SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–86572; File No. SR–MSRB–2019–10]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change To Amend and Restate the MSRB's August 2, 2012 Interpretive Notice Concerning the Application of Rule G–17 to Underwriters of Municipal Securities

August 5, 2019.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 1, 2019 the Municipal Securities Rulemaking Board (''MSRB'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The MSRB filed with the Commission a proposed rule change (the ''proposed rule change'') to amend and restate the MSRB's August 2, 2012 interpretive notice concerning the application of MSRB Rule G–17 to underwriters of municipal securities (the ''2012 Interpretive Notice'').[3] The proposed rule change seeks to update the 2012 Interpretive Notice in light of its implementation in the market since its first adoption and current market practices.

Following the approval of the proposed rule change, the MSRB will publish a regulatory notice within 90 days of the publication of approval in the **Federal Register** (the 2012 Interpretive Notice, so amended by the proposed rule change, is referred to herein as the ''Revised Interpretive Notice''), and such notice shall specify the compliance date for the amendments described in the proposed rule change, which in any case shall be not less than 90 days, nor more than one year, following the date of the notice establishing such compliance date. Until such compliance date, the current version of the 2012 Interpretive Notice would remain in effect with respect to underwriting relationships commenced prior to the compliance date, at which time underwriters would then be subject to the Revised Interpretive Notice for all of their underwriting relationships beginning on or after that date. The 2012 Interpretive Notice would be superseded by the Revised Interpretive Notice as of such compliance date. Similarly, and as further described herein, the MSRB's implementation guidance dated July 18, 2012 concerning the 2012 Interpretive Notice (the ''Implementation Guidance'')[4] and the regulatory guidance dated March 25, 2013 answering certain frequently asked questions regarding the 2012 Interpretive Notice (the ''FAQs'')[5] would be withdrawn as of such compliance date.

The text of the proposed rule change is available on the MSRB's website at *www.msrb.org/Rules-and-Interpretations/SEC-Filings/2019-Filings.aspx,* at the MSRB's principal office, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the MSRB included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The MSRB has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

I. 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 municipal entity issuers, and not engage in any deceptive, dishonest or unfair practice. The 2012 Interpretive Notice describes certain fair dealing obligations dealers owe to issuers in the course of their underwriting relationships, and promotes fair dealing in the municipal securities market by, among other things, prescribing the delivery of written disclosures to issuers regarding the nature of their underwriting relationships, compensation and other conflicts, and the risks associated with certain recommended municipal security transactions in negotiated offerings. Beyond these matters, the 2012 Interpretive Notice also describes an underwriter's obligation to: Have a reasonable basis for the representations it makes, and other material information it provides, to an issuer in order to ensure that such representations are accurate and not misleading; purchase securities from the issuer at a fair and reasonable price, 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 of pricing; honor the issuer's rules for retail order periods by, among other things, not accepting or placing orders that do not satisfy the issuer's definition of ''retail;'' and avoid certain lavish gifts and entertainment.[6]

II. Proposed Rule Change

In response to informal feedback from market participants regarding their experience with the 2012 Interpretive Notice and, particularly, the effectiveness of the disclosures and related requirements, the MSRB initiated a retrospective review of the 2012 Interpretive Notice and published a request for comment on June 5, 2018 (the ''Concept Proposal'').[7] The Concept Proposal requested feedback on whether amendments to the 2012 Interpretive Notice should be considered to help ensure that it continues to achieve its intended purpose and reflects the current state of the municipal securities market. The MSRB received five comment letters in response to the Concept Proposal, all of which supported the retrospective review and suggested modifications to the 2012 Interpretive Notice.[8] The feedback

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

[2] 17 CFR 240.19b–4.

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

[4] *See* MSRB Notice 2012–38 (July 18, 2012).

[5] *See* MSRB Notice 2013–08 (Mar. 25, 2013).

[6] As further described therein, the 2012 Interpretive Notice provides that, except where otherwise noted, the obligations described are only applicable to negotiated offerings and do not apply to selling group members.

[7] MSRB Notice 2018–10 (June 5, 2018) (*i.e.,* the Concept Proposal).

[8] *See* Letters from: Mike Nicholas, Chief Executive Officer, Bond Dealers of America (BDA), dated August 6, 2018 (''BDA Letter I''); Emily S. Brock, Director, Federal Liaison Center, Government Finance Officers Association (GFOA), dated August 6, 2018 (''GFOA Letter I''); Susan Gaffney, Executive Director, National Association of Municipal Advisors (NAMA), dated August 6, 2018 (''NAMA Letter I''); Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association

received formed the foundation for a subsequent request for comment published on November 16, 2018 (the ''Request for Comment'').[9] The MSRB received five comment letters in response to the Request for Comment.[10] Following review of the comments, the MSRB conducted additional outreach with various market participants. The feedback received and follow-up conversations formed the basis for the proposed rule change.

In general, the comment letters observed that the disclosures under the 2012 Interpretive Notice had become too voluminous in length and boilerplate in nature. Commenters generally stated that the length and nature of the disclosures both created a significant burden for dealers and also made it difficult for issuers to assess which conflicts, risks, and other matters were most significant. As more fully discussed below in the MSRB's summary of comments, commenters also addressed the following major topics—the redundancy of certain disclosures received by an issuer, particularly if an issuer frequently goes to market and/or a syndicate is formed in a particular offering; the benefits of separately identifying certain categories of disclosures; the standard applicable to determine whether an underwriter has made a recommendation to an issuer of a particular municipal securities financing; what potential material conflicts of interest must be disclosed by an underwriter; whether an underwriter must disclose the conflicts of other parties involved with the transaction; underwriter communications regarding the issuer's engagement of a municipal advisor; what an underwriter may rely upon to substantiate an issuer's receipt of a disclosure; and various other clarifications and revisions to the 2012 Interpretive Notice that would promote market efficiency and reduce the regulatory burden on underwriters, while not diminishing the protections afforded to municipal entity issuers.

