue was not involved?
5. Should the optional alternative manner of providing the standard disclosures also apply to dealer-specific disclosures or transaction-specific disclosures or both?

## E. Clear and Separate Identification of Disclosures

The 2012 Guidance does not prescribe the format in which the required disclosures must be provided. All of the commenters generally agree that the disclosures currently being provided under the 2012 Guidance, in what are commonly known as “G-17 letters,” have become too long, voluminous, boilerplate and duplicative. The Florida Division of Bond Finance believes that these issues may cause disclosures of specific conflicts and risks to be buried inadvertently within non-material information. Similarly, GFOA believes some issuers either ignore or do not understand the important information being provided. GFOA further explained that small and large issuers are burdened in different ways by the disclosures. Larger issuers, which may be in the market frequently, have to receive and acknowledge the paperwork many times, while smaller and infrequent issuers may find the information overwhelming to review and understand.

GFOA suggested that underwriters should provide non-material or boilerplate disclosures separately from key conflicts and risks within the same document (*e.g.*, in an appendix). NAMA also believes that the information provided in the disclosures should be presented in a straight forward manner with general disclosures separated from the statements and discussions of material transaction risks and conflicts of interest. After consideration of the comments, the MSRB believes that simple changes to the formatting of the disclosures in the G-17 letters would have a meaningful positive impact on issuers’ ability to review the disclosures. Accordingly, the MSRB is proposing to require underwriters, when providing the various disclosures in the same document, to clearly identify each category of disclosures and separate them (*e.g.*, by placing the standard disclosures in an appendix or attachment), which should allow issuers to discern the disclosures that are specific to a certain dealer or the transaction more easily and quickly.

### Question(s)

1. Is there any reason why underwriters cannot separate the standard, dealer-specific and transaction-specific disclosures when they are provided within the same document?
2. Would the separation of the standard, dealer-specific and transaction-specific disclosures, when they are provided within the same document, create any challenges for issuers’ review of them?

## **F. Disclosure on the Part of Parties Other than the Underwriter**

As noted above, the 2012 Guidance requires underwriters to provide issuers with the standard, dealer-specific and transaction-specific disclosures. SIFMA requested clarification that conflicts of interest that might exist on the part of other parties to a financing, including, in particular, conflicts of issuer personnel, are not required by the 2012 Guidance.

The standard disclosures cover generic conflicts of interest that could apply to any underwriter in any underwriting, the dealer-specific disclosures are the actual and potential material conflicts of interest on the part of the underwriter, and the transaction-specific disclosures relate to the specific financing structure recommended by the underwriter. None of the requirements in the 2012 Guidance prescribes that the underwriter provide the issuer with disclosures on the part of any transaction participants other than syndicate members (when and if applicable, as described above), including issuer personnel, and it was not the MSRB's intent to create such a requirement. Accordingly, the MSRB is proposing to amend the 2012 Guidance to clarify that underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction, except for a syndicate manager making disclosures on behalf of other syndicate members as described above.

### **Question(s)**

1. What, if any, types of conflicts of interest of issuer personnel have underwriters been disclosing pursuant to the 2012 Guidance?
2. Are there examples of conflicts of interest of issuer personnel that should be required to be disclosed with the dealer-specific disclosures, even if such conflicts are not themselves conflicts of an underwriter?
3. Are there conflicts of interest of any persons other than issuer personnel and the underwriter which should be required to be disclosed (for example, affiliates of the underwriter or swap counterparties or service providers recommended by the underwriter)? If so, should the requirement be limited to actual or potential material conflicts of interests that are actually known to the underwriter?

## **G. Plain English**

Under the 2012 Guidance, the disclosures required must be made in a

manner designed to make clear to an issuer official the subject matter of such disclosures and their implications for the issuer. GFOA commented that the disclosures should be provided in a “plain English” manner, and NAMA indicated that the disclosures should be presented in a straight forward manner. The MSRB believes that the standard for the manner of the disclosures noted above is consistent with and substantially equivalent to plain English. As such, the MSRB is proposing that the Amended Guidance explicitly clarify that plain English is required.

### **Question(s)**

1. What types of disclosures have underwriters not provided to issuers in a manner designed to make clear the subject matter of such disclosures and their implications?
2. Are there any disclosures that are of such a complex nature that, even when designed by an underwriter to make their subject matter and implications clear, cannot be reduced adequately into plain English?
3. Would any simplification of disclosures to satisfy the plain English standard increase the risk that underwriters imprecisely draft the disclosures that could make it difficult for issuers to fully appreciate the nature of material conflicts of interest and risks of transactions, thereby increasing risk to issuers and/or underwriters?

## **II. Issuer Acknowledgement of Receipt of Underwriter Disclosures**

The 2012 Guidance requires underwriters to attempt to receive written acknowledgement of receipt of the disclosures by the official of the issuer (other than by automatic e-mail receipt). If the official of the issuer agrees to proceed with the underwriting engagement after receipt of the disclosures but will not provide written acknowledgement of receipt, the underwriter may proceed with the engagement after documenting with specificity why it was unable to obtain such written acknowledgement during the course of the engagement. SIFMA commented that this requirement creates a significant burden for underwriters with no corresponding benefit to issuers. To address this issue, SIFMA recommended that receipt of an e-mail return receipt should be conclusive proof of delivery if other transaction documentation also has been provided to the same e-mail address. GFOA did not comment on this issue, but NAMA believes the acknowledgement requirement should remain in place.

The MSRB believes the acknowledgement requirement continues to have value to ensure that issuers receive the disclosures. However, the MSRB does

not believe underwriters should have to seek a particularized acknowledgement, which an issuer may not provide. Accordingly, the MSRB is proposing to retain the acknowledgement requirement but allow for e-mail delivery of the disclosures to the official of the issuer identified as the primary contact for the issuer and provide that an automatic e-mail return receipt from that individual's e-mail address may be a means to satisfy the acknowledgement requirement.<sup>15</sup>

### Question(s)

1. Should the Amended Guidance require that the underwriter receive a read receipt, or should an automated confirmation of delivery of the e-mail constitute acknowledgement?
2. How should issuers designate their primary contacts? Should the MSRB specify how this designation should be made?

### III. Underwriter Recommendations

Under the 2012 Guidance, the type of financing structure that an underwriter recommends to the issuer determines what transaction-specific disclosures it must provide. SIFMA requested clarification as to whether the MSRB's guidance on the meaning of "recommendation" under MSRB Rule G-42, on duties of non-solicitor municipal advisors, describing a two-prong analysis for determining whether advice is a recommendation for purposes of that rule applies when determining whether an underwriter has recommended a municipal securities financing.<sup>16</sup> The MSRB believes that the same two-prong analysis, generally consisting of a call to action to proceed with a specific recommended financing structure, is applicable and is proposing to provide that requested clarification in the Amended Guidance.

### Question(s)

1. Is there any reason why the MSRB's guidance on the meaning of "recommendation" under Rule G-42 should not apply to this aspect of underwriters' fair-dealing obligations to issuers?

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<sup>15</sup> As noted above, when there is an underwriting syndicate, only the syndicate manager would be required to obtain the required acknowledgement of issuer receipt. *See* note 10 *supra*.

<sup>16</sup> *See* [FAQs Regarding MSRB Rule G-42 and Making Recommendations](#).

#### **IV. Underwriter Discouragement of the Use of a Municipal Advisor**

The 2012 Guidance currently states that “[t]he underwriter must not recommend that the issuer not retain a municipal advisor.” Both GFOA and NAMA commented that this language should be strengthened by requiring the underwriter to affirmatively state that the issuer may hire a municipal advisor and by stating that the underwriter take no action to discourage or deter the use of a municipal advisor. The MSRB believes the commenters’ request can be satisfied, as a practical matter, by amending the 2012 Guidance to incorporate language already included in the Implementation Guidance. Specifically, the Amended Guidance would further state that “an underwriter may not discourage an issuer from using a municipal advisor or otherwise imply that the hiring of a municipal advisor would be redundant because the underwriter can provide the same services that a municipal advisor would.” The MSRB believes that this amendment would clarify that the scope of the prohibition covers communications beyond the underwriter’s specific recommendations and would adequately address the commenters’ concerns regarding other actions intended to discourage the use of municipal advisors.

#### **Question(s)**

1. Do underwriters discourage issuers from engaging municipal advisors? If so, how?
2. Do other market participants involved in the issuance of municipal securities discourage issuers from engaging municipal advisors? If so, how?
3. Would the draft amendment sufficiently address the issue or would it allow for certain dealer communications regarding issuer retention of municipal advisors that should be prohibited?
4. Should the MSRB require that the standard disclosures include an affirmative statement that the issuer may retain a municipal advisor?

#### **Discussion of Other Comments**

This section describes the MSRB’s analysis of other comments received, for which no corresponding amendments are proposed in this Request for Comment.

## I. Disclosures to Conduit Borrowers

The 2012 Guidance specifies underwriters' fair-dealing obligations to issuers but does not apply the requirements to underwriters dealing with conduit borrowers. The Implementation Guidance, however, acknowledges that underwriters must deal fairly with all persons, including conduit borrowers, and that dealers' obligations to conduit borrowers depend upon the dealers' relationship with them and other facts and circumstances. In response to a specific question contained in the Initial Request for Comment on whether underwriters provided the disclosures required by the 2012 Guidance to conduit borrowers, SIFMA indicated that it is common but not universal for underwriters to provide a conduit borrower with a copy of the disclosures provided to the conduit issuer. SIFMA did not comment on whether that common practice should be required, but GFOA stated that the MSRB should make clear that the information in the disclosures would best be utilized if it was sent to the party making decisions about the issuance and liable for the debt, which it indicated is the conduit borrower in most cases.

Although it may be common practice by some underwriters, the MSRB, at this time, does not believe the 2012 Guidance should be amended to extend the obligations contained therein to underwriters' dealings with conduit borrowers.<sup>17</sup>

### Question(s)

1. Should the MSRB extend the application of the 2012 Guidance to require underwriters to provide the required disclosures to conduit borrowers? If so, should that application extend to all conduit borrowers or only those with whom the underwriter(s) have engaged directly?
2. Should the MSRB extend the application of the 2012 Guidance to any other obligated persons beyond conduit borrowers? If so, please specify to whom it should be extended and why.

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<sup>17</sup> The MSRB understands that the level of engagement between underwriters and conduit borrowers is not universal, such that, in some circumstances, the underwriter(s) works directly with the conduit borrower to build the deal team and structure a financing prior to enlisting a conduit issuer to facilitate the transaction, while, in others, the underwriter(s) are engaged by the conduit issuer and subsequently find a conduit borrower with which to partner.

## II. Classification of Issuers to Create Tiered Disclosure Requirements

The 2012 Guidance applies to underwriters in their dealings with all issuers in the same manner. The Initial Request for Comment posed the question of whether there should be different disclosure obligations for different classes of issuers. The Florida Division of Bond Finance stated that a “one size fits all” approach is not effective and that issuers could benefit from underwriters tailoring such disclosures based on issuer size and sophistication. Similarly, SIFMA noted that the size of the issuer may have some bearing on issuer sophistication but that it is most appropriate to focus on the knowledge, expertise and experience of the issuer personnel, as well as access to the advice of a municipal advisor (*e.g.*, if the issuer is relying on the advice of an independent registered municipal advisor (IRMA)<sup>18</sup> and the underwriter invokes the IRMA exemption to the SEC’s registration rule for municipal advisors). While BDA also believes the disclosure obligations of the 2012 Guidance should not apply if an issuer has an IRMA with respect to the same aspects of an issuance of municipal securities, it does not believe there should be different obligations for different types of issuers because the personnel in large issuers that frequently issue municipal securities change regularly and continue to need the disclosures, and because the uniform requirement allows for a consistent, standard process for dealers. NAMA also does not support the varying of underwriters’ responsibilities for different issuers, and GFOA believes that the wide variety of issuers would make it nearly impossible to develop ways to modify the 2012 Guidance for some issuers but not others.

The MSRB does not believe there is an obvious, appropriate methodology for classifying issuers in a manner that would advance the policies underlying the 2012 Guidance or that would materially relieve burdens for underwriters or issuers, and requiring different disclosure standards for different issuers may have unintended consequences that cause more harm than good. In light of these considerations, the MSRB is not proposing any classification of, and varied disclosure requirements for, issuers.

The MSRB further believes that the issuer’s retention of an IRMA and the underwriter’s corresponding invocation of the IRMA exemption should not relieve the underwriter from the obligations to provide disclosures. First, the MSRB believes that the standard disclosures are so fundamental that they should always be provided and that, even if an IRMA could assist an issuer in

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<sup>18</sup> An IRMA is “a municipal advisor registered pursuant to Section 15B of the [Securities Exchange Act of 1934] . . . and the rules and regulations thereunder and that is not, and within at least the past two years was not, associated . . . with the [dealer] seeking to rely on [the IRMA exemption]. 17 CFR 240.15Ba1-1(d)(3)(vi)(A); *see also* note 19 *infra*.”

understanding the role and responsibilities of the underwriter, the underwriter should be required to make the representations regarding its role in the transaction.

Additionally, the IRMA exemption was crafted with a specific purpose in mind—to allow unregistered persons to provide advice to or on behalf of municipal entities or obligated persons with respect to municipal financial products or the issuance of municipal securities, without themselves having to register as municipal advisors, provided that the municipal entities and obligated persons are represented by and rely on IRMAs who are subject to fiduciary or other duties.<sup>19</sup> When the conditions of the exemption are satisfied as provided by the SEC, the exemption effectively provides that the presence of IRMAs eliminates the need for issuers to have the protections of requiring the unregistered persons to register as municipal advisors and comply with all of the duties associated with being municipal advisors. This is a different purpose and construct than the protections afforded by the 2012 Guidance under Rule G-17. Dealers acting as underwriters need to deal fairly with all persons, which, in some cases, means disclosing details about their own conflicts of interest, the details of transactions that they recommend and having a reasonable basis for making those recommendations. The presence and independence of an IRMA would not necessarily provide any safeguards from the underwriter's material conflicts of interest and, therefore, should not relieve an underwriter from having to provide those dealer-specific disclosures.

For transaction-specific disclosures, the MSRB notes that, among other factors, an underwriter (including a syndicate manager, when there is a syndicate) may consider the issuer's retention of an IRMA, who can help the issuer evaluate underwriter recommendations and identify potential conflicts of interest, when assessing the issuer's level of knowledge and experience with the financing structure the underwriter recommends, which may support a determination by the underwriter that a more limited disclosure would satisfy the obligation for that transaction.<sup>20</sup> As discussed more below, the MSRB does not believe that any such assessment should eliminate the requirement to provide transaction-specific disclosures entirely, and the MSRB believes that certain complex municipal securities financings could be so complex that, even when all parties to the transaction are sophisticated with knowledge and experience with those financing structures, the

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<sup>19</sup> See 17 CFR 240.15Ba1-1(d)(2)(vi); [Registration of Municipal Advisors](#), 78 FR 67468, 67471 (Nov. 12, 2013); [Registration of Municipal Advisors Frequently Asked Questions](#), Section 3 (Sept. 20, 2017).

<sup>20</sup> See note 10 *supra* and corresponding text.

transaction-specific disclosures would continue to serve the crucial purpose of highlighting important issues for the parties to discuss.

### **III. Issuer Opt-Out**

Under the 2012 Guidance, all issuers receive the disclosures required to be provided by underwriters, and they may not opt out. In response to a specific inquiry in the Initial Request for Comment, GFOA opposed the concept of an issuer opt-out, while SIFMA argued that issuers should have the choice to not receive the standard disclosures in a written election based on their knowledge, expertise, experience and financial ability, upon which underwriters should be permitted to conclusively rely. The MSRB believes that it is important for issuers to receive or have access to the disclosures for all of their negotiated transactions, and, given that the key concerns of commenters would be addressed by the draft amendments to the 2012 Guidance, and the benefits to dealers of a uniform process and to issuers with changing personnel, the MSRB is not proposing to allow any issuer to opt out of receiving the required disclosures.

### **IV. Trigger for Transaction-Specific Disclosures**

The 2012 Guidance provides that, absent unusual circumstances or features, the typical fixed rate offering may be presumed to be well understood by issuer personnel that have the lead responsibilities in connection with the issuance of municipal securities, which may obviate the need for an underwriter to provide a disclosure on the material aspects of a fixed rate financing when the underwriter recommends such a structure. Conversely, the 2012 Guidance allows for a variance in the level of disclosure required for unique, atypical or otherwise complex offerings (“complex municipal securities financings”) depending, based on the reasonable belief of the underwriter, on the issuer’s knowledge or experience with the proposed financing structure or similar structures, capability of evaluating the risks of the recommended financing and financial ability to bear the risks of the recommended financing.

