MSRB Notice

MSRB Municipal Securities Rulemaking Board

2018-29

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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]

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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").[1] 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.[2]

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[1] 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).

[2] 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.

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")[3] and answers to frequently-asked questions (the "FAQs")[4] 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.[5]

The MSRB received five comment letters in response to the Initial Request for Comment,[6] all of which supported the retrospective review and

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[3] MSRB Notice 2012-38 (July 18, 2012).

[4] MSRB Notice 2013-08 (Mar. 25, 2013).

[5] MSRB Notice 2018-10 (June 6, 2018).

[6] *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[7]

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.[8]

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.

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

[7] The costs and benefits of each of the draft amendments are considered in the Economic Analysis, *infra*.

[8] 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.[9]

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

[9] 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 official 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.[10]

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

[10] 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.[11]

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).[12] 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,[13] but that retention period would reset each time the letter is referenced and reconfirmed.[14]

[11] 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.

[12] 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.

[13] 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).

[14] 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**
A Syndicate Manager (SM)	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	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
C	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 Syndicate Manager (SM)	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
C	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
D	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**

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*.

D Syndicate Manager (SM)	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
E	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
ISSUANCE #1 FOR ISSUER Y			
Dealer	**Standard Disclosures**	**Transaction-Specific Disclosures**	**Dealer-specific disclosures**
A Syndicate Manager (SM)	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
E	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.[15]

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.[16] 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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[15] 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*.

[16] *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.[17]

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.

[17] 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)[18] 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

[18] 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.[19] 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.[20] 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

[19] *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).

[20] *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[21] 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

[21] 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.[22] The results of the study are consistent with the interpretation that the

[22] 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.[23] 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?

[23] 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[1] such as states and their political subdivisions that are issuers of municipal securities ("issuers").

* Underlining indicates new language; strikethrough denotes deletions.

[1] 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.[2] [More recently, w]With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[3] 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.[4]

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").[5] 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.[6] 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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[2] *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").

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

[4] *See* Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Aug. 2, 2012).

[5] *See* MSRB Notice 2012-38 (July 18, 2012); MSRB Notice 2013-08 (Mar. 25, 2013).

[6] 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[4][7] of dealers, they are subject to the same protections under MSRB rules, including Rule G-17, that apply to other customers.[5][8] 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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[7] 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."

[8] *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].[9]

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;[10]

(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;[11]

(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.[12]

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

[9] 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.

[10] 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.

[11] *Id.*

[12] 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"),[13] including, but not limited to, the following:

(i) any payments described below under "Conflicts of Interest/[ ]Payments to or from Third Parties";[14]

(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").[15]

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

[13] 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.

[14] 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.

[15] 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.[16] 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

[16] 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.[17]

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.[18] 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).[19] 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,[20] but that retention period would reset each time the original

[17] 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.

[18] 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.

[19] 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.

[20] 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.[21] 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.[22] 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

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).

[21] 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*.

[22] 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.[23] 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").[24]

[23] 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.

[24] 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").[6][25] 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.[26] 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.[7][27] It must also disclose any incentives for the underwriter to recommend the

[25] 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.

[26] 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*.

[27] 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.[8]28 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).[9]29 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.[30] 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

[28] 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.

[29] 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.

[30] 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.[31] 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.[32]

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.[10][33] These documents are critical to the

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[31] Page after page of complex legal jargon in small print would not satisfy this requirement.

[32] 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.

[33] 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.[11][34] 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)[12][35] 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.

[34] 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.

[35] 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.[13][36]

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.[14][37] 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.[38] 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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[36] *See* 1997 Interpretation.

[37] *See also* "Required Disclosures to Issuers" herein.

[38] 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.[15][39] 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[16][40] 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,

[39] *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).

[40] 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.[17]41 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.[18]42

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

41 *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.

42 *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).