The amendments in the proposed rule change are intended to update and streamline certain obligations specified in the 2012 Interpretive Notice and, thereby, benefit issuers and underwriters alike by reducing the burdens associated with those obligations, including the obligation of underwriters to make, and the burden on issuers to acknowledge and review, written disclosures that itemize risks and conflicts that are unlikely to materialize during the course of a transaction, not unique to a given transaction or a particular underwriter where a syndicate is formed, and/or otherwise duplicative.

A. Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs Into the Revised Interpretive Notice and Related Revisions

The proposed rule change would integrate the substantive concepts from the Implementation Guidance [11] and the FAQs [12] into the Revised Interpretive Notice and, thereby, would consolidate the Implementation Guidance, FAQs, and the Revised Interpretive Notice into a single publication. Except as described herein, the proposed rule change would incorporate the substantive content of the Implementation Guidance and FAQs without material revision. Along with the 2012 Interpretive Notice, assuming approval of the proposed rule change, the Implementation Guidance and FAQs would be withdrawn as of the compliance date of the Revised Interpretive Notice. The proposed technical revisions are necessary to conform or supplement the statements from the Implementation Guidance and FAQs into the Revised Interpretive Notice.[13] Unless otherwise expressly stated herein, the MSRB's conforming edits are only intended to promote consistency of language and otherwise are not intended to substantively alter the understanding and implementation of these existing fair dealing concepts.

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

As presently stated in the Implementation Guidance, no type of underwriting is wholly excluded from the application of the 2012 Interpretive Notice. The Implementation Guidance makes clear that the 2012 Interpretive Notice applies not only to primary offerings of new issues of municipal bonds and notes by an underwriter, but also to a dealer serving as primary distributor (but not to dealers serving solely as selling dealers) in a continuous offering of municipal fund securities, such as interests in 529 savings plans.[14] The proposed rule change would incorporate this language into the Revised Interpretive Notice as stated in the Implementation Guidance with one addition. More specifically, the proposed rule change would add a reference to Achieving a Better Life Experience (ABLE) programs [15] as another example of a continuous offering of municipal fund securities. In relevant part, the Revised Interpretive Notice would read, ''[t]his notice applies not only to a primary offering of a new issue of municipal securities 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 and Achieving a Better Life Experience (ABLE) programs.''

(SIFMA), dated August 6, 2018 (''SIFMA Letter I''); and J. Ben Watkins III, Director, State of Florida, Division of Bond Finance of the State Board of Administration (''Florida Division of Bond Finance''), dated August 8, 2018 (''Florida Division of Bond Finance Letter'').

[9] *See* MSRB Notice 2018–29 (November 16, 2018) (*i.e.,* the Request for Comment).

[10] *See* Letters from: Mike Nicholas, Chief Executive Officer, BDA, dated January 15, 2019 (''BDA Letter II''); Emily S. Brock, Director, Federal Liaison Center, GFOA, dated January 15, 2019 (''GFOA Letter II''); Susan Gaffney, Executive Director, NAMA, dated January 15, 2019 (''NAMA Letter II''); Leslie M. Norwood, Managing Director and Associate General Counsel, SIFMA, dated January 15, 2019 (''SIFMA Letter II''); and City of San Diego (unsigned and undated) (''City of San Diego Letter'').

[11] Published on July 18, 2012, the Implementation Guidance was intended to assist dealers in revising their written supervisory procedures in accordance with their fair practice obligations under the 2012 Interpretive Notice.

[12] Published on March 25, 2013, the FAQs answered certain frequently asked questions regarding operational matters pertaining to the 2012 Interpretive Notice.

[13] The MSRB notes that the Implementation Guidance and FAQs were issued in distinct formats—*i.e.,* in a list of bulleted statements and frequently asked questions, respectively—from the format of the 2012 Interpretive Notice and, consequently, in many instances cannot be simply copied-and-pasted into the proposed format of the Revised Interpretive Notice without conforming revisions. Similarly, the proposed rule change incorporates newly defined terms and other modified substantive concepts (*e.g.,* assigning the fair dealing obligation to provide the standard disclosures and transaction-specific disclosures to syndicate managers, as further described herein), which require tailoring edits to appropriately integrate the existing concepts of the Implementation Guidance and FAQs into the Revised Interpretive Notice. Thus, the MSRB is proposing to make conforming technical revisions of a non-substantive, drafting nature when integrating the existing language of the Implementation Guidance and FAQs into the Revised Interpretive Notice (referred to hereinafter as, ''conforming edits''). The MSRB has identified in the discussion below when it has proposed such conforming edits and also provided the proposed language of the Revised Interpretive Notice in relevant part for ease of comparison.

[14] As a general matter, a 529 savings plan is a tax-advantaged qualified tuition program established by a state, or an agency, or instrumentality of a state, designed to encourage families to save for a child's future education expenses.