SIFMA believes that all transaction-specific disclosures, for fixed rate and complex municipal securities financings, should be triggered by the same standard, which would create the possibility that an underwriter (including a syndicate manager, when there is a syndicate) need not provide disclosures about the material aspects of a complex municipal securities financing if it reasonably believes that the issuer has sufficient knowledge or experience with the proposed financing structure. The MSRB acknowledges that the rationale espoused by SIFMA is conceptually consistent with the 2012 Guidance and that it is possible for certain issuers to develop a level of

knowledge and experience with certain complex municipal securities financings that would diminish the need for the disclosures related to the structure of such financings. However, the MSRB believes that the inherent nature of such unique and atypical financings requires a higher standard for the protection of issuers. Specifically, the MSRB believes that the risk of an underwriter inaccurately determining that such transaction-specific disclosures are not necessary is too great. The possible harms of an issuer's inability to understand the structure of a complex municipal securities financing and corresponding risks are very difficult to remedy after the transaction. The MSRB believes the potential resulting harm to the issuer outweighs the potential benefit of reduced transaction-specific disclosures. Accordingly, the MSRB is not proposing to change the 2012 Guidance as suggested by SIFMA.

#### **V. Third-Party Marketing Arrangements**

Under the 2012 Guidance, an underwriter is required to disclose to the issuer whether it has entered into any third-party arrangements for the marketing of the issuer's securities. SIFMA suggested eliminating this requirement because, in SIFMA's view, while issuers may want to be made aware of third-party marketing arrangements in connection with their new issues, the disclosures required by the 2012 Guidance are not the appropriate mechanism to do so, as this information often is conveyed during the syndicate formation process and market practices have evolved to include disclosure of these arrangements in the official statement in many instances. Additionally, SIFMA noted that these arrangements, also known as retail distribution agreements, are not an activity involving suspicious payments to a third party and do not increase costs to issuers. Rather, SIFMA stated that those arrangements simply pass on a discounted rate to a motivated dealer, which is commonly available to dealers after the bonds have become free to trade in any event. SIFMA alternatively requested an explanation for why selling group arrangements are not required to be disclosed in the same manner, if the MSRB does not amend the 2012 Guidance as it suggested.

The MSRB agrees that the nature of third-party marketing arrangements is not "suspicious" activity. However, the MSRB believes that such arrangements could create material conflicts of interest and that there may be circumstances in which an issuer would not or could not have certain dealers participate in the underwriting in such capacity. For example, an issuer may be subject to jurisdictional requirements that could dictate the participation or non-participation of certain dealers, or an issuer may have a preference to not involve certain dealers in their offering due to reputational concerns. As a result, it remains important for underwriters to disclose that information to issuers and the MSRB is not proposing any change to this

aspect of the 2012 Guidance. In response to SIFMA's alternative request, the MSRB notes that a key distinction between selling group arrangements and third-party marketing arrangements is that the issuer knows who is in the selling group, as it actively participates in determining whether there should be one and who is in it, whereas the existence of third-party marketing arrangements consummated by syndicate and selling group members with other dealers might not be known to the issuer but for the requirement to disclose those relationships in the 2012 Guidance.

## **VI. Credit Default Swaps**

The 2012 Guidance specifically references an underwriter's engagement in credit default swap activities as a potential material conflict of interest that would require disclosure to the issuer. SIFMA noted that dealer use of, and participation in, credit default swaps has significantly decreased since the financial crisis and the adoption of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and, as a result, in SIFMA's view, the reference is no longer as relevant. Despite this, SIFMA noted that material conflicts of interest related to credit default swaps still could arise and should continue to be disclosed. The MSRB believes that, even if credit default swaps are less prevalent in the municipal securities market, the possibility for underwriters to issue or purchase credit default swaps for which the reference is the issuer remains. Accordingly, the MSRB is not proposing to remove the specific reference from the 2012 Guidance.

## **VII. EMMA as a Tool for Disclosures**

Underwriters directly provide issuers with the disclosures required by the 2012 Guidance. In response to a question in the Initial Request for Comment on whether EMMA could or should be used as a tool to improve the utility of disclosures and the process for providing them to issuers, there was agreement among the commenters that responded to this question that EMMA was not an appropriate vehicle for the disclosures. Specifically, GFOA indicated that the use of EMMA could cause underwriters to provide even more boilerplate disclosures and that underwriters may be concerned about investor use of the information. SIFMA also opined that using EMMA would not be appropriate in light of the information disclosed, and NAMA stated that it would undermine the purpose of the 2012 Guidance by requiring issuers to have to seek out the disclosures instead of receiving them directly. The MSRB acknowledges commenters' views and is not proposing to amend the guidance to incorporate the use of EMMA for providing disclosures at this time.

## Economic Analysis

As discussed above, the MSRB is soliciting comments on the Amended Guidance, which would affect the 2012 Guidance in the following areas: (1) the nature, timing and manner of disclosures of conflicts of interest; (2) issuer acknowledgement of receipt of underwriter disclosures; (3) underwriter recommendations; and (4) the prohibition on discouraging the use of a municipal advisor.

### **1. The need for the Amended Guidance and how the Amended Guidance would meet that need.**

The primary purpose of amending the 2012 Guidance would be to clarify certain fair-dealing obligations of underwriters, improve market practices, better protect issuers and reduce the burdens on market participants. Some market participants indicated that the 2012 Guidance resulted in unintended consequences, including, but not limited to, the provision of voluminous disclosures to issuers, which placed a burden on underwriters and made it difficult for issuers to comprehensively evaluate the material information in the disclosures.

Market participants also have expressed concern about the production of duplicative disclosures to issuers from multiple underwriters as another unintended consequence due to the potential for the identical disclosures to be made in inconsistent manners and as a contributing factor to the issue of voluminous disclosures. Overall, the MSRB's primary concern is the unnecessary burden the guidance has placed on market participants, as well as the diminished efficiency of market practices, such as the ability of issuers to properly assess the risks of engaging underwriters and executing the transactions they recommend.

As described fully above, the MSRB intends for the Amended Guidance to clarify certain aspects of the 2012 Guidance, including what constitutes a potential material conflict of interest, whether disclosure on the part of parties other than the underwriter is required, the requirement to make the disclosures in plain English, what constitutes a recommendation by an underwriter, and the scope of the prohibition on underwriter discouragement of the use of a municipal advisor. Providing these clarifications would be critical to informing issuers on the risks of municipal securities financings and the various conflicts of interest which may arise from requesting the professional services of underwriters, as well as to reducing the costs of uncertainty and non-compliance. Overall, the MSRB believes that the Amended Guidance would reduce the amount of disclosures required, reduce duplication and require that the disclosures be

organized and written more clearly, with the overall benefit of streamlining the process for the benefit of all parties involved.

## **2. Relevant baselines against which the likely economic impact of elements of the Amended Guidance can be considered.**

To evaluate the potential economic impact of the Amended Guidance, a baseline must be established as a point of reference in comparison to the expected state with the amendments in effect. The economic impact of the draft amendments is generally viewed as the difference between the baseline state and the expected state. This section describes the baseline state used to evaluate the economic impact of the draft amendments. A reasonable baseline for the Amended Guidance is the 2012 Guidance. The draft amendments relate to the following aspects of the 2012 Guidance:

### Nature, Timing and Manner of Disclosures of Conflicts of Interest

- requires underwriters to disclose whether their compensation is contingent on the closing or size of their recommended transaction
- requires an underwriter to disclose actual and potential material conflicts of interest
- allows a syndicate manager to make the standard disclosures on behalf of other syndicate members
- requires an underwriter to provide issuers with all of the disclosures on a transaction-by-transaction basis
- does not prescribe the format of the disclosures
- does not articulate that underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction
- requires disclosures to be made in a manner designed to make clear to an issuer official the subject matter of such disclosures and their implications for the issuer

### Issuer Acknowledgement of Receipt of Dealer Disclosures

- requires underwriters to attempt to receive written acknowledgement of receipt (other than by automatic e-mail receipt) of the foregoing disclosures by the official of an issuer

### Underwriter Recommendations

- requires an underwriter to provide transaction-specific disclosures, the scope of which is determined by the financing structure that the underwriter recommends to the issuer

#### Underwriter Discouraging the Use of a Municipal Advisor

- states that “[t]he underwriter must not recommend that the issuer not retain a municipal advisor”

### **3. Identifying and evaluating reasonable alternative regulatory approaches.**

The MSRB policy on economic analysis in rulemaking addresses the need to consider reasonable alternative regulatory approaches. A reasonable regulatory alternative is to preserve the 2012 Guidance without any amendments. However, the MSRB believes that this would not reduce the burdens cited by market participants, and, therefore, it would be less preferable since the draft amendments would be intended to increase the effectiveness of the 2012 Guidance.

To clarify the nature, timing and manner of disclosures of conflicts of interest, the MSRB also could strictly limit the dealer-specific disclosures to actual material conflicts of interest only. This would remove the obligation to disclose potential material conflicts of interest and therefore reduce the volume of disclosures; however, it also would increase the potential that issuers do not become aware of potential material conflicts of interest that likely would mature into an actual material conflict of interest during the course of their transactions with underwriters and is thus an inferior alternative. To address this shortcoming of that alternative, the Amended Guidance would further clarify that a potential material conflict of interest requires disclosure if, but only if, it is reasonably foreseeable that it will mature into an actual material conflict of interest during the course of the transaction between the issuer and the underwriter. This would provide a reasonable balance between reducing the volume of disclosures as well as ensuring issuers that they have received or have access to the dealer-specific disclosures that are relevant to the time-period of the transaction.

Additionally, the MSRB also could amend the 2012 Guidance to permit issuers the option of opting out of receiving the required disclosures. Currently, all issuers receive the disclosures required to be provided by underwriters, and they may not opt out. Nevertheless, the MSRB believes that reducing the risk of issuers not knowing and/or appreciating information about material conflicts of interest and the recommended transactions disclosed by underwriters outweighs the burden of reviewing all of the disclosures provided by the underwriters. It is important for issuers to receive or have access to the disclosures for all of their negotiated transactions. Therefore, at this time, the MSRB does not believe issuers should have the choice to opt out of receiving them.

Other possible alternatives include classifying issuers to establish tiered disclosure requirements. Instead of having a “one size fits all” approach, underwriters could tailor disclosures based on, for example, issuer size, knowledge, expertise, experience of the issuer personnel or sophistication. This alternative regulatory approach would be costly since, for one thing, the personnel in large issuers that frequently issue municipal securities change regularly; therefore, the quality of issuer personnel could change over time and would be difficult to categorize. In addition, the wide variety of issuers would make it nearly impossible to develop ways to modify the 2012 Guidance for some issuers but not others. The MSRB does not believe there is a suitable and consistent methodology for classifying issuers in a manner that would advance the policies underlying the 2012 Guidance and reduce the burdens for underwriters or issuers.

#### **4. Assessing the benefits and costs of the Amended Guidance and the main alternative regulatory approaches.**

The MSRB’s regulation of the municipal securities market is designed to protect investors, issuers and the public interest by promoting a fair and efficient municipal securities market. The MSRB policy on economic analysis in rulemaking requires consideration of the likely costs and benefits of a proposed rule amendment with the rule amendment proposal fully implemented against the context of the economic baselines as specified in Section 2 above.

The MSRB is seeking, as part of this Request for Comment, additional data or studies relevant to the costs and benefits of the draft amendments to the 2012 Guidance. In addition, the MSRB requests market participants to provide quantitative estimates of both the upfront and ongoing costs in relation to complying with the Amended Guidance.

The main purpose of amending the 2012 Guidance is to reduce burdens on underwriters while not decreasing benefits to issuers. The MSRB’s analysis below shows that the draft amendments not only would accomplish this objective, but that they may further benefit issuers by easing their document review load and enhance their ability to evaluate the required disclosures.

I. Benefits and Costs – Nature, Timing and Manner of Disclosures of Conflicts of Interest

a. Clarifications: Potential Material Conflicts of Interest, Disclosure on the Part of Parties Other than the Underwriter and Plain English Requirement

The Amended Guidance would clarify: (1) when a potential material conflict of interest must be disclosed; (2) that underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction, except for a syndicate manager making disclosures on behalf of other syndicate members; and (3) that plain English is already required for disclosures.

The dealer-specific disclosures include both actual and potential material conflicts of interest. The amount of disclosures would be reduced by the Amended Guidance if underwriters are currently including potential material conflicts of interest which are not likely to mature into an actual material conflict of interest during the course of the transaction between the issuer and the underwriter. The Amended Guidance would clarify that these types of material conflicts of interest are not required. Similarly, the clarification that underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction, except for a syndicate manager making disclosures on behalf of other syndicate members, should decrease the volume of disclosures.

A secondary benefit of the reduction in the volume of disclosures would be that issuers would not have to sift through conflicts of interest which would not relate to the risk environment associated with the underwriter during the course of the transaction. When there are too many disclosures, it is possible that an issuer's ability to make a comprehensive and efficient assessment of the disclosures is constrained. With the Amended Guidance, issuers should be able to discern more easily which conflicts of interest are "real," which should improve issuers' ability to assess the material conflicts of interest and transaction risks, therefore reducing asymmetric information<sup>21</sup> between the underwriters and issuers. Clarification of disclosures with the plain English requirement would also reduce asymmetric information. Asymmetric information may cause market price distortion and/or transaction volume

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<sup>21</sup> In economics, information asymmetry refers to transactions where one party has more or better information than the other.

depression. Therefore, reducing information asymmetry would have a beneficial impact on the municipal securities market.

Assuming underwriters are already compliant with the requirements under the 2012 Guidance, there are no implicit or explicit economic costs associated with clarifying that plain English is already required. However, clarifying when a potential material conflict of interest requires disclosure would create initial/upfront costs to each underwriter since underwriters would have to amend their policies and procedures to specify what constitutes a reasonably foreseeable potential material conflict of interest, though the MSRB believes that such costs would be minor. As for the clarification that underwriters are not required to make any disclosures on the part of other parties to the transaction, the costs should either be reduced or remain the same, depending on how often underwriters are actually making those disclosures currently. However, in both cases, the MSRB believes that the benefits would outweigh the costs.

*b. Include the Disclosures Concerning the Underwriter's Compensation in the Standard Disclosures*

The Amended Guidance would continue to require a disclosure concerning the contingent nature of underwriter's compensation along with the disclosures concerning the role of the underwriter in the standard disclosures. The MSRB continues to believe that the contingent nature of underwriting compensation presents an inherent conflict of interest and disclosure of the underwriter's compensation is beneficial for issuers. For example, an underwriter may recommend a transaction that is not necessary or size of a transaction that is larger than necessary, both of which may not be in the best interest of the issuer. By including the disclosure that the underwriter's compensation is contingent on the closing or size of the transaction in the standard disclosures, both dealers and issuers should benefit from the consolidation of disclosure requirements.

The MSRB expects initial/upfront costs to sole underwriters and syndicate managers since they might have to change the manner in which they disclose the contingent nature of their underwriting compensation to include that information as part of the standard disclosures. The MSRB expects that these initial setup costs would be minor and that the benefits of consolidation of the disclosures concerning the role of the underwriter and the underwriter's compensation should outweigh the costs.

c. Require Syndicate Manager Disclosure of Standard and Transaction-Specific Disclosures on Behalf of Syndicate Members

At present, the 2012 Guidance allows, but does not require, a syndicate manager to make standard and transaction-specific disclosures on behalf of the other syndicate members. Amending the 2012 Guidance to require, rather than permit, the standard and transaction-specific disclosures to be made by a syndicate manager on behalf of the other syndicate members would resolve the issue of duplication when there is a syndicate. Additionally, it would promote the dissemination of complete and consistent disclosures to issuers and improve the process for dealers since they would be able to uniformly rely on syndicate managers for compliance.

While the MSRB believes that, under the 2012 Guidance, syndicate managers often provide the standard and transaction-specific disclosures to the issuer on behalf of the syndicate, the draft amendment, however, would create a new burden for syndicate managers that currently are not but would be required to do so under the Amended Guidance. Although those syndicate managers would incur costs associated with the additional disclosures on behalf of other syndicate members, greater benefits should accrue to issuers and syndicate members as a whole as a result of an improved process of standard and transaction-specific disclosures. The reduced likelihood of inconsistency between duplicative disclosures on the same matters and the reduced burden placed on syndicate members to provide standard and transaction-specific disclosures to the issuer should be a benefit to both dealers and issuers.

d. Optional Alternative Manner of Providing Standard Disclosures

Unless requested otherwise by issuers, the Amended Guidance would allow for an alternative to transaction-by-transaction standard disclosures and permit underwriters (including a syndicate manager, when there is a syndicate) to provide standard disclosures to an issuer one time and then subsequently provide them by reference to and reconfirmation of those initial standard disclosures. This alternative manner of providing disclosures would be more streamlined and efficient and should reduce the burdens on both issuers, who review the disclosures, and underwriters, who submit the disclosures.

The MSRB believes underwriters, who choose to take advantage of the optional alternative manner of providing standard disclosures, would incur costs when subsequently reconfirming and referring to past disclosures associated with specifically and clearly identifying the G-17 letter in which the standard disclosures were made previously. However, those

underwriters choosing this option presumably would save costs overall when compared to the transaction-by-transaction disclosure method. In aggregate, the benefits to underwriters and issuers should outweigh the costs because of the decrease in volume and frequency of disclosure. There would be no costs incurred by underwriters who do not provide disclosures through this alternative method.

*e. Clear and Separate Identification of Disclosures*

The Amended Guidance would create a new requirement for underwriters; when providing the various disclosures in the same document, an underwriter would have to clearly identify each category of disclosure. This would prevent material conflicts of interest and risks of the transaction or financing structure from being buried inadvertently within boilerplate information. The MSRB believes that the benefits of this requirement would be to provide clarity to issuers, reduce information asymmetry and make it easier for issuers to assess the conflicts of interest and risks associated with transactions or financing structures recommended by underwriters. The costs to dealers for clearly identifying and separating the standard, dealer-specific and transaction-specific disclosures should be minor, and the MSRB believes that the benefits would outweigh the costs.

II. Benefits and Costs – Issuer Acknowledgement of Receipt of Underwriter Disclosures

Currently, the 2012 Guidance requires underwriters to attempt to receive written acknowledgement of receipt of the disclosures by an official of the issuer. The Amended Guidance would allow for automatic e-mail return receipt to constitute issuer acknowledgement of receipt of the disclosures. The acknowledgment requirement continues to have value to ensure that issuers receive the disclosures. Allowing for an automatic e-mail return receipt from an individual's e-mail address to constitute acknowledgment should reduce burdens on underwriters (including syndicate managers, when there is a syndicate) and issuers from spending time to follow up with written acknowledgement without any corresponding reduction in benefits to issuers.

The MSRB expects minor initial/upfront costs (which are optional) to the underwriter associated with the implementation of the use of automatic e-mail return receipts, and related compliance, supervisory and record-retention procedures. However, the benefits associated with the reduced burden of spending time to obtain written acknowledgment would accrue over time and should exceed the initial costs.

### III. Benefits and Costs – Underwriter Recommendations

The 2012 Guidance requires an underwriter to make transaction-specific disclosures to the issuer based on the transaction or financing structure it recommends and the level of knowledge and experience of the issuer with that type of transaction or financing structure. The Amended Guidance would clarify that a recommendation constitutes a two-prong analysis, generally consisting of a call to action to proceed with a specific recommended transaction or financing structure. One benefit of this clarification would be the reduction of the costs of uncertainty and non-compliance for underwriters, since underwriters would be able to determine whether advice concerning a complex municipal securities financing is considered a recommendation and is applicable for purposes of the Amended Guidance. Assuming underwriters are already compliant with these requirements under the 2012 Guidance, there would be no implicit or explicit economic costs associated with clarifying that a recommendation constitutes a two-prong analysis.

### IV. Benefits and Costs – Underwriter Discouragement of the Use of a Municipal Advisor

The 2012 Guidance prohibits an underwriter from recommending that an issuer not retain a municipal advisor, but it does not emphasize or explicitly state that an underwriter is prohibited from discouraging an issuer from using a municipal advisor or implying that the services of a municipal advisor are not warranted or redundant. Clarifying that the scope of the prohibition on making such a recommendation includes an underwriter discouraging the use of a municipal advisor would reduce the likelihood that underwriters may directly and indirectly discourage the use of municipal advisors. This would increase the potential benefits an issuer may receive from engaging with a municipal advisor during the process of bond issuance, if an issuer decides to retain a municipal advisor.

A study from 2006 has shown that using a financial advisor in the municipal bond issuance process reduces underwriter gross spreads, provides statistically significant borrowing costs savings and lower reoffering yields.<sup>22</sup> The results of the study are consistent with the interpretation that the

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<sup>22</sup> Vijayakumar Jayaraman and Kenneth N. Daniels, “The Role and Impact of Financial Advisors in the Market for Municipal Bonds,” *Journal of Financial Services Research*, 2006. After investigating how using a financial advisor affects the interest costs of issuers, Vijayakumar and Daniels, find that a financial advisor significantly reduces municipal bond interest rates, reoffering yields, and underwriters’ gross spreads.

monitoring and information asymmetry reduction roles of financial advisors potentially reduces the perceived risk for issues. Another study from 2010 found lower interest costs with municipal issues using financial advisors, and the interest cost savings were significantly large especially for more opaque and complex issues.<sup>23</sup> Given that an underwriter does not have the same fiduciary responsibility of a municipal advisor and that issuers obtain real economic benefits from using municipal advisors, the MSRB believes that clarifying the scope of this prohibition should continue to improve market practices and prevent outside influence on an issuer's decision to engage municipal advisory services that may lead to lowered net costs. As to the potential costs of compliance, assuming underwriters are already compliant with the 2012 Guidance, there would be no implicit or explicit economic costs associated with clarifying this already-existing obligation in the 2012 Guidance.

#### V. Effect on Competition, Efficiency and Capital Formation

The MSRB believes that the draft amendments to the 2012 Guidance should improve the municipal securities market's operational efficiency by promoting consistency in underwriter's disclosures to issuers and ensuring transparency. At present, the MSRB is unable to quantitatively evaluate the magnitude of the efficiency gains or losses, but believes the benefits outweigh the costs. Additionally, the MSRB believes that the draft amendments should also reduce confusion and risk to both underwriters and issuers and allow issuers to make more informed financing decisions and risk assessments. Therefore, the draft amendments to the 2012 Guidance should improve capital formation.

Additionally, since the Amended Guidance would be applicable to all underwriters, it should not have any impact on market competition.

### **Request for Comment**

The MSRB seeks public comment on the foregoing and following questions, as well as on any other topic relevant to the 2012 Guidance or this request. The MSRB particularly welcomes statistical, empirical and other data from commenters that may support their views and/or support or refute the views, assumptions or issues raised in this Request for Comment.

- 1) Would any of the draft amendments have a negative impact on issuers?

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<sup>23</sup> Allen, Arthur and Donna Dudney, "Does the Quality of Financial Advice Affect Prices?" *The Financial Review* 45, 2010.

- 2) Are there other relevant baselines the MSRB should consider when evaluating the economic impact of the draft amendments?
- 3) What, if any, would be the costs or burdens, direct, indirect, or inadvertent, of complying with the Amended Guidance? Are there data or other evidence, including studies or research, that support commenters' cost or burden estimates?
- 4) If the draft amendments were adopted, what would be the likely effects on competition, efficiency and capital formation?
- 5) Would three months from the date of publication of the Amended Guidance be sufficient time for dealers to implement any changes to policies, procedures and/or systems to comply with the new requirements?

November 16, 2018

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## Text of Draft Amendments\*

### INTERPRETIVE NOTICE CONCERNING THE APPLICATION OF MSRB RULE G-17 TO UNDERWRITERS OF MUNICIPAL SECURITIES – [August 2, 2012]Date of Issuance to Be Specified

Under Rule G-17 of the Municipal Securities Rulemaking Board ([the "[MSRB]"), brokers, dealers, and municipal securities dealers (collectively, "dealers") must, in the conduct of their municipal securities activities, deal fairly with all persons and must not engage in any deceptive, dishonest, or unfair practice. This rule is most often cited in connection with duties owed by dealers to investors; however, it also applies to their interactions with other market participants, including municipal entities<sup>1</sup> such as states and their political subdivisions that are issuers of municipal securities ("issuers").

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\* Underlining indicates new language; strikethrough denotes deletions.

<sup>1</sup> The term "municipal entity" is defined by Section 15B(e)(8) of the Securities Exchange Act of 1934 (the "Exchange Act") to mean: "any State, political subdivision of a State, or municipal corporate instrumentality of a State, including—(A) any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (B) any plan, program, or pool of assets sponsored or established by the State, political subdivision, or municipal corporate instrumentality or any agency, authority, or instrumentality thereof; and (C) any other issuer of municipal securities."

The MSRB has previously observed that Rule G-17 requires dealers to deal fairly with issuers in connection with the underwriting of their municipal securities.<sup>2</sup> [More recently, w]With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act,<sup>3</sup> the MSRB was expressly directed by Congress to protect municipal entities. Accordingly, in 2012, the MSRB [is ]provided[ing] additional interpretive guidance that addressed[s] how Rule G-17 applies to dealers acting in the capacity of underwriters in the municipal securities transactions described below.<sup>4</sup>

This interpretive notice supersedes the MSRB’s interpretive guidance, dated August 2, 2012, concerning the application of Rule G-17 to underwriters of municipal securities, as well the related implementation guidance, dated July 18, 2012, and frequently-asked questions (FAQs), dated March 25, 2013 (collectively, the “prior guidance”).<sup>5</sup> The prior guidance will remain in effect with respect to underwriting engagements commencing prior to the date which is three months after the date of publication of this notice. Underwriters will be required to comply with the amended requirements for all of their underwriting engagements beginning on or after that date. For purposes of this notice, an underwriting engagement is considered to have begun at the time the first disclosure requirement is triggered (i.e., the earliest stages of the underwriter’s relationship with the issuer with respect to an issue).

### **Applicability of the Notice**

Except where a competitive underwriting is specifically mentioned, this notice applies to negotiated underwritings only.<sup>6</sup> Furthermore, it does not apply to selling group members.

This notice applies not only to primary offerings of municipal bonds and notes by an underwriter, but also to a dealer serving as primary distributor (but not to dealers serving solely as selling dealers) in a continuous offering of municipal fund securities, such as interests in 529 savings plans. This notice also applies to a primary offering that is placed with investors by a dealer serving as placement agent, although certain disclosures may be omitted as described below.

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<sup>2</sup> See Reminder Notice on Fair Practice Duties to Issuers of Municipal Securities, [MSRB Notice 2009-54 \(Sept.\[ember\] 29, 2009\); Rule G-17 Interpretive Letter – Purchase of new issue from issuer, MSRB interpretation of December 1, 1997](#), reprinted in MSRB Rule Book (“1997 Interpretation”).

<sup>3</sup> [Dodd-Frank Wall Street Reform and Consumer Protection Act, ]Pub. L. No. 111-203 § 975, 124 Stat. 1376 (2010).

<sup>4</sup> See [Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities \(Aug. 2, 2012\)](#).

<sup>5</sup> See [MSRB Notice 2012-38 \(July 18, 2012\)](#); [MSRB Notice 2013-08 \(Mar. 25, 2013\)](#).

<sup>6</sup> The MSRB has always viewed competitive offerings narrowly to mean new issues sold by the issuer to the underwriter on the basis of the lowest price bid by potential underwriters – that is, the fact that an issuer publishes a request for proposals and potential underwriters compete to be selected based on their professional qualifications, experience, financing ideas, and other subjective factors would not be viewed as representing a competitive offering for purposes of this notice. In light of this meaning of the term “competitive underwriting,” it should be clear that, although most of the examples relating to misrepresentations and fairness of financial aspects of an offering consist of situations that would only arise in a negotiated offering, Rule G-17 should not be viewed as allowing an underwriter in a competitive underwriting to make misrepresentations to the issuer or to act unfairly in regard to the financial aspects of the new issue.

The fair practice duties outlined in this notice are those duties that a dealer owes to a municipal entity when the dealer underwrites its new issue of municipal securities. This notice does not set out the underwriter's fair-practice duties to other parties to a municipal securities financing (e.g., conduit borrowers). The MSRB notes, however, that Rule G-17 does require that an underwriter deal fairly with all persons. What actions are considered fair will, of necessity, be dependent on the nature of the relationship between a dealer and such other parties, the particular actions undertaken, and all other relevant facts and circumstances. Although this notice does not address what an underwriter's fair-dealing duties may be with respect to other parties, it may serve as one of many bases for an underwriter to consider how to establish appropriate policies and procedures for ensuring that they meet such fair-practice obligations, in light of their relationship with such other participants and their particular roles.

The examples discussed in this notice are illustrative only and are not meant to encompass all obligations of dealers to municipal entities under Rule G-17. The notice also does not address a dealer's duties when the dealer is serving as an advisor to a municipal entity. Furthermore, when municipal entities are customers<sup>[4]2</sup> of dealers, they are subject to the same protections under MSRB rules, including Rule G-17, that apply to other customers.<sup>[5]8</sup> The MSRB notes that an underwriter has a duty of fair dealing to investors in addition to its duty of fair dealing to issuers. An underwriter also has a duty to comply with other MSRB rules as well as other federal and state securities laws.

### **Basic Fair Dealing Principle**

As noted above, Rule G-17 precludes a dealer, in the conduct of its municipal securities activities, from engaging in any deceptive, dishonest, or unfair practice with any person, including an issuer of municipal securities. The rule contains an anti-fraud prohibition. Thus, an underwriter must not misrepresent or omit the facts, risks, potential benefits, or other material information about municipal securities activities undertaken with a municipal issuer. However, Rule G-17 does not merely prohibit deceptive conduct on the part of the dealer. It also establishes a general duty of a dealer to deal fairly with all persons (including, but not limited to, issuers of municipal securities), even in the absence of fraud.

### **Role of the Underwriter/Conflicts of Interest**

In a negotiated underwriting, the underwriter's Rule G-17 duty to deal fairly with an issuer of municipal securities requires the underwriter to make certain disclosures to the issuer to clarify its role in an issuance

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<sup>7</sup> MSRB Rule D-9 defines the term "customer" as follows: "Except as otherwise specifically provided by rule of the [Board][MSRB], the term "Customer" shall mean any person other than a broker, dealer, or municipal securities dealer acting in its capacity as such or an issuer in transactions involving the sale by the issuer of a new issue of its securities."

<sup>8</sup> See MSRB Reminds Firms of Their Sales Practice and Due Diligence Obligations When Selling Municipal Securities in the Secondary Market, [MSRB Notice 2010-37 \(Sept.\[ember\] 20, 2010\)](#).

of municipal securities and to identify, with respect to that specific issuance, all of its actual material conflicts of interest and [or ]potential material conflicts of interest[ with respect to such issuance].<sup>9</sup>

**Disclosures Concerning the Underwriter’s Role.** The underwriter must disclose to the issuer that:

- (i) Municipal Securities Rulemaking Board Rule G-17 requires an underwriter to deal fairly at all times with both municipal issuers and investors;
- (ii) the underwriter’s primary role is to purchase securities with a view to distribution in an arm’s-length commercial transaction with the issuer and it has financial and other interests that differ from those of the issuer;<sup>10</sup>
- (iii) unlike a municipal advisor, the underwriter does not have a fiduciary duty to the issuer under the federal securities laws and is, therefore, not required by federal law to act in the best interests of the issuer without regard to its own financial or other interests;<sup>11</sup>
- (iv) the underwriter has a duty to purchase securities from the issuer at a fair and reasonable price, but must balance that duty with its duty to sell municipal securities to investors at prices that are fair and reasonable; and
- (v) the underwriter will review the official statement for the issuer’s securities in accordance with, and as part of, its responsibilities to investors under the federal securities laws, as applied to the facts and circumstances of the transaction.<sup>12</sup>

The underwriter also must not recommend that the issuer not retain a municipal advisor. In addition, the underwriter may not discourage the issuer from using a municipal advisor or otherwise imply that the

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<sup>9</sup> Except for a syndicate manager making disclosures on behalf of other syndicate members (as described herein), underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction.

<sup>10</sup> In a private placement where a dealer acting as placement agent takes on a true agency role with the issuer and does not take a principal position (including not taking a “riskless principal” position) in the securities being placed, the disclosure relating to an “arm’s length” relationship would be inapplicable and may be omitted due to the agent-principal relationship between the dealer and issuer that normally gives rise to state law obligations – whether termed as a fiduciary or other obligation of trust. See Exchange Act Rel. No. 66927 (May 4, 2012), 77 FR 27509 (May 10, 2012) (SR-MSRB-2011-09). In certain other contexts, depending on the specific facts and circumstances, a dealer acting as an underwriter or primary distributor may take on, either through an agency arrangement or other purposeful understanding, a fiduciary relationship with the issuer. In such cases, it would also be appropriate for the underwriter to omit disclosures inapplicable as a result of such relationship. Dealers exercising an option to omit such disclosure should understand that they are effectively acknowledging the existence of a fiduciary responsibility on behalf of the issuer.

<sup>11</sup> Id.

<sup>12</sup> In many private placements, as well as in certain other types of new issue offerings, no official statement may be produced, so that, to the extent that such an offering occurs without the production of an official statement, the dealer would not be required to disclose its role with regard to the review of an official statement.

hiring of a municipal advisor would be redundant because the underwriter can provide the same services that a municipal advisor would.

**Disclosure Concerning the Underwriter’s Compensation.** The underwriter must disclose to the issuer whether its underwriting compensation will be contingent on the closing of a transaction. It must also disclose that compensation that is contingent on the closing of a transaction or the size of a transaction presents a conflict of interest[,] because it may cause the underwriter to recommend a transaction that [it] is unnecessary or to recommend that the size of the transaction be larger than is necessary. This disclosure and the disclosures concerning the underwriter’s role, noted above, constitute standard disclosures that all underwriters must make to their issuer clients (the “standard disclosures”). If a dealer underwrites an issuer’s offering with an alternative compensation structure that is not contingent on the transaction closing or the size of the transaction, the dealer would need to indicate that the standard disclosure on underwriter compensation does not apply and explain the alternative structure to the extent that such alternative structure also presents a conflict of interest.