[15] As a general matter, an ABLE program is a tax-advantaged savings account established by a state, or an agency, or instrumentality of a state, designed to allow eligible individuals and their families to save on a tax-deferred basis for qualified disability expenses.

ii. Incorporate Statements Regarding the Applicability of the Revised Interpretive Notice to a Primary Offering That Is Placed With Investors by a Placement Agent

As presently stated in the Implementation Guidance, no type of underwriting is wholly excluded from the application of the 2012 Interpretive Notice, including certain private placement activities. In relevant part, the Implementation Guidance states:

> 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. . . . As described [in the Implementation Guidance], in a private placement where a dealer acts as a true placement agent, the disclosure relating to fiduciary duty would be inapplicable and may be omitted due to the existence of similar state law obligations. . . . 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.

In a footnote to this language, the Implementation Guidance further states:

> 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.

The proposed rule change would incorporate these concepts from the Implementation Guidance into the Revised Interpretive Notice with conforming edits and the omission of certain language. It also would incorporate a supplemental concept regarding how a dealer's activities as a placement agent may interact with the Commission's registration and record-keeping requirements for municipal advisors.[16]

In terms of the conforming edits, the proposed rule change would not word-for-word integrate the existing text that, ''. . . in a private placement where a dealer acts as a true placement agent, the disclosure relating to a fiduciary duty would be inapplicable and may be omitted due to the existence of similar state law obligations.'' In light of the other amendments proposed herein, the proposed rule change would revise and supplement the existing text with the following conforming edits that, ''it would also be appropriate for an underwriter to omit *those* disclosures inapplicable as a result of such relationship *and the existence of any analogous legal obligations under other law, such as certain fiduciary duties existing pursuant to applicable state law*'' (emphasis added). The MSRB believes that the guidance provided by this revised and supplemented language is substantively equivalent to the concept articulated by the omitted statement.

Additionally, the proposed rule change would omit the final sentence from the footnote of the Implementation Guidance stating that, ''[d]ealers 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.'' The MSRB believes that this statement is substantively redundant with the statements that precede it and, ultimately, may create more confusion than it would resolve, as its inclusion in the Revised Interpretive Notice might be interpreted to bind underwriters into a binary scenario of either: (1) Including the relevant disclosure(s) and, thereby, communicating the lack of a fiduciary duty to an issuer client, or (2) omitting the relevant disclosure(s) and, thereby, ''effectively acknowledging'' the existence of a fiduciary duty to an issuer client. At bottom, an underwriter has a fair dealing obligation under Rule G–17 to not engage in any deceptive, dishonest, or unfair practice when interacting with a municipal entity client in the course of an underwriting relationship, which requires the underwriter to accurately, honestly, and fairly describe its services and the scope of its relationship with the municipal entity. This overarching fair dealing obligation requires an underwriter to include, omit, and/or supplement the relevant fiduciary disclosures as necessary to meet its fair dealing obligations in light of the particular facts and circumstances of a given transaction. Consequently, the exclusion of this statement from the proposed rule change is not intended to diminish this overarching fair dealing obligation, but, rather, eliminate a potentially confusing and redundant statement.

The Revised Interpretive Notice in relevant part would provide:

> 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 commonly gives rise to other duties as a matter of common law or another statutory or regulatory regime—whether termed as a fiduciary or other obligation of trust. . . . 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, such a fiduciary relationship with the issuer. In such cases, it would also be appropriate for an underwriter to omit those disclosures inapplicable as a result of such relationship and the existence of any analogous legal obligations under other law, such as certain fiduciary duties existing pursuant to applicable state law.

In addition, the proposed rule change would update the 2012 Interpretive Notice by incorporating supplemental language into the Revised Interpretive Notice intended to harmonize it with the Commission's adoption of its permanent rules regarding the registration and record-keeping requirements applicable to municipal advisors, and related exclusions and exceptions, which went into effect after the effective date of the 2012 Interpretive Notice.[17] The Revised Interpretive Notice would also incorporate language regarding the application of the exclusion from the definition of ''municipal advisor'' applicable to dealers acting as underwriters pursuant to Exchange Act Rule 15Ba1–1(d)(2)(i)[18] and the

[16] *See* Registration of Municipal Advisors, Release No. 34–70462 (September 20, 2013), 78 FR 67467 (hereinafter, the ''MA Rule Adopting Release'') (November 12, 2013) (available at *http://www.sec.gov/rules/final/2013/34-70462.pdf*); *see also* note 18 *infra* and related text.

[17] *See* Final MA Adopting Release (citation and link at note 16 *supra*).

[18] *See* Final MA Rule Adopting Release, 78 FR at 67515–67516 (stating: ''The Commission does not believe that the underwriter exclusion should be limited to a particular type of underwriting or a particular type of offering. Therefore, if a registered broker-dealer, acting as a placement agent, performs municipal advisory activities that otherwise would be considered within the scope of the underwriting of a particular issuance of municipal securities as discussed [therein], the broker-dealer would not have to register as a municipal advisor.''); *see also* the Final MA Rule Adopting Release, 78 FR at 67513–67514 (discussing activities within and outside the scope of serving as an underwriter of

application of this underwriter exclusion to a dealer's placement agent activities. In relevant part, the Revised Interpretive Notice would state:

A dealer acting as a placement agent in the primary offering of a new issuance of municipal securities should also consider how the scope of its activities may interact with the registration and record-keeping requirements for municipal advisors adopted by the Securities and Exchange Commission (the 'Commission') under Section 15B of the Exchange Act (15 U.S.C. 78o–4), including the application of the exclusion from the definition of 'municipal advisor' applicable to a dealer acting as an underwriter pursuant to Exchange Act Rule 15Ba1–1(d)(2)(i).