**Other Conflicts Disclosures.** The underwriter must also disclose, when and if applicable, other dealer-specific [potential or ]actual and potential material conflicts of interest (“dealer-specific disclosures”),<sup>13</sup> including, but not limited to, the following:

- (i) any payments described below under “Conflicts of Interest/[ ]Payments to or from Third Parties”;<sup>14</sup>
- (ii) any arrangements described below under “Conflicts of Interest/Profit-Sharing with Investors”;
- (iii) the credit default swap disclosures described below under “Conflicts of Interest/Credit Default Swaps”; and
- (iv) any incentives for the underwriter to recommend a complex municipal securities financing and other associated conflicts of interest (as described below under “Required Disclosures to Issuer”).<sup>15</sup>

These categories of conflicts of interest are not mutually exclusive and, in some cases, a specific conflict may reasonably be viewed as falling into two or even more categories. An underwriter making disclosures of dealer-specific conflicts of interest to an issuer should concentrate on making them in a complete and

<sup>13</sup> A potential material conflict of interest exists and is required to be disclosed if, but only if, it is reasonably foreseeable to mature into an actual material conflict of interest during the course of the transaction between the issuer and the underwriter.

<sup>14</sup> The third-party payments to which the disclosure requirement would apply are those that give rise to actual or potential material conflicts of interest and typically would not apply to third-party arrangements for products and services of the type that are routinely entered into in the normal course of business, so long as any specific routine arrangement does not give rise to an actual or potential conflict of interest.

<sup>15</sup> The specific requirement with respect to complex financings does not obviate the requirement to disclose the existence of payments, values, or credits received by the underwriter or of other material conflicts of interest in connection with any negotiated underwriting, whether it be complex or routine.

understandable manner and need not necessarily organize them according to the categories listed above, particularly if adhering to a strict categorization process might interfere with the clarity of disclosures.

To promote consistent and complete disclosure to issuers when there is an underwriting syndicate, while reducing the likelihood of issuers receiving multiple duplicative disclosures on the same matters in potentially inconsistent manners, [D]the standard disclosures [concerning the role of the underwriter ]and [the underwriter’s compensation ] transaction-specific disclosures (as defined herein) [may]must be made by a syndicate manager on behalf of other syndicate members.<sup>16</sup> The standard and transaction-specific disclosures will not vary from dealer to dealer with respect to a particular transaction.

[Other]Notwithstanding the foregoing, each underwriter in the syndicate has a duty to [disclose]provide all of its dealer-specific [conflicts of interest]disclosures to the issuer[ disclosures must be made by the particular underwriters subject to such conflicts]. In general, dealer-specific disclosures for one dealer cannot be satisfied by disclosures made by another dealer (e.g., the syndicate manager) because such disclosures are, by their nature, not uniform, and must be prepared by each dealer. However, a syndicate manager may deliver each of the dealer-specific disclosures to the issuer as part of a single package of disclosures, as long as it is clear to which dealer each disclosure is attributed. An underwriter in the syndicate is not required to notify an issuer if it has determined that it does not have any dealer-specific disclosures to make. However, underwriters are reminded that the obligation to provide dealer-specific disclosures includes material conflicts of interest arising after the time of engagement with the issuer, as noted below.

**Timing and Manner of Disclosures.** All of the foregoing disclosures must be made in writing to an official of the issuer that the underwriter reasonably believes has the authority to bind the issuer by contract with the underwriter and that, to the knowledge of the underwriter, is not a party to a disclosed conflict. If provided within the same document as the dealer-specific disclosures, the standard disclosures must be identified clearly as such and provided apart from dealer-specific disclosures (e.g., in an appendix).

Disclosures must be made in plain English (i.e., in a manner designed to make clear to such official the subject matter of such disclosures and their implications for the issuer). The standard disclosure concerning the arm’s-length nature of the underwriter-issuer relationship must be made in the earliest stages of the underwriter’s relationship with the issuer with respect to an issue (e.g., in a response to a request for proposals or in promotional materials provided to an issuer). The [O]other standard disclosures [concerning the role of the underwriter and the underwriter’s compensation generally ]must be made when the underwriter is engaged to perform underwriting services (e.g., in an engagement letter), not solely in a bond purchase agreement. [Other]Dealer-specific [conflicts] disclosures must be made at the

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<sup>16</sup> When there is an underwriting syndicate, the syndicate manager would have sole responsibility for providing the standard and transaction-specific disclosures, including, but not limited to, determining the level of disclosure required based on the type of financing recommended and a reasonable belief of the issuer’s knowledge and experience regarding that type of financing. In light of, and consistent with, the obligations placed on the syndicate manager when there is an underwriting syndicate, only the syndicate manager must maintain and preserve records of the standard and transaction-specific disclosures made on behalf of the syndicate in accordance with MSRB rules.

same time, except with regard to conflicts discovered or arising after the underwriter has been engaged. For example, an actual or potential material conflict of interest may not be present until an underwriter has recommended a particular financing. In that case, the disclosure must be provided in sufficient time before the execution of a contract with the underwriter to allow the official to evaluate the recommendation, as described below under “Required Disclosures to Issuers.” Unless directed otherwise by an issuer, an underwriter (including a syndicate manager, when there is an underwriting syndicate) may update selected portions of disclosures previously provided so long as such updates clearly identify the additions or deletions and are capable of being read independently of the prior disclosures.<sup>17</sup>

As an alternative to providing the standard disclosures on a transaction-by-transaction basis, underwriters (including a syndicate manager, when there is an underwriting syndicate) may provide the standard disclosures to an issuer one time and then subsequently provide them by referring to and reconfirming those initial standard disclosures, unless the issuer requests that the standard disclosures be made on a transaction-by-transaction basis and subject to the obligations to amend existing, or provide new, standard disclosures.<sup>18</sup> Specifically, when an underwriter engages in multiple negotiated underwritings with a particular issuer, the underwriter may provide the standard disclosures in accordance with the foregoing timing requirements as part of the first underwriting. The underwriter must then refer to and reconfirm the standard disclosures for any subsequent underwritings, also consistent with those same requirements vis-à-vis the subsequent offerings. The reference back and reconfirmation must clearly identify when the initial standard disclosures were made previously and make them readily accessible to the issuer in a hard copy or electronic format (e.g., including a functional hyperlink to the original standard disclosures).<sup>19</sup> Additionally, the sole underwriter or syndicate manager (when there is an underwriting syndicate) must retain an original copy of the standard disclosures for the period of time required by MSRB Rule G-9, on preservation of records,<sup>20</sup> but that retention period would reset each time the original

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<sup>17</sup> Not all transactions proceed along the same timeline or pathway. The timeframes should be viewed in light of the overarching goals of Rule G-17 and the purposes that required disclosures are intended to serve as described herein. That is, the issuer (i) has clarity throughout all substantive stages of a financing regarding the roles of its professionals, (ii) is aware of conflicts of interest promptly after they arise and well before it effectively becomes fully committed (either formally or due to having already expended substantial time and effort) to completing the transaction with the underwriter, and (iii) has the information required to be disclosed with sufficient time to take such information into consideration before making certain key decisions on the financing.

<sup>18</sup> If the initial standard disclosures need to be amended when there is an underwriting syndicate, the syndicate manager may deliver such amended standard disclosures and all syndicate members may subsequently reference and reconfirm the amended standard disclosures.

<sup>19</sup> An underwriter that previously engaged an issuer as part of a syndicate, for which a syndicate manager provided the standard disclosures on behalf of the other syndicate members, would be able to reference back to and reconfirm the standard disclosures provided by the syndicate manager, as long as that underwriter otherwise satisfies any applicable requirements, including to make the initial standard disclosures readily accessible to the issuer. In this scenario, the standard disclosures from a prior offering with the issuer referenced and reconfirmed by the syndicate manager would be provided on behalf of, and operative for, all of the syndicate members, even if they were not a part of the syndicate for the prior offering.

<sup>20</sup> Rule G-9(b)(viii)(C) requires “all written and electronic communications received and sent, including inter-office memoranda, relating to the conduct of the activities of such municipal securities broker or municipal securities dealer with respect to

standard disclosures are referenced and reconfirmed.<sup>21</sup> Underwriters may always choose to provide the standard disclosures on a transaction-by-transaction basis. As indicated above, when there is an underwriting syndicate, the syndicate manager must provide the standard and transaction-specific disclosures on behalf of the syndicate.

**Acknowledgement of Disclosures.** The sole underwriter or syndicate manager (when there is an underwriting syndicate) must attempt to receive written acknowledgement, ([other than]including, for example, by automatic e-mail receipt) by the official of the issuer identified by the issuer as the primary contact for the issuer, of receipt of the foregoing disclosures.<sup>22</sup> This notice does not specify the particular form of acknowledgement. Accordingly, an underwriter may proceed with a receipt of acknowledgment that includes an issuer’s reservation of rights or other self-protective language. If the official of the issuer agrees to proceed with the underwriting engagement after receipt of the disclosures but will not provide written acknowledgement of receipt, the sole underwriter or syndicate manager may proceed with the engagement after documenting with specificity why it was unable to obtain such written acknowledgement. Additionally, the sole underwriter or syndicate manager must be able to produce evidence that the required disclosures were delivered with sufficient time for evaluation by the issuer before proceeding with the transaction. An issuer’s written acknowledgment of the receipt of disclosure is not dispositive of whether such disclosures were made with an appropriate amount of time. The analysis of whether disclosures were provided with sufficient time for an issuer’s review is based on the totality of the facts and circumstances.

## Representations to Issuers

All representations made by underwriters to issuers of municipal securities in connection with municipal securities underwritings, whether written or oral, must be truthful and accurate and must not misrepresent or omit material facts. Underwriters must have a reasonable basis for the representations and other material information contained in documents they prepare and must refrain from including representations or other information they know or should know is inaccurate or misleading. For example, in connection with a certificate signed by the underwriter that will be relied upon by the issuer or other

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municipal securities” to be retained for not less than four years (or three years for each dealer that is a bank or subsidiary or department or division of a bank).

<sup>21</sup> For example, if an underwriter, which is not a bank or subsidiary or department or division of a bank, provided an issuer with its original standard disclosures in a letter on June 14, 2020, Rule G-9 would require the underwriter to retain that original letter until June 14, 2024. However, if the underwriter engages with the same issuer in a subsequent underwriting, and refers back to and reconfirms that June 14, 2020, letter on February 21, 2024, a new retention obligation would be triggered and the underwriter would need to retain the original letter until February 21, 2028. See note 16 *supra*.

<sup>22</sup> When there is an underwriting syndicate, only the syndicate manager, as the dealer delivering the standard and transaction-specific disclosures to the issuer, would be required to obtain the acknowledgment of the issuer on behalf of the syndicate. Absent red flags, and subject to the underwriter’s ability to reasonably rely on a representation from an issuer official that he or she has the authority to bind the issuer by contract with the underwriter, an underwriter (including the syndicate manager, on behalf of the entire syndicate, as applicable) may reasonably rely on a written delegation by an authorized issuer official in, among other things, the issuer’s request for proposals to another issuer official to receive and acknowledge receipt of the required disclosures.

relevant parties to an underwriting (e.g., an issue price certificate), the dealer must have a reasonable basis for the representations and other material information contained therein.

The need for underwriters to have a reasonable basis for representations and other material information provided to issuers extends to the reasonableness of assumptions underlying the material information being provided. The less certain an underwriter is of the validity of underlying assumptions, the more cautious it should be in using such assumptions and the more important it will be that the underwriter disclose to the issuer the degree and nature of any uncertainties arising from the potential for such assumptions not being valid. If an underwriter would not rely on any statements made or information provided for its own purposes, it should refrain from making the statement or providing the information to the issuer, or should provide any appropriate disclosures or other information that would allow the issuer to adequately assess the reliability of the statement or information before relying upon it. Further, underwriters should be careful to distinguish statements made to issuers that represent opinion rather than factual information and to ensure that the issuer is aware of this distinction.

In addition, an underwriter's response to an issuer's request for proposals or qualifications must fairly and accurately describe the underwriter's capacity, resources, and knowledge to perform the proposed underwriting as of the time the proposal is submitted and must not contain any representations or other material information about such capacity, resources, or knowledge that the underwriter knows or should know to be inaccurate or misleading.<sup>23</sup> Matters not within the personal knowledge of those preparing the response (e.g., pending litigation) must be confirmed by those with knowledge of the subject matter. An underwriter must not represent that it has the requisite knowledge or expertise with respect to a particular financing if the personnel that it intends to work on the financing do not have the requisite knowledge or expertise.

### Required Disclosures to Issuers

Many municipal securities are issued using financing structures that are routine and well understood by the typical municipal market professional, including most issuer personnel that have the lead responsibilities in connection with the issuance of municipal securities. For example, absent unusual circumstances or features, the typical fixed rate offering may be presumed to be well understood. Nevertheless, in the case of issuer personnel that the underwriter reasonably believes lack knowledge or experience with such structures, the underwriter (including a syndicate manager, when there is an underwriting syndicate) must provide disclosures on the material aspects of such structures that it recommends (the "transaction-specific disclosures").<sup>24</sup>

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<sup>23</sup> As a general matter, a response to a request for proposal should not be treated as merely a sales pitch without regulatory consequence, but instead should be treated with full seriousness that issuers have the expectation that representations made in such responses are true and accurate.

<sup>24</sup> For purposes of determining when an underwriter recommends a financing structure, the MSRB's guidance on the meaning of "recommendation" under MSRB Rule G-42, on duties of non-solicitor municipal advisors is applicable. See [FAQs Regarding MSRB Rule G-42 and Making Recommendations](#).

However, in some cases, issuer personnel responsible for the issuance of municipal securities would not be well positioned to fully understand or assess the implications of a financing in its totality, because the financing is structured in a unique, atypical, or otherwise complex manner (a “complex municipal securities financing”).<sup>[6]25</sup> Examples of complex municipal securities financings include variable rate demand obligations ([“]VRDOs[”]) and financings involving derivatives (such as swaps). An underwriter (including a syndicate manager, when there is an underwriting syndicate) in a negotiated offering that recommends a complex municipal securities financing to an issuer has an obligation under Rule G-17 to make more particularized transaction-specific disclosures than those that may be required in the case of routine financing structures.<sup>26</sup> The sole underwriter or syndicate manager must disclose the material financial characteristics of the complex municipal securities financing, as well as the material financial risks of the financing that are known to the sole underwriter or syndicate manager and reasonably foreseeable at the time of the disclosure.<sup>[7]27</sup> It must also disclose any incentives for the underwriter to recommend the

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<sup>25</sup> If a complex municipal securities financing consists of an otherwise routine financing structure that incorporates a unique, atypical or complex element and the issuer personnel have knowledge or experience with respect to the routine elements of the financing, the disclosure of material risks and characteristics may be limited to those relating to such specific element and any material impact such element may have on other features that would normally be viewed as routine.

<sup>26</sup> Sole underwriters and syndicate managers (when there is an underwriting syndicate) must make reasonable judgments regarding whether a particular recommended financing structure or product is complex, understanding that the simple fact that a structure or product has become relatively common in the market does not automatically result in it being viewed as not complex. Not all negotiated offerings involve a recommendation by the underwriter(s), such as where a sole underwriter merely executes a transaction already structured by the issuer or its financial advisor. See note 16 supra.

<sup>27</sup> For example, an underwriter (including a syndicate manager, when there is an underwriting syndicate) that recommends a VRDO should inform the issuer of the risk of interest rate fluctuations and material risks of any associated credit or liquidity facilities (e.g., the risk that the issuer might not be able to replace the facility upon its expiration and might be required to repay the facility provider over a short period of time). As an additional example, if [the] a sole underwriter recommends that the issuer swap the floating rate interest payments on the VRDOs to fixed rate payments under a swap, the underwriter must disclose the material financial risks (including market, credit, operational, and liquidity risks) and material financial characteristics of the recommended swap (e.g., the material economic terms of the swap, the material terms relating to the operation of the swap, and the material rights and obligations of the parties during the term of the swap), as well as the material financial risks associated with the VRDO. Such disclosure should be sufficient to allow the issuer to assess the magnitude of its potential exposure as a result of the complex municipal securities financing. The underwriter must also inform the issuer that there may be accounting, legal, and other risks associated with the swap and that the issuer should consult with other professionals concerning such risks. If the underwriter’s affiliated swap dealer is proposed to be the executing swap dealer, the underwriter may satisfy its disclosure obligation with respect to the swap if such disclosure has been provided to the issuer by the affiliated swap dealer or the issuer’s swap or other financial advisor that is independent of the underwriter and the swap dealer, as long as the underwriter has a reasonable basis for belief in the truthfulness and completeness of such disclosure. If the issuer decides to enter into a swap with another dealer, the underwriter is not required to make disclosures with regard to that swap. The MSRB notes that dealers that recommend swaps or security-based swaps to municipal entities may also be subject to rules of the Commodity Futures Trading Commission or those of the Securities and Exchange Commission ([“]SEC[”]).

complex municipal securities financing and other associated material conflicts of interest.<sup>[8]</sup><sup>28</sup> Such disclosures must be made in a fair and balanced manner based on principles of fair dealing and good faith.