The MSRB believes that the guidance provided by this harmonizing language is in keeping with the existing references included in the 2012 Interpretive Notice and its guidance regarding the existence of other relevant or similar legal obligations that could have a bearing on an underwriter's fair dealing obligations under Rule G–17.

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

By its terms, and as presently stated in the Implementation Guidance, the 2012 Interpretive Notice applies primarily to negotiated offerings of municipal securities, with many of its provisions not applicable to competitive offerings. The Implementation Guidance clarifies what constitutes a negotiated offering for purposes of the 2012 Interpretive Notice, stating that:

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 the 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 proposed rule change would incorporate this language into the Revised Interpretive Notice as stated in the Implementation Guidance. In relevant part, the Revised Interpretive Notice would read:

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.

iv. Incorporate Statements Regarding the Applicability of the Revised Interpretive Notice to Persons Other Than Issuers of Municipal Securities and Update the Definition of Municipal Entities

The 2012 Interpretive Notice outlines the duties that a dealer owes to an issuer of municipal securities when the dealer underwrites a new issuance. As explained in the Implementation Guidance, the 2012 Interpretive Notice ''does not set out the underwriter's fair dealing obligations to other parties involved with a municipal securities financing, including a conduit borrower.'' As discussed further below,[19] the MSRB sought feedback in the Concept Release and Request for Proposal regarding whether the 2012 Interpretive Notice should be amended to incorporate specifics regarding how an underwriter must fulfill its obligations to a conduit borrower. Ultimately, the MSRB decided not to incorporate such an amendment in the proposed rule change for the reasons discussed further herein, including that the issues presented by the relationship between underwriters and conduit borrowers are sufficiently distinct to merit their own full consideration in separate guidance. Accordingly, the proposed rule change would incorporate the language from the Implementation Guidance into the Revised Interpretive Notice with conforming edits, stating ''[t]his notice does not set out the underwriter's fair-practice duties to other parties to a municipal securities financing (*e.g.,* conduit borrowers).''

The proposed rule change would also update the definition of ''municipal entity'' as used in the 2012 Interpretive Notice. In relevant part, the Revised Interpretive Notice would read, ''. . . the term 'municipal entity' is used as defined by Section 15B(e)(8) of the Securities Exchange Act of 1934 (the 'Exchange Act'), 17 CFR 240.15Ba1–1(g), and other rules and regulations thereunder.'' This revision would harmonize the Revised Interpretive Notice with the Final MA Rules and MSRB Rule G–42.[20] The MSRB believes this revision to be non-substantive.

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

The Implementation Guidance further clarifies the scope of the prohibition included in the 2012 Interpretive Notice, affirming that an underwriter must not recommend that the issuer not retain a municipal advisor. The prior guidance states 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 proposed rule change would incorporate this language into the Revised Interpretive Notice as stated in the Implementation Guidance with conforming edits.[21] In relevant part, the Revised Interpretive Notice would provide:

Underwriters also must not recommend issuers not retain a municipal advisor. Accordingly, underwriters may not discourage issuers from using a municipal advisor or otherwise imply that the hiring of a municipal advisor would be redundant

a particular issuance of municipal securities for purposes of the underwriter exclusion).

[19] Relatedly, the comments received by the MSRB regarding the incorporation of this language are discussed further below in the MSRB's summary of comments. *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Disclosures to Conduit Borrowers* and related notes 137 *et. seq. infra; see also Summary of Comments Received in Response to the Request for Comment—Disclosures to Conduit Borrowers* and related note 228.

[20] *See* Rule G–42(f)(vi) (''Municipal entity' shall, for purposes of [Rule G–42], have the same meaning as in Section 15B(e)(8) of the Act, 17 CFR 240.15Ba1–1(g) and other rules and regulations thereunder.'').

[21] Relatedly, the comments received by the MSRB regarding the incorporation of this language are discussed further below in the MSRB's summary of comments. *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Underwriter Discouragement of Use of Municipal Advisor; Addition of a New Standard Disclosure Regarding the Engagement of Municipal Advisors* and related notes 134 *et. seq. infra,* and *Summary of Comments Received in Response to the Request for Comment—Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor* and related notes 201 *et. seq. infra.*

because the sole underwriter or underwriting syndicate can provide the services that a municipal advisor would.

The MSRB believes this revision to be a non-substantive incorporation of existing guidance. The comments the MSRB received in response to this change are discussed herein in the MSRB's summary of comments.[22]

vi. Incorporate Statements Regarding Third-Party Payments

The Implementation Guidance clarifies the obligation of underwriters to disclose certain third-party payments, as well as other payments, values or credits received by an underwriter. More specifically, the 2012 Implementation Guidance states, ''[t]he third-party payments to which the disclosure requirement under the [2012 Interpretive Notice] would apply are those that give rise to actual or potential 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.'' The Implementation Guidance further states that, ''[e]ven though . . . the [2012 Interpretive Notice] specifically requires disclosure of the existence of any incentives for the underwriter to recommend a complex municipal securities financing or any other conflicts of interest associated with such recommendation, 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.''

The proposed rule change would incorporate this language into the Revised Interpretive Notice as stated in the Implementation Guidance with the following exception and conforming edits. The proposed rule change omits the statements from the 2012 Implementation Guidance that the disclosure, ''. . . 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.'' The MSRB views this language to be redundant with the prior language regarding the applicability of the disclosure to only those third-party payments that give rise to actual material conflicts of interest or potential material conflicts of interest. Consequently, the MSRB views the omission of this text as non-substantive. Thus, with this omission and the conforming edits, the Revised Interpretive Notice would read in relevant part:

> The third-party payments to which the disclosure standard would apply are those that give rise to actual material conflicts of interest or potential material conflicts of interest only. . . . The specific standard with respect to complex financings does not obviate a dealer's fair dealing obligation 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.

vii. Incorporate Statements Regarding the Need for Each Underwriter in a Syndicate To Deliver Dealer-Specific Conflicts of Interest When Applicable

The FAQs clarify what disclosures may be effected by a syndicate manager on behalf of co-managing underwriters in the syndicate. As stated in the FAQs:

> In general, disclosures of dealer-specific conflicts of interest cannot be satisfied by disclosures made by the syndicate manager because such disclosures are, by their nature, not uniform, and must be prepared by each dealer. However, nothing in the [2012 Interpretive Notice] or [Implementation Guidance] would preclude a syndicate manager from delivering each of the dealer-specific conflicts to the issuer as part of a single package of disclosures. . . . The [2012 Interpretive Notice] does not require an underwriter to notify an issuer if it has determined that it does not have an actual or potential conflict of interest subject to disclosure. However, underwriters are reminded that the obligation to disclose actual or potential conflicts of interest includes conflicts arising after the time of engagement with the issuer, as [further noted in the FAQs].

Despite certain other amendments discussed herein that would require the syndicate manager to deliver the standard disclosures and transaction-specific disclosures where a syndicate is formed, these statements regarding the dealer-specific disclosures in the FAQs would remain true and accurate under the Revised Interpretive Notice. Accordingly, the proposed rule change would incorporate this language into the Revised Interpretive Notice as stated in the FAQs with conforming edits, including the technical clarification that such disclosures apply to ''actual material conflicts of interest'' and ''potential material conflicts of interest'' in order to make the statements consistent with related amendments in the proposed rule change.[23] In relevant part, the Revised Interpretive Notice would read:

> 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, the obligation to provide dealer-specific disclosures includes material conflicts of interest arising after the time of engagement with the issuer, as noted [therein].

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

The Implementation Guidance and FAQs clarify the timing for the delivery of the disclosures under the 2012 Interpretive Notice. More specifically, the Implementation Guidance states that, ''[n]ot all transactions proceed along the same timeline or pathway and on rare occasions precise compliance with some of the timeframes set out in the [2012 Interpretive Notice] may not be feasible.'' It further states:

> The timeframes set out in the [2012 Interpretive Notice] 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 in the [2012 Interpretive Notice]. . . . 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.

[22] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Underwriter Discouragement of Use of Municipal Advisor* and under *Summary of Comments Received in Response to the Request for Comment—Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor* and related notes 201 *et. seq. infra.*

[23] The MSRB notes that the proposed rule change would preserve existing language from the 2012 Interpretive Notice that the syndicate manager may deliver the dealer-specific disclosures of the other syndicate members in a single package, but the MSRB views this simply as a permissive function of delivery rather than an obligation to craft adequate disclosures on the part of other parties.

On this particular point, the Implementation Guidance concludes by stating that, ''. . . the timeframes set out in the [2012 Interpretive Notice] are not intended to establish hair-trigger tripwires resulting in technical rule violations so long as underwriters act in substantial compliance with such timeframes and have met the key objectives for providing such disclosures under the [2012 Interpretive Notice].''

The FAQs provide that certain disclosures be made at different points in a transaction. More specifically, the FAQs specify that:

- The underwriter's disclosure regarding the arm's length nature of the relationship must be disclosed ''at the earliest stage of the relationship, generally at or before a response to a request for proposals or promotional materials are delivered to an issuer;''
- the other role disclosures and disclosures regarding the underwriter's compensation must be disclosed ''[a]t or before the time the underwriter has been engaged to perform the underwriting services;''
- those dealer-specific conflicts of interest known at the time of the engagement must be disclosed ''[a]t or before the time the dealer has been engaged to serve as underwriter'' in the case of a sole underwriter or syndicate manager where a syndicate has been formed;
- a co-managing underwriter joining a syndicate must disclose any dealer-specific conflicts of interest known at that time concurrent with the formation of the syndicate or upon the co-managing underwriter joining an already-formed syndicate;
- those dealer-specific conflicts of interest discovered or arising after being engaged as an underwriter must be disclosed ''as soon as practicable after [being] discovered and with sufficient time for the issuer to evaluate the conflict and its implications;''
- any conflicts arising in connection with a recommendation of a complex municipal securities financing must be disclosed ''[b]efore the execution of a commitment by the issuer (which may include a bond purchase agreement) relating to such recommendation, and with sufficient time to allow the issuer to evaluate the conflict and its implication;''
- the disclosures regarding the material aspects of a routine financing must be disclosed ''[b]efore the execution of a commitment by the issuer (which may include a bond purchase agreement) relating to the financing, and with sufficient time to allow the issuer to evaluate the features of the financing;'' and
- the disclosures regarding the material financial risks and characteristics of a complex financing must be disclosed ''[b]efore the execution of a commitment by the issuer (which may include a bond purchase agreement) relating to the financing, and with sufficient time to allow the issuer to evaluate the features of the financing.''

The proposed rule change would incorporate these timeline concepts from the Implementation Guidance and FAQs into the Revised Interpretive Notice with certain conforming edits (*e.g.,* by utilizing the Revised Interpretive Notice's defined terms of ''standard disclosure'', ''dealer-specific disclosures,'' and ''transaction-specific disclosures'').