The level of transaction-specific disclosure required may vary according to the issuer's knowledge or experience with the proposed financing structure or similar structures, capability of evaluating the risks of the recommended financing, and financial ability to bear the risks of the recommended financing, in each case based on the reasonable belief of the underwriter (including a syndicate manager, when there is an underwriting syndicate).<sup>[9]</sup><sup>29</sup> Among other factors, a sole underwriter or syndicate manager (when there is an underwriting syndicate) may consider the issuer's retention of an IRMA, who can help the issuer evaluate underwriter recommendations and identify potential conflicts of interest, when assessing the issuer's level of knowledge and experience with the recommended financing structure, which may support a determination by the sole underwriter or syndicate manager that a more limited disclosure would satisfy the obligation for that transaction. The level of transaction-specific disclosure to be provided to a particular issuer also can vary over time. To the extent that an issuer gains experience with a complex financing structure or product over the course of multiple new issues utilizing that structure or product, the level of transaction-specific disclosure required to be provided to the issuer with respect to such complex financing structure or product would likely be reduced over time. If an issuer that previously employed a seasoned professional in connection with its complex financings who has been replaced by personnel with little experience, knowledge or training serving in the relevant responsible position or in undertaking such complex financings, the level of transaction-specific disclosure required to be provided to the issuer with respect to such complex financing structure or product would likely increase. In all events, the sole underwriter or syndicate manager must disclose any incentives for the sole underwriter or the syndicate to recommend the complex municipal securities financing and other associated conflicts of interest.

The transaction-specific disclosures [described in this section of this notice ]must be made in writing to an official of the issuer whom the underwriter (including a syndicate manager, when there is an underwriting syndicate) reasonably believes has the authority to bind the issuer by contract with the underwriter(s) (i) in sufficient time before the execution of a contract with the underwriter(s) to allow the official to evaluate the recommendation and (ii) in a manner designed to make clear to such official the subject matter of such disclosures and their implications for the issuer.<sup>30</sup> Unless directed otherwise by an issuer, an underwriter (including a syndicate manager, when there is an underwriting syndicate) may use an omnibus set of disclosures containing detailed descriptions of the material elements of a routine financing or the material

<sup>28</sup> For example, a conflict of interest may exist when [the]a sole underwriter is also the provider of a swap used by an issuer to hedge a municipal securities offering or when the underwriter receives compensation from a swap provider for recommending the swap provider to the issuer. *See also* "Conflicts of Interest/Payments to or from Third Parties" herein.

<sup>29</sup> Even a financing in which the interest rate is benchmarked to an index that is commonly used in the municipal marketplace (e.g., [LIBOR or ]SIFMA) may be complex to an issuer that does not understand the components of that index or its possible interaction with other indexes.

<sup>30</sup> Absent red flags, an underwriter or syndicate manager (when there is an underwriting syndicate) may reasonably rely on a written representation from an issuer official in, among other things, the issuer's request for proposals that he or she has the ability to bind the issuer by contract with the underwriter(s). Moreover, the underwriter or syndicate manager may reasonably rely on a written statement from such person that he or she is not a party to a disclosed conflict.

financial characteristics and risks for various complex municipal securities financing structures or products; however, the underwriter or syndicate manager must identify with sufficient clarity and ease of review the applicable portions of such omnibus document to a particular transaction. The underwriter or syndicate manager also must make an independent assessment that such disclosures are appropriately tailored to the issuer's level of sophistication.

The disclosures concerning a complex municipal securities financing must address the specific elements of the financing, rather than being general in nature. An underwriter (including a syndicate manager, when there is an underwriting syndicate) cannot satisfy this requirement by providing an issuer a single document setting out general descriptions of the various complex municipal securities financing structures or products that may be recommended from time to time to various issuer clients that would effectively require issuer personnel to discover which disclosures apply to a particular recommendation and to the particular circumstances of that issuer. An underwriter can create, in advance, individualized descriptions, with appropriate levels of detail, of the material financial characteristics and risks for each of the various complex municipal securities financing structures or products (including any typical variations) it may recommend from time to time to its various issuer clients, with such standardized descriptions serving as the base for more particularized disclosure for the specific complex financing the underwriter is recommending to a particular issuer.<sup>31</sup> The underwriter could incorporate, to the extent applicable, any refinements to the base description needed to fully describe the material financial features and risks unique to that financing.<sup>32</sup>

If the underwriter (including a syndicate manager, when there is an underwriting syndicate) does not reasonably believe that the official to whom the disclosures are addressed is capable of independently evaluating the disclosures, the underwriter or syndicate manager must make additional efforts reasonably designed to inform the official or its employees or agent.

### **Underwriter Duties in Connection with Issuer Disclosure Documents**

Underwriters often play an important role in assisting issuers in the preparation of disclosure documents, such as preliminary official statements and official statements.<sup>[10]33</sup> These documents are critical to the

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<sup>31</sup> Page after page of complex legal jargon in small print would not satisfy this requirement.

<sup>32</sup> Underwriters should be able to leverage such materials for purposes of assisting issuers to more efficiently prepare disclosures to the public included in official statements in a manner that promotes more consistent marketplace disclosure of a particular financing type from issue to issue, and also should be able to leverage the materials for internal training and risk management purposes.

<sup>33</sup> Underwriters that assist issuers in preparing official statements must remain cognizant of their duties under federal securities laws. With respect to primary offerings of municipal securities, the SEC has noted, "By participating in an offering, an underwriter makes an implied recommendation about the securities." See [SEC]Exchange Act Rel. No. [34-]26100 (Sept. 22, 1988) (proposing Exchange Act Rule 15c2-12) at text following note 70. The SEC has stated that "this recommendation itself implies that the underwriter has a reasonable basis for belief in the truthfulness and completeness of the key representations made in any disclosure documents used in the offerings." Furthermore, pursuant to [SEC]Exchange Act Rule 15c2-12(b)(5), an underwriter may not purchase or sell municipal securities in most primary offerings unless the underwriter has reasonably determined that the issuer or an obligated person has entered into a written undertaking to provide certain types of secondary

municipal securities transaction, in that investors rely on the representations contained in such documents in making their investment decisions. Moreover, investment professionals, such as municipal securities analysts and ratings services, rely on the representations in forming an opinion regarding the credit. A dealer's duty to have a reasonable basis for the representations it makes, and other material information it provides, to an issuer and to ensure that such representations and information are accurate and not misleading, as described above, extends to representations and information provided by the underwriter in connection with the preparation by the issuer of its disclosure documents (*e.g.*, cash flows).

### Underwriter Compensation and New Issue Pricing

**Excessive Compensation.** An underwriter's compensation for a new issue (including both direct compensation paid by the issuer and other separate payments, values, or credits received by the underwriter from the issuer or any other party in connection with the underwriting), in certain cases and depending upon the specific facts and circumstances of the offering, may be so disproportionate to the nature of the underwriting and related services performed as to constitute an unfair practice with regard to the issuer that it is a violation of Rule G-17. Among the factors relevant to whether an underwriter's compensation is disproportionate to the nature of the underwriting and related services performed[,] are the credit quality of the issue, the size of the issue, market conditions, the length of time spent structuring the issue, and whether the underwriter is paying the fee of the underwriter's counsel or any other relevant costs related to the financing.

**Fair Pricing.** The duty of fair dealing under Rule G-17 includes an implied representation that the price an underwriter pays to an issuer is fair and reasonable, taking into consideration all relevant factors, including the best judgment of the underwriter as to the fair market value of the issue at the time it is priced.<sup>[11]34</sup> In general, a dealer purchasing bonds in a competitive underwriting for which the issuer may reject any and all bids will be deemed to have satisfied its duty of fairness to the issuer with respect to the purchase price of the issue as long as the dealer's bid is a bona fide bid (as defined in MSRB Rule G-13)<sup>[12]35</sup> that is based on the dealer's best judgment of the fair market value of the securities that are the subject of the bid. In a negotiated underwriting, the underwriter has a duty under Rule G-17 to negotiate in good faith with the issuer. This duty includes the obligation of the dealer to ensure the accuracy of representations made during the course of such negotiations, including representations regarding the price negotiated and the nature of investor demand for the securities (*e.g.*, the status of the order period and the order book). If,

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market disclosure and has a reasonable basis for relying on the accuracy of the issuer's ongoing disclosure representations. [SEC]Exchange Act Rel. No. [34-]34961 (Nov. 10, 1994) (adopting continuing disclosure provisions of Exchange Act Rule 15c2-12) at text following note 52.

<sup>34</sup> The MSRB has previously observed that whether an underwriter has dealt fairly with an issuer for purposes of Rule G-17 is dependent upon all of the facts and circumstances of an underwriting and is not dependent solely on the price of the issue. See MSRB Notice 2009-54 (Sept. 29, 2009) and the 1997 Interpretation. See also "Retail Order Periods" herein.

<sup>35</sup> Rule G-13(b)(iii) provides: "For purposes of subparagraph (i), a quotation shall be deemed to represent a "bona fide bid for, or offer of, municipal securities" if the broker, dealer or municipal securities dealer making the quotation is prepared to purchase or sell the security which is the subject of the quotation at the price stated in the quotation and under such conditions, if any, as are specified at the time the quotation is made."

for example, the dealer represents to the issuer that it is providing the “best” market price available on the new issue, or that it will exert its best efforts to obtain the “most favorable” pricing, the dealer may violate Rule G-17 if its actions are inconsistent with such representations.<sup>[13]36</sup>

## Conflicts of Interest

**Payments to or from Third Parties.** In certain cases, compensation received by the underwriter from third parties, such as the providers of derivatives and investments (including affiliates of the underwriter), may color the underwriter’s judgment and cause it to recommend products, structures, and pricing levels to an issuer when it would not have done so absent such payments. The MSRB views the failure of an underwriter to disclose to the issuer the existence of payments, values, or credits received by the underwriter in connection with its underwriting of the new issue from parties other than the issuer, and payments made by the underwriter in connection with such new issue to parties other than the issuer (in either case including payments, values, or credits that relate directly or indirectly to collateral transactions integrally related to the issue being underwritten), to be a violation of the underwriter’s obligation to the issuer under Rule G-17.<sup>[14]37</sup> For example, it would be a violation of Rule G-17 for an underwriter to compensate an undisclosed third party in order to secure municipal securities business. Similarly, it would be a violation of Rule G-17 for an underwriter to receive undisclosed compensation from a third party in exchange for recommending that third party’s services or product to an issuer, including business related to municipal securities derivative transactions. This notice does not require that the amount of such third-party payments be disclosed. The underwriter must also disclose to the issuer whether it has entered into any third-party arrangements for the marketing of the issuer’s securities.

**Profit-Sharing with Investors.** Arrangements between the underwriter and an investor purchasing new issue securities from the underwriter (including purchases that are contingent upon the delivery by the issuer to the underwriter of the securities) according to which profits realized from the resale by such investor of the securities are directly or indirectly split or otherwise shared with the underwriter also would, depending on the facts and circumstances (including in particular if such resale occurs reasonably close in time to the original sale by the underwriter to the investor), constitute a violation of the underwriter’s fair-dealing obligation under Rule G-17.<sup>38</sup> Such arrangements could also constitute a violation of Rule G25(c), which precludes a dealer from sharing, directly or indirectly, in the profits or losses of a transaction in municipal securities with or for a customer. An underwriter should carefully consider whether any such arrangement, regardless of whether it constitutes a violation of Rule G-25(c), may evidence a potential failure of the underwriter’s duty with regard to new issue pricing described above.

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<sup>36</sup> See 1997 Interpretation.

<sup>37</sup> See also “Required Disclosures to Issuers” herein.

<sup>38</sup> Underwriters should be mindful that, depending on the facts and circumstances, such an arrangement may be inferred from a purposeful but not otherwise justified pattern of transactions or other course of action without the existence of a formal written agreement.

**Credit Default Swaps.** The issuance or purchase by a dealer of credit default swaps for which the reference is the issuer for which the dealer is serving as underwriter, or an obligation of that issuer, may pose a conflict of interest, because trading in such municipal credit default swaps has the potential to affect the pricing of the underlying reference obligations, as well as the pricing of other obligations brought to market by that issuer. Rule G-17 requires, therefore, that a dealer disclose the fact that it engages in such activities to the issuers for which it serves as underwriter. Activities with regard to credit default swaps based on baskets or indexes of municipal issuers that include the issuer or its obligation(s) need not be disclosed, unless the issuer or its obligation(s) represents more than 2% of the total notional amount of the credit default swap or the underwriter otherwise caused the issuer or its obligation(s) to be included in the basket or index.

### Retail Order Periods

Rule G-17 requires an underwriter that has agreed to underwrite a transaction with a retail order period to, in fact, honor such agreement.<sup>[15]39</sup> A dealer that wishes to allocate securities in a manner that is inconsistent with an issuer's requirements must not do so without the issuer's consent. In addition, Rule G-17 requires an underwriter that has agreed to underwrite a transaction with a retail order period to take reasonable measures to ensure that retail clients are bona fide. An underwriter that knowingly accepts an order that has been framed as a retail order when it is not (*e.g.*, a number of small orders placed by an institutional investor that would otherwise not qualify as a retail customer) would violate Rule G-17 if its actions are inconsistent with the issuer's expectations regarding retail orders. In addition, a dealer that places an order that is framed as a qualifying retail order but in fact represents an order that does not meet the qualification requirements to be treated as a retail order (*e.g.*, an order by a retail dealer without "going away" orders<sup>[16]40</sup> from retail customers, when such orders are not within the issuer's definition of "retail") violates its Rule G-17 duty of fair dealing. The MSRB will continue to review activities relating to retail order periods to ensure that they are conducted in a fair and orderly manner consistent with the intent of the issuer and the MSRB's investor protection mandate.

### Dealer Payments to Issuer Personnel

Dealers are reminded of the application of MSRB Rule G-20, on gifts, gratuities, and non-cash compensation, and Rule G-17, in connection with certain payments made to, and expenses reimbursed for,

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<sup>39</sup> See [MSRB Interpretation on Priority of Orders for Securities in a Primary Offering under Rule G17, MSRB interpretation of October 12, 2010](#), reprinted in MSRB Rule Book. The MSRB also reminds underwriters of previous MSRB guidance on the pricing of securities sold to retail investors. See [Guidance on Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities, MSRB Notice 2009-42 \(July 14, 2009\)](#).

<sup>40</sup> In general, a "going away" order is an order for new issue securities for which a customer is already conditionally committed. See [\[SEC\]Exchange Act Release No. \[34-\]62715, File No. SR-MSRB-2009-17 \(August 13, 2010\)](#).

issuer personnel during the municipal bond issuance process.<sup>[17]41</sup> These rules are designed to avoid conflicts of interest and to promote fair practices in the municipal securities market.

Dealers should consider carefully whether payments they make in regard to expenses of issuer personnel in the course of the bond issuance process, including in particular, but not limited to, payments for which dealers seek reimbursement from bond proceeds or issuers, comport with the requirements of Rule G-20. For example, a dealer acting as a financial advisor or underwriter may violate Rule G-20 by paying for excessive or lavish travel, meal, lodging and entertainment expenses in connection with an offering (such as may be incurred for rating agency trips, bond closing dinners, and other functions) that inure to the personal benefit of issuer personnel and that exceed the limits or otherwise violate the requirements of the rule.<sup>[18]42</sup>

[August 2, 2012]Date of Issuance to Be Specified

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<sup>41</sup> See [MSRB Rule G-20 Interpretation — Dealer Payments in Connection With the Municipal Securities Issuance Process, MSRB interpretation of January 29, 2007](#), reprinted in MSRB Rule Book.

<sup>42</sup> See In the Matter of RBC Capital Markets Corporation, [SEC]Exchange Act Rel. No. [34-]59439 (Feb. 24, 2009) (settlement in connection with broker-dealer alleged to have violated MSRB Rules G-20 and G-17 for payment of lavish travel and entertainment expenses of city officials and their families associated with rating agency trips, which expenditures were subsequently reimbursed from bond proceeds as costs of issuance); In the Matter of Merchant Capital, L.L.C., [SEC]Exchange Act Rel. No. [34-]60043 (June 4, 2009) (settlement in connection with broker-dealer alleged to have violated MSRB rules for payment of travel and entertainment expenses of family and friends of senior officials of issuer and reimbursement of the expenses from issuers and from proceeds of bond offerings).

**ALPHABETICAL LIST OF COMMENT LETTERS ON NOTICE 2018-29 (NOVEMBER 16, 2018)**

1. Bond Dealers of America: Letter from Mike Nicholas, Chief Executive Officer, dated January 15, 2019
2. City of San Diego: Letter
3. Government Finance Officers Association: Letter from Emily S. Brock, Director, Federal Liaison Center, dated January 15, 2019
4. National Association of Municipal Advisors: Letter from Susan Gaffney, Executive Director, dated January 15, 2019
5. Securities Industry and Financial Markets Association: Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, and Bernard V. Canepa, Vice President and Assistant General Counsel, dated January 15, 2019



1909 K Street NW • Suite 510  
Washington, DC 20006  
202.204.7900  
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January 15, 2019

**Submitted Electronically**

Ronald W. Smith  
Corporate Secretary  
Municipal Securities Rulemaking Board  
1300 I Street NW  
Washington, DC 20005

**RE: Request for Comment on Draft Amendments to 2012 Interpretive Notice  
Concerning the Application of MSRB Rule G-17 to Underwriters of  
Municipal Securities**

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Dear Mr. Smith:

On behalf of the Bond Dealers of America (“BDA”), I am pleased to submit this letter in response to the MSRB’s Notice 2018-29 (the “Notice”): Request for Comment on Draft Amendments (the “Draft Amendments”) to 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities. BDA is the only DC-based group representing the interests of securities dealers and banks exclusively focused on the U.S. fixed income markets. We welcome this opportunity to present our comments.

***The BDA believes that the Draft Amendments contain several unnecessary inclusions, which can make compliance with the Draft Amendments more burdensome.***

The Draft Amendments include some unnecessary additions to existing statements that were clear on their own. Our members are concerned that, in the context of an examination, those unnecessary additions will be construed as imposing new compliance expectations as opposed to clarifications of existing requirements, which we believe is the MSRB’s intent. Here are three examples:

- In the new paragraph at the top of page 35 of the Notice<sup>1</sup>, the BDA believes that this new language is not necessary, is fully encompassed in existing

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<sup>1</sup> The following is the new paragraph: “The fair practice duties outlined in this notice are those duties that a dealer owes to a municipal entity when the dealer underwrites its new issue of municipal securities. This notice does not set out the underwriter’s fair-practice duties to other parties to a municipal securities financing (e.g., conduit borrowers). The MSRB notes, however, that Rule G-17 does require that an underwriter deal fairly with all persons. What actions are considered fair will, of necessity, be dependent on the nature of the relationship

application of Rule G-17, is outside of the scope of the disclosures and the MSRB should not include it.

- In the last paragraph on page 36 of the Notice<sup>2</sup>, the Draft Amendments add additional sentence to the effect that an underwriter may not discourage the issuer from retaining a municipal advisor. The BDA believes that the additional sentence is entirely covered by the existing sentence that precedes the new sentence. Any underwriter who discourages an issuer from retaining a municipal advisor for any reasons would be making already a prohibited recommendation to do so.
- In the new paragraph at the top of page 41 of the Notice<sup>3</sup>, the BDA believes that all of this is already covered in the existing language. A dealer who does not make reasonable assumptions in its representations cannot have a reasonable basis for its representations.

While the BDA believes this text is unnecessary, dealers will still need to determine how to establish that they comply with the new statements. Our members are concerned that these additions will look differently in the context of an examination than what the MSRB intends. Accordingly, the BDA believes that the existing language sufficed and the additions in the Draft Amendments should be deleted.

***The BDA believes that the MSRB should re-phrase new language on page 43 of the Notice.***

On page 43 of the Notice, the Draft Amendments state that if less-sophisticated personnel of an issuer replaces more sophisticated personnel, then the “level of transaction-specific disclosure...would likely increase.” The BDA believes that the language should state that an underwriter should take into consideration changes in sophistication of an issuer when determining the level of transaction-specific disclosures. In the abstract, there is no way to determine whether the level should increase or not because it will depend on many factors.

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between a dealer and such other parties, the particular actions undertaken, and all other relevant facts and circumstances. Although this notice does not address what an underwriter’s fair-dealing duties may be with respect to other parties, it may serve as one of many bases for an underwriter to consider how to establish appropriate policies and procedures for ensuring that they meet such fair practice obligations, in light of their relationship with such other participants and their particular roles.”

2 The following is the new language: “In addition, the underwriter may not discourage the issuer from using a municipal advisor or otherwise imply that the hiring of a municipal advisor would be redundant because the underwriter can provide the same services that a municipal advisor would.”

3 The following is the new language: “The need for underwriters to have a reasonable basis for representations and other material information provided to issuers extends to the reasonableness of assumptions underlying the material information being provided. The less certain an underwriter is of the validity of underlying assumptions, the more cautious it should be in using such assumptions and the more important it will be that the underwriter disclose to the issuer the degree and nature of any uncertainties arising from the potential for such assumptions not being valid. If an underwriter would not rely on any statements made or information provided for its own purposes, it should refrain from making the statement or providing the information to the issuer, or should provide any appropriate disclosures or other information that would allow the issuer to adequately assess the reliability of the statement or information before relying upon it. Further, underwriters should be careful to distinguish statements made to issuers that represent opinion rather than factual information and to ensure that the issuer is aware of this distinction.”

***The BDA does not believe that the MSRB's approach to disclosures by co-managers will materially reduce the number of disclosures.***

The Draft Amendments continue to require dealers who serve as co-managers to provide "dealer-specific" conflicts of interest. As a practical matter, conflicts of interest tend to be specific to dealers in that each dealer has specific arrangements that create the conflict. As a practical matter, though, the role of co-manager does not entail the kind of active discussions with an issuer to merit disclosure by all co-managers of their specific conflicts. The BDA believes that the disclosures from the senior manager are sufficient to inform issuers of the various matters they discuss, including conflicts. In the end, the if co-managers are required to deliver these disclosures, it will result in a roughly the same number of disclosures to issuers as currently is the case.

***The BDA believes that the MSRB should clarify the timing of a syndicate manager's delivery of disclosures.***

The Draft Amendments clarify that only a syndicate manager is required to deliver the standard disclosures and transaction-specific disclosures, but the Draft Amendments do not clarify that those disclosures can be delivered earlier than the time when a syndicate is formed. Frequently, an underwriter that later becomes a syndicate manager begins its discussions with an issuer either as a sole manager or as an underwriter without clarity of whether a syndicate will be formed. In these instances, the underwriter may deliver the standard disclosures and transaction-specific disclosures well before a syndicate is formed. The Draft Amendments should clarify that standard disclosures and transaction-specific disclosures delivered by a syndicate manager can be delivered before a syndicate is formed and that the syndicate manager is not required to deliver new disclosures after a syndicate is formed or new syndicate members are added.

\* \* \*

Thank you for the opportunity to provide these comments.

Sincerely,

A handwritten signature in blue ink that reads "Mike Nicholas". The signature is written in a cursive, flowing style.

Mike Nicholas  
Chief Executive Officer

City of San Diego Response to:

Request for Comment on Draft Amendments to 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Notice 2018-29)

I - Nature, Timing and Manner of Disclosures of Conflicts of Interest

**B. Potential Material Conflicts of Interest**

It is reasonable to limit what constitutes a potential material conflict of interest to that which is reasonably foreseeable to mature into an actual conflict of interest. Inclusion of all potential conflicts without regard to likelihood of occurrence could make it difficult to discern real areas of concern.

A greater likelihood than “reasonable foreseeability” should not be set. Such a standard could eliminate the disclosure of some potential conflicts of interest that have a reasonable chance of occurring, even if they are not highly likely to occur.

The obligation requiring underwriters to provide disclosures of actual material conflicts of interest discovered or arising after the underwriter is engaged does not eliminate or reduce the need to disclose potential material conflicts of interest. It is important for an issuer to be apprised of potential material conflicts of interest up front, so the issuer can properly evaluate the potential conflicts and determine if it is prudent to move forward.

**C. Syndicate Manager Disclosure of Standard and Transaction-Specific Disclosures on Behalf of Syndicate Members**

Each syndicate member should be responsible for delivering the standard and transaction specific disclosures. Even for a frequent issuer, receipt of disclosures from each syndicate member is manageable. As such, all syndicate members should continue to be required to obtain acknowledgement of receipt from the issuer. The ability to handle this electronically should minimize any burdens. The standard and transaction specific disclosures should be bifurcated from the dealer specific disclosures to aide in the review of information.

**D. Optional Alternative Manner of Providing Standard Disclosures**

While the alternative manner could reduce the volume of disclosures, it may be confusing, particularly when a syndicate member in one transaction becomes a syndicate manager in a subsequent transaction and refers back to the disclosure provided by the syndicate manager in the prior transaction. It is most straight forward to require disclosures on a transaction by transaction basis. Even for a frequent issuer, receipt of disclosures from each syndicate member, and by transaction, is manageable.

## E. Clear and Separate Identification of Disclosures

Many underwriters already separate dealer and transaction specific disclosures in the same document. The separation of the standard, dealer-specific and transaction specific disclosures, when they are provided within the same document, would not create challenges when the issuer reviews them. Conversely, the separation would aid in the review of the information.

## G. Plain English

Many underwriters present disclosures in a clear manner when they are engaged for non-complex municipal securities financings. In these cases, some underwriters explicitly state in the disclosures that they are not recommending a complex municipal securities financing to the issuer. Such a statement should be required under these circumstances. Similarly, if the subject matter is so complex that it cannot be explained in plain English, that should be explicitly stated within the disclosures about the financing. Such a statement would alert an issuer that it needs to ask more questions, allows the issuer to consult with its municipal advisor or counsel, and may be important in the issuer's determination of whether it should recommend the transaction to its legislative body and proceed with execution.

## II – Issuer Acknowledgement of Receipt of Underwriter Disclosures

The issuer should designate its primary contact for receipt of the underwriter disclosures. The primary contact should be someone with financial decision-making authority who leads the issuer's financing efforts. Delivery of disclosures by e-mail and confirmation via a read receipt should be permitted so long as the underwriter has delivered the disclosures to the issuer designated primary contact.

## IV – Underwriter Discouragement of the Use of a Municipal Advisor

Since an issuer (particularly one that is not in the market often) could experience a situation where an underwriter discourages the issuer from engaging a municipal advisor, the strengthened language under the Amended Guidance is important. The draft amendment, by explicitly stating that an underwriter may not discourage an issuer from using a municipal advisor or otherwise imply that the hiring of a municipal advisor would be redundant because the underwriter can provide the same services that a municipal advisor would, should address the issue. In addition, the standard disclosures should include an affirmative statement that the issuer may retain a municipal advisor.



Government Finance Officers Association  
660 North Capitol Street, Suite 410  
Washington, D.C. 20001 202.393.8467

January 15, 2019

Mr. Ronald Smith  
Corporate Secretary  
Municipal Securities Rulemaking Board 1300 I Street, N.W.  
Washington, D.C. 20005

Re: MSRB Regulatory Notice 2018-29

Dear Mr. Smith:

The Government Finance Officers Associations (“GFOA”) appreciates the opportunity to comment on the Municipal Securities Rulemaking Board’s (MSRB) proposal to address interpretive guidance, advisories and compliance resources. The GFOA represents nearly 20,000 state and local government finance professionals across the United States, many of whom issue municipal securities, and therefore is very interested in this rulemaking.

The GFOA welcomes the opportunity to comment on MSRB Notice 2018-29. GFOA has commented in the past on Rule G-17<sup>12</sup> and subsequent interpretative guidance, as the MSRB’s work in this area is very important to municipal securities issuers. Rule G-17, in particular, is representative of MSRB rulemaking that is done to fulfill its mission to protect issuers.

As GFOA stated in its August 6, 2018 letter, the intent of the rulemaking must be to ensure that issuers are aware of conflicts that exist with their underwriting team, (and in particular, the representative underwriter) and risks associated with a financing. While the revised proposed guidance is a step forward in many areas – including separating standard from specific disclosures, eliminating the issuer opt out provision, and requiring plain English standards – other parts of the guidance are not as strong as they should be in order to equip issuers with proper awareness and adequate disclosures about transactions and their underwriter(s). Our comments primarily focus on sections that reference underwriter disclosures to issuers. Responses to specific questions are noted below.

*Clarity and communication of disclosures:* When determining clarity and communication of disclosures, standard disclosures should be discussed separately from specific transaction and underwriter disclosures.

*Timing and frequency of disclosures:* The MSRB’s suggestion that disclosures be provided once and then referenced thereafter (see Section “D” page 7) is problematic. GFOA stated previously

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<sup>1</sup> GFOA G-17 2018 Comment Letter referenced throughout: <http://msrb.org/RFC/2018-10/GFOA.pdf>

<sup>2</sup> GFOA G-17 2011 Comment Letter referenced throughout: <https://www.sec.gov/comments/sr-msrb-2011-09/msrb201109-22.pdf>

that some boilerplate/standard disclosures could be provided annually for some frequent issuers; however, we believe that this practice may diminish the import of the actual matter being disclosed. The revised guidance should be changed to mandate that disclosures are provided to issuers for each transaction, to ensure that the issuers are aware of the fair dealing requirement for each issuance of securities. There may be some instances where annual boilerplate disclosures for frequent issuers may make sense, but that should not be applied across the board nor as the MSRB suggests that disclosures may be provided once and then referenced in future transactions. Transaction specific and material underwriter conflicts of interest should be provided for each issuance of securities.

*Types of transaction-specific disclosures:* The types of transaction specific disclosures provided to issuers should include key information about the risks of a transaction. The MSRB should not formulate rulemaking that could dilute the information that an underwriter provides to an issuer about the material risks within a transaction. This calls into question whether the revised G-42 standard cited in the Notice is the most appropriate when underwriters recommend a financing structure to issuers. The “two-prong analysis, generally consisting of a call to action to proceed with a specific recommended financing structure” standard could prevent some issuers from receiving the right information they need to determine what financing structures are best for their government.

*Conflicts of interest and “reasonably foreseeable” conflicts of interest:* The material conflicts of interest and “reasonably foreseeable” conflicts of interest standard should be used by the underwriter. Including “all potential” risks could not only increase the disclosures in magnitude but also it could diminish the meaningful inclusions that issuers need to know. To restate, it is important for the key conflicts to be reported in a separate document from standard disclosures. Underwriters should also continue to have an “ongoing obligation” to provide material disclosures after the execution of the contract and continuing through the underwriting period.

*Underwriter discouragement of the use of a Municipal Advisor:* The proposed language helps to make sure that underwriters avoid telling issuers not to hire a municipal advisor. However, per our comments in 2018 and 2011, we suggest that MSRB also include a requirement that underwriters affirmatively state that issuers may choose to hire a municipal advisor to represent their interests in a transaction.

Thank you again for the opportunity to comment. Please feel free to contact me at ebrock@gfoa.org or (202) 393-8467 if you have any questions on or would like to discuss any of the information provided in this letter.

Sincerely,

A handwritten signature in cursive script that reads "Emily S. Brock". The signature is written in black ink and is positioned below the "Sincerely," text.

Emily Swenson Brock  
Director, Federal Liaison Center



January 15, 2019

Mr. Ronald W. Smith  
Corporate Secretary  
Municipal Securities Rulemaking Board  
1300 I Street, NW Suite 1100  
Washington, DC 20005

**RE: MSRB Notice 2018-29**

Dear Mr. Smith:

The National Association of Municipal Advisors (“NAMA”) appreciates the opportunity to comment on amendments to the 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (“Notice”). NAMA represents independent municipal advisory firms, and individual municipal advisors (“MA”) from around the country, and our members are interested in the guidance that the MSRB develops for regulated entities.

We appreciate the work that the MSRB has done in seeking a balance between curtailing the length of MSRB Rule G-17 underwriter disclosures to better meet the underpinning objectives and be provided in plain English, while attempting to enhance the effectiveness of those disclosures. The tenet for these changes should be what can be done to continue to “protect issuers” and ensuring that key information about a transaction is clearly and promptly provided so that the issuer can make fully informed decision(s) about key aspects of a transaction.

As discussed below there are many proposed changes in the Notice that are helpful to the marketplace as a whole. However, a key area of concern continues to be related to the types of underwriter disclosures that must be provided. In the Notice the MSRB has proposed setting a standard for underwriter disclosures based on a municipal advisor standard which does not adequately balance the differing duties of the underwriter. We oppose such action, and would note that the basis for which the G-42 recommendation standard for municipal advisors (professionals with a fiduciary duty to the issuer) is not an appropriate basis for the types of G-17 transaction specific disclosures that an underwriter should be providing to an issuer. The MSRB should work to ensure that transaction specific and actual conflicts of interest are provided clearly to issuers, without sacrificing delivery of key information to issuers about the risks of various aspects of a transaction and actual conflicts related to the underwriter.

#### Underwriter Disclosures

A major concern we have with the Notice, is that it could lead to important disclosures about transaction risks not being made to issuers. The revised Notice sets the standard of what underwriters must disclose regarding underwriter recommendations and sets that threshold as the same as a municipal advisor’s MSRB Rule G-42 recommendation standard.

We have two main concerns with the revised Notice:

1. Issuers may not receive key information. It appears as though the MSRB is recommending new language be included in the Interpretative Notice that could lead to key aspects of complex financing structures not being provided to an issuer even when recommended by an underwriter. Under Rule G-42, the recommendation standard for municipal advisors is set at whether the client should engage in a municipal securities transaction. If that threshold was applied to underwriter recommendations, key pieces of a transaction (e.g. interest rate modes, various types of credit enhancement, redemption provisions) would not result in disclosures from the underwriter, yet may be a significant enough of a term of a transaction that an issuer should be made aware of the risks. This new standard for disclosures regarding underwriter recommendations appears to be in opposition to MSRB's statutory mandate to protect issuers. We would oppose such action, and ask that the MSRB have underwriters disclose appropriate transaction information and risks for the client.