The proposed rule change would also incorporate clarifying language regarding the intent of these timelines. More specifically, the intent that the timelines are defined to ensure that underwriters act promptly to deliver disclosures in light of all the relevant facts and circumstances, but are not ''intended to establish strict, hair-trigger tripwires resulting in mere technical rule violations.'' [24] In relevant part, the Revised Interpretive Notice would read:

> The MSRB acknowledges that not all transactions proceed along the same timeline or pathway. The timeframes expressed herein should be viewed in light of the overarching goals of Rule G–17 and the purposes that the disclosures are intended to serve as further described in this notice. The various timeframes set out in this notice are not intended to establish strict, hair-trigger tripwires resulting in mere technical rule violations, so long as an underwriter acts in substantial compliance with such timeframes and meets the key objectives for providing disclosure under the notice. Nevertheless, an underwriter's fair dealing obligation to an issuer of municipal securities in particular facts and circumstances may demand prompt adherence to the timelines set out in this notice. Stated differently, if an underwriter does not timely deliver a disclosure and, as a result, the issuer: (i) Does not have clarity throughout all substantive stages of a financing regarding the roles of its professionals, (ii) is not aware of conflicts of interest promptly after they arise and well before the issuer effectively becomes fully committed—either formally (*e.g.,* through execution of a contract) or informally (*e.g.,* due to having already expended substantial time and effort)—to completing the transaction with the underwriter, and/or (iii) does not have the information required to be disclosed with sufficient time to take such information into consideration and, thereby, to make an informed decision about the key decisions on the financing, then the underwriter generally will have violated its fair-dealing obligations under Rule G–17, absent other mitigating facts and circumstances.

[24] Relatedly, the comments received by the MSRB regarding the incorporation of this language are discussed further below in the MSRB's summary of comments. *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into a Single Interpretive Notice—Modification of Implementation Guidance's Language Regarding the ''No Hair-Trigger''* and related note 95 and *Summary of Comments Received in Response to the Request for Comment—Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into a Single Interpretive Notice—Reincorporation of the ''No Hair-Trigger'' Language from the Implementation Guidance* and related notes 157 *et. seq. infra.*

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

The FAQs clarify the circumstances under which an underwriter may rely on the representations of issuer officials, stating:

> Absent red flags, an underwriter 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. Moreover, the underwriter may reasonably rely on a written statement from such person that he or she is not a party to a disclosed conflict.

The proposed rule change would incorporate this language from the FAQs into the Revised Interpretive Notice with clarifying language regarding the relevance of facts discovered during the course of an underwriter's due diligence, including diligence related to the transaction generally or pursuant to an underwriter's own determination of whether it has any actual material conflicts of interest or potential material conflicts of interest. Specifically, the Revised Interpretive Notice supplements the existing statement from the FAQs with the following text:

> The reasonableness of an underwriter's reliance on such a written statement will depend on all the relevant facts and circumstances, including the facts revealed in connection with the underwriter's due diligence in regards to the transaction generally or in determining whether the underwriter itself has any actual material conflicts of interest or potential material conflicts of interest that must be disclosed.

This statement is intended to clarify that if an underwriter becomes aware of a fact through the normal course of its diligence that would lead it to doubt a representation of an issuer official, such information may rise to the level of a red flag that would not allow the underwriter to reasonably rely on the written representation.

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

The 2012 Interpretive Notice states that underwriters must ''have a reasonable basis for representations and other material information provided to issuers'' and clarifies that the obligation ''extends to the reasonableness of assumptions underlying the material information being provided.'' The Implementation Guidance further contextualizes this reasonable basis standard, stating:

> 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 is uncomfortable having an issuer rely on any statements made or information provided to such issuer, it should refrain from making the statement or providing the information, or should provide any appropriate disclosures or other information that would allow the issuer to adequately assess the reliability of the statement or information. . . . 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. . . . Underwriters should be careful to distinguish statements made to issuers that represent opinion rather than factual information and to ensure that the issuer is aware of this distinction.

The proposed rule change would incorporate this language from the Implementation Guidance into the Revised Interpretive Notice with conforming edits and the following exception.[25] The proposed rule change omits the statements from the 2012 Implementation Guidance that:

> 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.

The MSRB views this statement to be potentially confusing and likely redundant with the preceding statement regarding the need for an underwriter to have a reasonable basis for its assumptions underlying any material information being provided to an issuer. Accordingly, the MSRB views the omission of this text as non-substantive. In relevant part, the Revised Interpretive Notice would read as follows:

> 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. 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.

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

The 2012 Implementation Guidance describes a complex municipal securities financing as ''a new issue financing that is structured in a unique, atypical, or otherwise complex manner that issuer personnel responsible for the issuance of municipal securities would not be well positioned to fully understand or to assess the implications of a financing in its totality.'' The Implementation Guidance clarifies that, ''[u]nderwriters 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.'' The 2012 Interpretive Notice then provides a non-exclusive, illustrative list of examples of new issue structures that constitute a complex municipal securities financing, inclusive of variable rate demand obligations (VRDOs); financings involving derivatives (such as swaps); and financings in which the interest rate is benchmarked to an index that is commonly used in the municipal marketplace (*e.g.,* LIBOR or SIFMA), which may be complex to an issuer that does not understand the components of that index or its possible interaction with other indexes.