Although there are positive changes in the Notice that bifurcate standard disclosures from transaction specific disclosures, limiting the types of transition specific disclosures received by the issuer severely undercuts any positive advances made to make these disclosures more understandable to issuers.

2. The standard developed by the MSRB for a G-42 Recommendation by a municipal advisor is not the right standard for a G-17 disclosure standard for a broker-dealer. Amongst other things, it is important to note that making a G-42 Recommendation triggers the requirement for an MA to make a suitability determination as well as other requirements in the context of the already higher duties they owe to municipal entities and obligated persons. This same recommendation standard is inappropriate for a mere disclosure requirement by an underwriter with only a fair dealing obligation. Applying the G-42 recommendations standard to underwriter G-17 disclosures creates a false regulatory parity that is not appropriate given the MSRB's mission to protect issuers and the very different roles and duties that municipal advisors and underwriters have to issuers. The MSRB has already determined that, despite the higher duty they owe to their clients, if a municipal advisor goes so far as to make a G-42 Recommendation they must also determine that the transaction or product is suitable. But, for advice and recommendations that do not rise to the level of a G-42 Recommendation, a municipal advisor still must put the interests of the municipal advisor client ahead of its own and is still subject to a duty of care that requires it to, amongst other things, "make a reasonable inquiry as to the facts that are relevant to a client's determination as to whether to proceed with a course of action or that form the basis for any advice provided to the client." The MSRB imposed all of these requirements citing its statutory mandate to protect issuers. Now, the MSRB appears to be saying that an issuer is equally well-protected, including in cases where not represented by an MA (of note - 28% of transactions in 2018 were done without a municipal advisor<sup>1</sup>) if an underwriter merely discloses risks associated with a G-42 recommendation. The underwriter does not have to determine that the transaction is suitable. The infrequent issuer receives no disclosures at all with respect to interest rate modes, credit enhancement or various other complex aspects of a transaction that an underwriter might recommend as long as the underwriter did not recommend the actual transaction. The MSRB comes to the illogical view that issuers need more protection from regulated persons that already owe them a fiduciary duty than they do from regulated persons with lesser obligations.

#### Bifurcating Standard Disclosures From Underwriter and Transaction Specific Disclosures

The MSRB is proposing to permit sole underwriters or syndicate managers (when there is a syndicate) to provide standard disclosures to an issuer one time and then to provide them subsequently by reference to and reconfirmation of those initial standard disclosures, in writing, unless the issuer requests that the standard disclosures be made on a transaction-by-transaction basis.

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<sup>1</sup> Bloomberg data

NAMA supports separating standard disclosures from transaction specific disclosures as a way to highlight key items to clients. However, as noted above we are concerned with using the G-42 recommendation threshold as the determining factor as to what information would have to be disclosed. The transaction specific disclosures should be provided up-front and ahead of standard disclosures so that they are not diluted and receive the attention of the issuer.

#### Providing Disclosures to Issuers

Regarding the frequency of underwriter disclosures, NAMA opposes action that would not provide the disclosures for each transaction, and believes that the Notice should not allow underwriters to provide disclosures and then in future transactions reference those disclosures. There could be any number of changes both with the underwriter and with the issuer that warrant disclosures for each transaction, the least of which is to provide information to issuers to ensure their protection in every transaction.

#### Underwriters Deterring Use of Municipal Advisors

The Notice updates the language to help ensure that underwriters do not deter the use of MAs by issuers. Our members are aware of instances where both underwriters and bond counsel directly deter the use of a municipal advisor or bond counsel dictates who the municipal advisor should be.

#### Other Items

NAMA is pleased that the Notice: does not permit the posting of disclosures on EMMA as satisfying the G-17 requirement; does not permit issuers to opt-out of receiving disclosures; would continue to mandate a form of acknowledgement from issuers that the disclosures are received, even through an e-mail return receipt; and that underwriter disclosures are to be provided in "plain English."

Thank you for the opportunity to comment on these issues.

Sincerely,



Susan Gaffney  
Executive Director



**January 15, 2019**

Ronald W. Smith  
Corporate Secretary  
Municipal Securities Rulemaking Board  
1300 I Street NW  
Suite 1000  
Washington, DC 20005

**Re: MSRB Notice 2018-29: Request for Comment on Draft Amendments to 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities**

Dear Mr. Smith,

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> appreciates this opportunity to respond to Notice 2018-29 (the “Request for Comment”)<sup>2</sup> issued by the Municipal Securities Rulemaking Board (the “MSRB”), in which the MSRB seeks comment on draft amendments to the Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Aug. 2, 2012) (the “2012 Guidance”)<sup>3</sup>. We refer in this letter to the 2012 Guidance, as amended, as the “Amended Guidance.”

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<sup>1</sup> SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

<sup>2</sup> MSRB Notice 2018-29 (Nov. 16, 2018), <http://www.msrb.org/~media/Files/Regulatory-Notices/RFCs/2018-29.ashx?n=1>.

<sup>3</sup> Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Aug. 2, 2012), <http://msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-17.aspx?tab=2>, and originally published in MSRB Notice 2012-25 (May 7, 2012). The 2012 Guidance was approved by the Securities and Exchange Commission (the “SEC”) in Release No. 34-66927 (File No. SR-MSRB-2011-09) (May 4, 2012), 77 FR 27509 (May 10, 2012).

Mr. Ronald W. Smith  
Corporate Secretary  
Municipal Securities Rulemaking Board  
Page 2 of 10

We support the MSRB's retrospective review<sup>4</sup> of the 2012 Guidance, and our comments below seek to ensure that the purpose of the review is fully realized. We appreciate that the MSRB has proposed adopting some of the suggestions we made in our comment letter<sup>5</sup> to the MSRB's Initial Request for Comment, including: 1) incorporating the practical considerations of MSRB Notice 2012-38 (July 18, 2012) (the "Implementation Guidance")<sup>6</sup> and MSRB Notice 2013-08 (Mar. 25, 2013) (the "FAQs")<sup>7</sup> into the Amended Guidance; 2) clarifying the applicability of MSRB Rule G-42's two-prong analysis to a recommendation for complex municipal financings; and 3) allowing for an automatic email return receipt as a means to evidence receipt of the underwriter disclosures.<sup>8</sup> These proposed amendments – along with a requirement that syndicate managers provide the standard disclosures on behalf of syndicate participants as well as the clarification that underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction – provide greater clarity and reduce unnecessary burdens.

SIFMA, however, believes that certain proposed amendments do not satisfy the goal of the retrospective review, that is to move the needle toward more efficient and effective disclosures that benefit issuers and underwriters alike. Any changes to the 2012 Guidance should address the perceived problem of the diminishing utility of increasingly duplicative and lengthy disclosures, not contribute to it. The 2012 Guidance should be amended in a way that reflects a more mature municipal securities market; recognizes that different business models exist, and a one-sized-fits-all approach does not work; reduces costs without impacting the benefits; and results ultimately in more efficient and effective disclosures for the benefit of all market participants.

Our comments below first focus on amendments proposed by the MSRB that we believe are beneficial or would be more beneficial with additional clarifications. We

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<sup>4</sup> As announced in MSRB Notice 2018-10, Request for Comment: Retrospective Review of 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (June 5, 2018), <http://www.msrb.org/~media/Files/Regulatory-Notices/RFCs/2018-10.ashx?la=en> (the "Initial Request for Comment").

<sup>5</sup> Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, SIFMA, to Ronald W. Smith, Corporate Secretary, MSRB (Aug. 6, 2018), <http://msrb.org/RFC/2018-10/SIFMA.pdf> (the "Prior SIFMA Letter").

<sup>6</sup> MSRB Notice 2012-38 (July 18, 2012), <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2012/2012-38.aspx>.

<sup>7</sup> MSRB Notice 2013-08 (Mar. 25, 2013), <http://www.msrb.org/Rules-and-Interpretations/Regulatory-Notices/2013/2013-08.aspx>.

<sup>8</sup> *Supra* note 2.

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then turn to amendments proposed by the MSRB that we find problematic. We attach an appendix with answers to select questions posed by the MSRB.

Given the substantial operational changes that would need to be implemented from any amendments, SIFMA respectfully requests that underwriters be given, at a minimum, six (6) months from the date of SEC approval of the Amended Guidance to implement any changes. This would allow our members enough time to review and revise their policies and procedures and disclosure documents, communicate to and train their employees on the changes, and operationalize the requirements of the Amended Guidance.

## **1. Proposed Amendments or Clarifications that, if Adopted, would be Beneficial**

### **a. Timing of the required disclosures**

Although the MSRB has not requested comment on this particular point, we note that footnote 8 of the Request for Comment creates some confusion, as it states that an underwriting engagement would begin at the time the “first disclosure requirements” are triggered (i.e., at the earliest stages of the relationship between the underwriter and issuer with respect to an issue). In the 2012 Guidance itself, request for proposal (“RFP”) responses and promotional materials are stated to be examples of the earliest stages of the relationship between issuer and underwriter. It is certainly contrary to the common understanding of the word “engagement” to state that the underwriter is engaged when it submits an RFP response or a pitch book. An underwriter is engaged when an issuer makes the decision to engage and so engages the underwriter. While the G-17 “arm’s-length” disclosures are required to be made “at the earliest stages,” as are the virtually identical G-23 disclosures,<sup>9</sup> the other G-17 disclosures are made no earlier than the point of engagement.<sup>10</sup> Footnote 8 is inconsistent with the text of the 2012 Guidance itself. This point should be clarified, as the proposed effective date of the changes turns on it.

### **b. Clear and Separate Identification of Disclosures**

The MSRB proposed that underwriters would be required to clearly identify each category of disclosures and separate them (e.g., by placing the standard disclosures in an appendix or attachment). If the MSRB does not eliminate the need to disclose

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<sup>9</sup> Guidance on the Prohibition of Underwriting Issues of Municipal Securities for which a Financial Advisory Relationship Exists Under Rule G-23 (Nov. 27, 2011), <http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-23.aspx?tab=2>.

<sup>10</sup> See paragraph 2 under “Timing and Manner of Disclosures” in the August 2, 2012 G-17 notice, *supra* note 3.

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potential material conflicts of interest as we strongly believe it should, this separation of actual and non-standard disclosures is a reasonable proposal.

**c. Disclosure on the Part of Parties Other than the Underwriter**

SIFMA welcomes the MSRB's clarification that would not require underwriters to make any disclosures on the part of issuer personnel or any other parties to the transaction, except possibly for a syndicate manager to make certain disclosures on behalf of other syndicate members. We would find it particularly useful for the MSRB to provide examples of conflicts of other parties that would not need to be disclosed. For example, if a potential underwriter of a school district bond issue contributed to a separate school foundation at the suggestion of a school district official, or contributed to a nonprofit in which an elected official has expressed an interest, would a G-17 conflicts disclosure of the contribution be required?

**2. Proposed Amendments that, if adopted, Defeat the Purpose of the Retrospective Review of the 2012 Guidance**

**a. Potential Material Conflicts of Interest**

Recognizing SIFMA's and the Government Finance Officers Association's ("GFOA's") prior statements that certain disclosures have become too complex and lengthy, which may distract from the focus on actual material conflicts, the MSRB proposes to amend the 2012 Guidance to clarify that a potential material conflict of interest must be disclosed if, but only if, it is *reasonably foreseeable* that it will mature into an actual material conflict of interest during the transaction.

SIFMA does not believe a *reasonably foreseeable* standard adequately addresses the recognized problem that, in the intervening six years since the 2012 Guidance was issued, the 2012 Guidance has resulted in some voluminous, generic disclosures with diminishing utility. We again suggest that the disclosure requirement be limited to actual, and not merely potential, material conflicts of interest, or in the very least, a *highly likely*<sup>11</sup> standard.

It is unnecessary, distracting, and does not advance the goal of the retrospective review to require disclosure of merely potential material conflicts.<sup>12</sup> First, it is unnecessary to

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<sup>11</sup> See attached appendix for a fuller discussion.

<sup>12</sup> Although the MSRB declined our suggestions to eliminate the disclosure requirements for third-party marketing arrangements and credit default swaps, we still believe that they should be eliminated. Given

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require disclosure of potential conflicts. If such potential conflicts become actual material conflicts prior to execution of a bond purchase agreement (“BPA”), they must be disclosed under the 2012 Guidance. It is exceedingly rare for potential conflicts of interest to arise after the BPA is signed, and arguably conflicts arising between BPA and closing are not relevant to the issuer’s decision to contract with the underwriter. In any event, such conflicts would be disclosed in the Official Statement, if appropriate. Second, it is not clear that it would demonstrably reduce the volume of disclosures, allowing issuers to focus on ones more closely related to their transaction. In addition to doing little to make disclosures more effective, the proposed standard would be exceedingly difficult to implement and monitor from a compliance standpoint. It is too difficult to ascertain and carries too great a risk of misjudging whether and when a potential conflict becomes material. Consequently, it would not reduce disclosures demonstrably because it is not clear that underwriters would be inclined to reduce their potential conflicts disclosures. In fact, it may result, depending on an underwriter’s view, in more disclosures.

Should the MSRB again reject our suggestion, we alternatively suggest that a potential conflict of interest should be disclosed if, but only if, it is *highly likely* that it will mature into an actual material conflict of interest during the transaction. We believe this higher standard may accomplish more than the Request for Comment’s proposed standard to reduce disclosures. We also request that the MSRB provide guidance in the form of examples of disclosures that should or should not be made under whatever standard is ultimately adopted.

#### **b. Removal of the “No Hair Trigger” Language**

Related to the timing of the required disclosures, SIFMA strongly objects to the MSRB modifying the language in the Implementation Guidance to eliminate the “no hair trigger” language.<sup>13</sup> This language has been an important reassurance to our members who have acted in substantial compliance with the prescribed timeframes despite transactions that have proceeded along unforeseen timelines and pathways. It has prevented hair-trigger tripwires resulting in mere technical rule violations that consume not only firm resources, but also valuable regulator resources. While we understand the MSRB’s concerns that the inclusion of such language suggests noncompliance is acceptable as an ordinary course of business, we do not believe that the industry has taken that to mean that routine noncompliance is acceptable. Unless the MSRB can point to prevalent abuses, the current language should be left as-is.

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the MSRB’s concerns, though, we suggest that these conflicts be disclosed only if they meet the “material conflicts” standard.

<sup>13</sup> *Supra* note 2 at p. 9 n.11.

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### **c. Plain English**

The MSRB proposes to explicitly require plain English in the Amended Guidance. SIFMA also strongly disagrees with this proposal. The words “plain English” are susceptible to different interpretations. For example, the plain English standard articulated by the SEC is very different from how underwriters draft their disclosures currently.<sup>14</sup> Even SEC commissioners have commented that it is difficult to understand and apply in practice.<sup>15</sup> Adopting such a standard would require underwriters to completely redo all manner of their G-17 disclosures, especially those pertaining to complex financings, an expensive and time-consuming effort with increased risk that the meaning of certain disclosures would be lost in the translation to plain English. Rather, we suggest that the MSRB adopt a “*clear and concise*” standard that is more universally understood, results in well-drafted disclosures, and is in line with the MSRB’s disclosure principles as well as the goals of the retrospective review of the 2012 Guidance.

### **d. Underwriter Discouragement of the Use of a Municipal Advisor**

The MSRB proposes to amend the 2012 Guidance to state that an underwriter may not discourage an issuer from using a municipal advisor (“MA”) or otherwise imply that the hiring of an MA would be redundant of the underwriter’s services.

SIFMA does not believe this proposal is necessary and would have unintended consequences. We are concerned that the proposal will limit otherwise permissible advice, such as describing what services can and cannot be provided, between underwriters and their clients for fear of implying that an MA may be redundant. The SEC has made clear in granting the underwriter’s exclusion from the MA rule that the services essential to complete an underwriting, including advice on the timing and the terms and structure of an underwriting can be performed by the underwriter without a MA.<sup>16</sup> We fear this proposal implies or creates a bias against underwriter-only transactions that could confuse issuers and discourage an issuer’s flexibility to control the cost and scope of its financings in cases where it chooses not to use a MA.

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<sup>14</sup> SEC, *A Plain English Handbook*, <https://www.sec.gov/pdf/handbook.pdf>.

<sup>15</sup> See, e.g., Robert Jackson, Commissioner, SEC, Remarks at the Municipal Securities Disclosure Conference (Dec. 6, 2018).

<sup>16</sup> In the adopting release to the definition of a municipal advisor, the SEC made clear that “the underwriter exclusion would include advice provided by the underwriter within the scope of the underwriting and would generally include advice with respect to the structure, timing, terms, and other similar matters concerning that issuance of municipal securities.” Securities Exchange Act Release No. 34-70462, 78 FR 67468, 67511 (Nov. 12, 2013).

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Although MAs are permitted to provide advice beyond essential services to complete an underwriting, such as assisting with political advocacy to help an issuer pass an election or advising on the method of sale (services that underwriters may not provide if acting under the underwriter's exclusion), issuers may not need or want to pay for these services and may prefer to make budget-driven decisions that exclude MAs. The fact that the duties of an MA and an underwriter are meaningfully different is already clearly articulated in the current 2012 Guidance, which requires an underwriter to explicitly explain to issuers and draw the line between its duties of fair dealing and the fiduciary duties owned by an MA.