The proposed rule change would incorporate this language from the Implementation Guidance into the Revised Interpretive Notice with conforming edits and an update to the illustrative, non-exclusive list of interest rate benchmarks to include the Secured Overnight Financing Rate (SOFR).[26] The MSRB believes this edit is a necessary update to ensure that the Revised Interpretive Notice would reflect current market practices. In relevant part, the Revised Interpretive Notice would read as follows, ''[e]xamples of complex municipal securities financings include, but are not limited to, variable rate demand obligations (VRDOs), financings involving derivatives (such as swaps), and financings in which interest rates are benchmarked to an index (such as LIBOR, SIFMA, or SOFR).'' The Revised Interpretive Notice would also incorporate the following footnote to this language:

> Respectively, the London Inter-bank Offered Rate (*i.e.,* 'LIBOR'), the SIFMA Municipal Swap Index (*i.e.,* 'SIFMA'), and Secured Overnight Financing Rate ('SOFR'). The MSRB notes that its references to LIBOR, SIFMA, and SOFR are illustrative only and non-exclusive. Any financings involving a benchmark interest rate index may be complex, particularly if an issuer is unlikely to fully understand the components of that index, its material risks, or its possible interaction with other indexes.

xii. Incorporate Statements Regarding the Specificity of Disclosures

The 2012 Interpretive Notice provides that an underwriter of a negotiated issue that recommends a complex municipal securities transaction or product to an issuer has an obligation to disclose all financial material risks known to the underwriter and reasonably foreseeable at the time of the disclosure, financial characteristics, incentives, and conflicts of interest regarding the transaction or product. The Implementation Guidance clarified the scope of this obligation, stating:

> The disclosures concerning a complex municipal securities financing must address the specific elements of the financing, rather than being general in nature. . . . An

[25] Relatedly, the comments received by the MSRB regarding the incorporation of this language are discussed further below in the MSRB's summary of comments. *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into a Single Interpretive Notice—General Comments Encouraging the Consolidation of the Implementation Guidance, and the FAQs* and related notes 91 *et. seq. infra,* and *Summary of Comments Received in Response to the Request for Comment—Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into a Single Interpretive Notice—Inclusion of Language Regarding a Reasonable Basis for Underwriter Representations* related note 155 *infra.*

[26] SOFR is published by the Federal Reserve Bank of New York and is based on a broad measure of the cost of borrowing cash overnight collateralized by U.S. Treasury securities in the repurchase agreement market. SOFR was chosen by the Alternative Reference Rates Committee (''ARRC'') as the rate that represents best practice for use in certain new USD derivatives and other financial contracts, representing the ARRC's preferred alternative to USD LIBOR. *See http://www.msrb.org/EducationCenter/Municipal-Market/About/Market/Market-Indicators.aspx.*

underwriter 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 it may recommend from time to time to its 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. 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.

The Implementation Guidance further states that ''[p]age after page of complex legal jargon in small print would not satisfy this requirement'' and that ''[u]nderwriters 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.'' The Implementation Guidance also clarifies that ''[n]ot all negotiated offerings involve a recommendation by the underwriter, such as where an underwriter merely executes a transaction already structured by the issuer or its financial advisor.'' The proposed rule change would incorporate this language from the Implementation Guidance into the Revised Interpretive Notice with conforming edits and the following exception.

In terms of the exception, the proposed rule change omits the statement regarding how such materials might assist issuers. Accordingly, in relevant part, the Revised Interpretive Notice would simply read, ''[u]nderwriters should be able to leverage such materials for internal training and risk management purposes.'' The MSRB views this statement as unnecessary and so its deletion is non-substantive for purposes of the Revised Interpretive Notice.

xiii. Incorporate Statements Regarding Profit Sharing Arrangements

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

> 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. . . . An underwriter should carefully consider whether any such arrangement, regardless of whether it constitutes a violation of MSRB Rule G–25(c) precluding a dealer from directly or indirectly sharing in the profits or losses of a transaction in municipal securities with or for a customer, may evidence a potential failure of the underwriter's duty with regard to new issue pricing [as further described in the Implementation Guidance].

The proposed rule change would incorporate this concept into the Revised Interpretive Notice as stated in the Implementation Guidance, which reads, in relevant part, ''[u]nderwriters should be mindful that, depending on the facts and circumstances, such an arrangement may be inferred from a purposeful but not otherwise justified pattern of transactions or other course of action, even without the existence of a formal written agreement.''

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

The proposed rule change would define certain categories of underwriter disclosures and assign the responsibility for the delivery of certain disclosures to the syndicate manager in circumstances where a syndicate is formed, as further described below.

i. Define Certain Categories of Underwriter Disclosures

The proposed rule change would define the following terms in order to delineate a dealer's various fair dealing obligations under the Revised Interpretive Notice: ''standard disclosures'' as collectively referring to the disclosures concerning the role of an underwriter [27] and an underwriter's compensation; [28] ''dealer-specific disclosures'' as collectively referring to the disclosures concerning an underwriter's actual material conflicts of interest and potential material conflicts of interest; and ''transaction-specific disclosures'' as collectively referring to the disclosures concerning the material aspects of financing structures that the underwriter recommends.

ii. Assign the Syndicate Manager the Exclusive Responsibility for the Standard Disclosures and Transaction-Specific Disclosures

The 2012 Interpretive Notice states that a syndicate manager is permitted, but not required, to make the standard disclosures and the transaction-specific disclosures on behalf of the other underwriters in the syndicate. The amendments in the proposed rule change would obligate only the