In lieu of the current proposal, we suggest the MSRB clarify the 2012 Guidance to eliminate any implication of a bias or creation of a competitive advantage of one group over another. SIFMA suggests that the MSRB make it clear in the Amended Guidance that neither MAs nor underwriters may misrepresent the services and duties that the other is permitted to provide, and that MAs may not state or imply that there is a regulatory requirement for an issuer to hire an MA. We believe these clarifications to be a better alternative to Request for Comment's proposal.

#### **e. Optional Alternative Manner of Providing Disclosures**

In the Prior SIFMA Letter, we essentially proposed a simplified, annual process of providing original and amended disclosures to repeat issuer clients, aiming to alleviate the burdens on both issuers and underwriters of duplicative and, in some cases, voluminous disclosures.<sup>17</sup> Recognizing the merit of a part of our suggestion, the MSRB proposed an alternative manner of providing the standard disclosures. The Amended Guidance would permit sole underwriters or syndicate manager to "...provide the standard disclosures to an issuer one time and then to provide them subsequently by reference to and reconfirmation of those initial standard disclosures, in writing, unless the issuer requests the disclosures on a transaction-by-transaction basis."<sup>18</sup> To utilize this option, underwriters would have to comply with several additional requirements if the standard disclosures needed to be amended. Those additional requirements would include delivering the amended disclosures, making a reference to when the initial disclosures were made, and making the initial and amended disclosures readily accessible in hard copy or electronic format. Further, a sole underwriter or syndicate manager would be required to maintain originals for the retention period prescribed in MSRB Rule G-9, but the retention period would reset each time this option is utilized.<sup>19</sup> The timing requirements for initial and amended disclosures would remain the same as in the 2012 Guidance.<sup>20</sup>

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<sup>17</sup> *Supra* note 5 at pp. 9-11.

<sup>18</sup> *Supra* note 2 at p. 8.

<sup>19</sup> *Id.* at pp. 8-9.

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While we appreciate the MSRB's consideration of our proposal, we believe that the MSRB's proposal complicates matters even further. The requirement to make the original disclosures readily accessible would involve a significant infrastructure build for firms, and the varying record retention requirements are likely to create confusion among underwriters and issuers. Simply put, it would be operationally burdensome for underwriters and do little to reduce the volume and nature of paperwork. Given that the alternative means of providing the standard disclosures are more complex and burdensome, we do not believe our members would avail themselves of this particular alternative method. We believe there are better alternatives, and we reiterate our original suggestion for an annual process, with bring-downs as necessary during the succeeding year, which simplifies recordkeeping.<sup>21</sup>

#### **f. Disclosures Concerning the Underwriter's Compensation**

Rather than eliminating this disclosure requirement altogether as SIFMA suggested in our the Prior SIFMA Letter,<sup>22</sup> the MSRB proposes that it be included in the standard disclosures; however, for alternative compensation structures, a dealer must indicate that the standard disclosure does not apply and explain the alternative structure as part of the transaction-specific disclosures to the extent that the alternate structure presents a conflict of interest.

SIFMA believes this proposal is contrary to the goals of this retrospective review because it would invariably result in more standardized and generic disclosures that may distract from more specific ones. Underwriters would, for instance, be required to add additional language to note that the compensation is not contingent. Should the MSRB not reconsider our original proposal, SIFMA would prefer retaining the current method of providing the disclosure, as it would not lead to more standardized and generic disclosures.

#### **g. Syndicate Manager Disclosure of Standard and Transaction-Specific Disclosures on Behalf of Syndicate Members**

The MSRB proposal would require, rather than permit, the standard disclosures to be made by a syndicate manager on behalf of syndicate participants. While SIFMA welcomes this proposal to reduce oftentimes duplicative disclosures provided to

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<sup>20</sup> *Id.*

<sup>21</sup> *Supra* note 5 at pp. 9-11.

<sup>22</sup> *Id.* at p. 8.

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issuers, it appears that the proposal may require the syndicate manager to affirmatively state the standard disclosures are being provided on behalf of the other syndicate members. If this is the case, it may be problematic because an underwriter may not know if there will be co-managers at the time the Rule G-17 disclosures are sent. For instance, in some cases, Rule G-17 disclosures are made when the underwriter is engaged in order to establish the underwriter exclusion from the municipal advisor rules. The SEC permits that to be done via a preliminary engagement letter, which oftentimes is executed before it is known whether there will be co-managers. Underwriters should not be required to suggest that the issuer might consider appointing co-managers. It should suffice that the senior manager has made the disclosures, without requiring the affirmative statement that the disclosures are being made on behalf of co-managers. This should apply to all disclosures except conflicts disclosures.<sup>23</sup>

#### **h. Classification of Issuers to Create Tiered Disclosure Requirements**

As noted in the Prior SIFMA Letter, we believe that tiered disclosure requirements may be beneficial to issuers and underwriters.<sup>24</sup> We also believe that for a tiered disclosure regime to work effectively, clear and objective standards are necessary. We would welcome further discussion on this issue.

#### **i. Trigger for Transaction-specific Disclosures**

Finally, in the Prior SIFMA Letter, we suggested that the MSRB adopt one standard based on the standard for routine financings,<sup>25</sup> which the MSRB declined to adopt, arguing that the risk is too great of an underwriter inaccurately determining that complex municipal securities financings disclosures are unnecessary. This is another area where we believe clear, objective standards in the Amended Guidance would be beneficial to issuers and underwriters. We also welcome further discussion on this issue.

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<sup>23</sup> Under the 2012 Guidance, transaction-specific disclosures are only required to be made when the underwriter has recommended the transaction. In many cases, the recommendation is only made by the senior manager, not the co-managers. As such, senior managers should be required to provide copies of its G-17 disclosures to the co-managers once they have been selected.

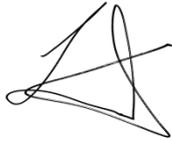
<sup>24</sup> See *supra* note 5 at p. 17.

<sup>25</sup> *Id.* at pp. 11-12.

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SIFMA appreciates this additional opportunity to comment on the proposed amendments to the 2012 Guidance. We would be pleased to discuss any of these comments in greater detail, or to provide any other assistance that would be helpful. If you have any questions, please do not hesitate to contact Leslie Norwood at (212) 313-1130.

Sincerely yours,

A handwritten signature in black ink, appearing to be 'Leslie M. Norwood', written in a cursive style.

Leslie M. Norwood  
Managing Director and Associate General Counsel

A handwritten signature in black ink, appearing to be 'Bernard V. Canepa', written in a cursive style.

Bernard V. Canepa  
Vice President and Assistant General Counsel

cc: Lynnette Kelly, President and Chief Executive Officer  
Lanny Schwartz, Chief Regulatory Officer  
Michael Post, General Counsel  
Carl Tugberk, Assistant General Counsel

**Appendix A:****SIFMA Answers to Select Questions Posed in MSRB Notice 2018-29****I.B. Potential Material Conflicts of Interest**

1. *Is limiting what constitutes a potential material conflict of interest to only those material conflicts of interest that are reasonably foreseeable to mature into actual material conflicts of interest during the course of the transaction an appropriate standard, and is it sufficiently clear to be implemented by underwriters?*

No, it is not an appropriate standard, and for the reasons discussed above, is not sufficiently clear to be implemented by underwriters.

2. *Should the standard require a greater likelihood than “reasonable foreseeability” that a potential material conflict of interest will mature into an actual material conflict of interest (e.g., “high probability”)?*

Yes, a higher standard, such as “highly likely,” would create a more workable standard to consider whether a potential material conflict will mature into an actual one. This is more likely to reduce the volume of unnecessary disclosures.

4. *Does the ongoing obligation requiring underwriters to provide disclosures of actual material conflicts of interest discovered or arising after the underwriter has been engaged eliminate or reduce the need to disclose potential material conflicts of interest? What if such a material conflict of interest is not discovered or does not arise until after the execution of a contract with the underwriter or otherwise does not allow an issuer official sufficient time to evaluate the underwriter’s recommendation?*

Yes, this would, in the very least, reduce the need to disclose potential conflicts of interest. If a potential conflict materializes into an actual conflict, it would be disclosed, but we believe that the likelihood this will happen after a BPA has been executed and before closing, depriving the issuer enough time to consider the conflict, is de minimis. Furthermore, if the BPA is executed before the conflict arises, the issuer’s decision to contract will not have been affected by the after-arising conflict.

**I.C. Syndicate Manager Disclosure of Standard and Transaction-specific Disclosures on Behalf of Syndicate Members**

1. *If the 2012 Guidance is amended to require a syndicate manager to provide the standard and transaction-specific disclosures on behalf of the syndicate, should the syndicate manager be solely responsible for the content of those disclosures or failing to deliver them, or should the other syndicate members have regulatory liability for any non-compliance? If yes, what would be an effective mechanism or process to help ensure that syndicate members will agree on the content of the standard and transaction-specific disclosures?*

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The liability and determination of content should be attributable to the syndicate manager. We do not believe there would be an effective mechanism or process to obtain agreement on the disclosures given how most syndicates are put together over time.

2. *If the 2012 Guidance is amended to require a syndicate manager to provide the standard and transaction-specific disclosures on behalf of a syndicate, should the other syndicate members continue to be required to obtain acknowledgment of receipt from the issuer? Should the other syndicate members be required to make and preserve records of the standard and transaction-specific disclosures provided to, and the acknowledgement of receipt of those disclosures received from, the issuer?*

This question suggests that there currently is a requirement for other syndicate members to obtain acknowledgment of receipt from the issuer. That would only be the case if other syndicate members were required to send their own disclosures (e.g., the senior manager has made other disclosures on its behalf and syndicate members had their own conflicts). Regarding the MSRB's proposal, the other syndicate members should not be required to retain the issuer's acknowledgment. Most likely, they will keep a record that the syndicate manager provided the disclosures to the issuer or the issuer's acknowledgement of the disclosures.

3. *If the 2012 Guidance is amended to require a syndicate manager to provide the standard and transaction-specific disclosures on behalf of a syndicate, should the MSRB require the syndicate manager to bifurcate its disclosure to provide the standard and transaction-specific disclosures on behalf of the entire syndicate separately from its own dealer-specific disclosures?*

Bifurcation should be voluntary and according to the recordkeeping processes of the syndicate manager.

**I.D. Optional Alternative Manner of Providing Disclosures**

1. *Would the alternative manner of providing the standard disclosures...reduce the volume and frequency of disclosures and make the disclosure process more streamlined and efficient as anticipated by the MSRB?*

Given the complicated nature of the proposal and the expense to operationalize it, we do not believe it would reduce the volume and frequency of disclosures because underwriters would not effectively or economically be able to utilize the approach.

2. *Would there be any unintended consequences to utilizing this alternative to provide the standard disclosures?*

As we stated in the letter, utilizing this alternative would require a significant infrastructure build for firms and operational concerns with the various requirements that must be met in order to utilize this alternative.

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3. *Should the underwriter acting as a sole underwriter or syndicate manager be able to provide the standard disclosures to an issuer by referring back to and reconfirming disclosures made in a previous underwriting with the same issuer when that underwriter was a member of the syndicate for which the syndicate manager that actually provided the disclosures for the previous issuance?*

Yes, as a general matter, but the approach may be confusing and not particularly practical or operationally workable.

5. *Should the optional alternative manner of providing the standard disclosures also apply to dealer-specific disclosures or transaction-specific disclosures or both?*

We reiterate our original suggestion that any new or different disclosures, whether they be standard, dealer-specific, or transaction-specific be provided on an annual basis with bring-downs as necessary throughout the year.

**I.E. Clear and Separate Identification of Disclosures**

1. *Is there any reason why underwriters cannot separate the standard, dealer-specific and transaction-specific disclosures when they are provided within the same document?*

If the MSRB does not eliminate the need to disclose potential conflicts of interest as SIFMA has suggested, we believe the separation of different types of disclosures is a good proposal, and we do not see any reason why the disclosures cannot be separated within the same document. This may be helpful to issuers.

2. *Would the separation of the standard, dealer-specific and transaction-specific disclosures, when they are provided within the same document, create any challenges for issuer's review of them?*

No. On the contrary, we believe the separation of disclosures may be beneficial for an issuer's review.

**I.F. Disclosure on the Part of Parties Other than the Underwriter**

2. *Are there examples of conflicts of interest of issuer personnel that should be required to be disclosed with the dealer-specific disclosures, even if such conflicts are not themselves conflicts of an underwriter?*

No, we are not aware of any examples of issuer personnel conflicts that should be disclosed with the dealer-specific disclosures.

3. *Are there conflicts of interest of any persons other than issuer personnel and the underwriter (for example, affiliates of the underwriter or swap counterparties or service providers recommended by the underwriter)? If so, should the requirement be limited to*

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*actual or potential material conflicts of interests that are actually known to the underwriter?*

No, we are not aware of any such conflicts of interest.

**I.G. Plain English**

1. *What types of disclosures have underwriters not provided to issuers in a manner designed to make clear the subject matter of such disclosures and their implications?*

Any implication that the subject matter of the disclosures and their implications that we provide to issuers were designed to be unclear is untrue. Though certain standard disclosures could be lengthy and contain a significant amount of generic language, they were made in a manner to address the 2012 Guidance. Addressing our comments above on the standard disclosures and adopting a “clear and concise” standard should address any perceived issuer concerns.

2. *Are there any disclosures that are of such a complex nature that, even when designed by an underwriter to make their subject matter and implications clear, cannot be reduced adequately into plain English?*

Yes. For example, swaps disclosures and Variable Rate Demand Obligations (“VRDO”) disclosures required by MSRB Rule G-17 would be difficult to simplify in a manner required by a plain English standard.

3. *Would any simplification of disclosures to satisfy the plain English standard increase the risk that underwriters imprecisely draft the disclosures that could make it difficult for issuers to fully appreciate the nature of material conflicts of interest and risks of transactions, thereby increasing risk to issuers and/or underwriters?*

Yes. Given that plain English is susceptible to different approaches, there may be an increased risk that underwriters imprecisely draft the disclosures to address a plain English standard.

**II. Issuer Acknowledgment of Receipt of Underwriter Disclosures**

2. *How should issuers designate their primary contacts? Should the MSRB specify how this designation should be made?*

Under the current guidance, underwriters are required to obtain acknowledgment from an official of an issuer who has the authority to bind that issuer by contract. The process generally works well currently and contacts are generally obtainable. We would note however, in certain instances, an issuer may designate a lawyer or other contact that may not have been given the authority to bind the issuer by contract. In these situations, underwriters may need to request another designee or confirm that the designee has the

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authority to bind the issuer by contract. Ideally, underwriters should be able to send G-17 letters to the individual designated to receive and acknowledge such letters by the issuer whether or not such individual has such authority.

It is not clear that there should be a formal process for designation by issuers or that the MSRB should specify how this designation should be made.

**IV. Underwriter Discouragement of the Use of a Municipal Advisor**

1. *Do underwriters discourage issuers from engaging municipal advisors? If so, how?*

We are not aware of any discouragement.

2. *Do other market participants involved in the issuance of municipal securities discourage issuers from engaging municipal advisors? If so, how?*

We are not aware of any discouragement.

3. *Would the draft amendments sufficiently address the issue or would it allow for certain dealer communications regarding issuer retention of municipal advisors that should be prohibited?*

As discussed in our letter, the proposed language would have the unintended effect of limiting otherwise permissible communications. We believe our suggestions would sufficiently address any concerns while at the same time providing a level playing field for underwriters and municipal advisors.

4. *Should the MSRB require that the standard disclosures include an affirmative statement that the issuer may retain a municipal advisor?*

No. Inclusion of the affirmative statement would be contrary to the purpose of this retrospective review, increasing standard disclosures. In any case, in the absence of a perfected independent registered municipal advisor exemption, underwriters are limited under the municipal advisor rules from providing advice outside the scope of the underwriter exclusion.

**I. Disclosures to Conduit Borrowers**

1. *Should the MSRB extend the application of the 2012 Guidance to require underwriters to provide the required disclosures to conduit borrowers? If so, should that application extend to all conduit borrowers or only those with whom the underwriter(s) have engaged directly?*

SIFMA does not believe the Amended Guidance should require disclosures to conduit borrowers. In some cases – e.g., in engagement letters or letters of intent with conduit

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borrowers entered into to establish an exclusion from the municipal advisor rules – underwriters provide a conduit borrower with a copy of the disclosures provided to the conduit issuer, but we do not see the benefit of another requirement layered on top of what is already required.<sup>1</sup>

2. *Should the MSRB extend the application of the 2012 Guidance to any other obligated persons beyond conduit borrowers? If so, please specify to whom it should be extended and why?*

No, there is no reason to extend the 2012 Guidance in this regard.

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<sup>1</sup> Note that such disclosures sent pursuant to the SEC's FAQs for the municipal advisor rules do not comprise a G-17 letter under the 2012 Guidance.