[27] Under the 2012 Interpretive Notice, these disclosures currently state: (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; (iii) unlike municipal advisors, underwriters do not have a fiduciary duty to the issuer under the federal securities laws and are, therefore, not required by federal law to act in the best interests of the issuer without regard to their own financial or other interests; (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. The proposed rule change incorporates one additional disclosure into the Revised Interpretive Notice, that the issuer may choose to engage the services of a municipal advisor with a fiduciary obligation to represent the issuer's interests in the transaction. *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Underwriter Discouragement of Use of Municipal Advisor; Addition of a New Standard Disclosure Regarding the Engagement of Municipal Advisors* and related notes 134 *et. seq. infra.,* and *Summary of Comments Received in Response to the Request for Comment—Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor* and related notes 201 *et. seq. infra.*

[28] Under the 2012 Interpretive Notice, an underwriter must disclose to an 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.

syndicate manager [29] of a syndicate—or sole underwriter, as the case may be—to make the standard disclosures and transaction-specific disclosures and eliminates any obligation of other co-managing underwriters in the syndicate to make the standard disclosures and transaction-specific disclosures. By eliminating the obligation of such other syndicate members to deliver the standard disclosures and transaction-specific disclosures upon the formation of the syndicate, the syndicate manager would no longer be delivering the disclosures ''on behalf of'' any other syndicate members, and such other syndicate members would be under no obligation to ensure the delivery of such disclosures on their behalf.[30] As further described in the MSRB's summary of comments,[31] the MSRB believes that this proposed change will result in issuers receiving fewer duplicative boilerplate disclosures, because a syndicate member will not be obligated to deliver its own disclosures.

In addition, the proposed rule change provides that any disclosures delivered by a syndicate manager prior to or concurrent with the formation of a syndicate would not need to be identified as delivered in the capacity of the syndicate manager or otherwise redelivered ''on behalf'' of the syndicate. It would suffice for purposes of the proposed rule change that an underwriter—later syndicate manager—has delivered the standard disclosures and/or transaction-specific disclosures to the issuer regardless of whether a syndicate may form or has already been formed in the course of the transaction.[32]

Each member of the syndicate would remain responsible for ensuring the delivery of any dealer-specific disclosures if, but only if, such syndicate member had actual material conflicts of interest or potential material conflicts of interest that must be disclosed. The MSRB continues to believe that the obligation for each underwriter to deliver dealer-specific disclosures is warranted because such disclosures are, by their nature, not uniform, and must be tailored to each underwriter's unique circumstances.[33] As currently stated in the 2012 Interpretive Notice, if an underwriter does not have any actual material conflicts of interest or potential material conflicts of interest, the proposed rule change would not require the underwriter to deliver an affirmative written statement to the issuer regarding the absence of such dealer-specific conflicts, but the underwriter is permitted to do so.

iii. Require the Separate Identification of the Standard Disclosures

The 2012 Interpretive Notice currently permits the delivery of omnibus disclosure documents, in which the standard disclosures need not be separately identified from the transaction-specific disclosures and dealer-specific disclosures. The proposed rule change would require the separate identification and formatting of the standard disclosures (*i.e.,* disclosures concerning the role of the underwriter and the underwriter's compensation) from the transaction-specific disclosure and the dealer-specific disclosures. For example, when providing the various disclosures in the same document, an underwriter would be required to clearly identify the standard disclosures and separate them from the other disclosures (*e.g.,* by placing the standard disclosures in an appendix or attachment).

iv. Clarify the Meaning of ''Recommendation'' for Purposes of Disclosures Related to Complex Municipal Securities Financings

The 2012 Interpretive Notice provides that an underwriter in a negotiated offering that recommends a complex municipal securities financing to an issuer must disclose the material financial characteristics of the complex municipal securities financing, as well as the material financial risks of the financing that are known to the underwriter and reasonably foreseeable at the time of the disclosure (a ''complex municipal securities financing disclosure''). Accordingly, as stated in the Implementation Guidance, the requirement to provide a complex municipal securities financing disclosure is triggered if—the new issue is sold in a negotiated offering; the new issue is a complex municipal securities financing; and such financing was recommended by the underwriter. These aspects of the 2012 Interpretive Notice would remain applicable under the Revised Interpretive Notice.

However, the 2012 Interpretive Notice does not define the term ''recommendation'' for purposes of this requirement. As further described in the MSRB's summary of comments,[34] the MSRB believes it is important to provide this clarification to facilitate dealer compliance with the proposed rule change. The proposed rule change would clarify that a communication by an underwriter is a ''recommendation'' that triggers the obligation to deliver a complex municipal securities financing disclosure if—given its content, context, and manner of presentation—the communication reasonably would be viewed as a call to action to engage in a complex municipal securities financing or reasonably would influence an issuer to engage in a particular complex municipal securities financing.[35] For the reasons described in

[29] For purposes of the proposed rule change, the term ''syndicate manager'' refers to the lead manager, senior manager, or bookrunning manager of the syndicate. In circumstances where an underwriting syndicate is formed, the proposed rule change would clarify that the syndicate manager is obligated to make the standard disclosures and transaction-specific disclosures. In the event that there are joint-bookrunning senior managers, the proposed rule change would state that only one of the joint-bookrunning senior managers would be obligated under the Revised Interpretive Notice to make the standard disclosures and transaction-specific disclosures. Unless otherwise agreed to, such as pursuant to an agreement among underwriters, the joint-bookrunning senior manager responsible for maintaining the order book of the syndicate would be solely responsible for providing the standard disclosures and transaction-specific disclosures under the Revised Interpretive Notice. Notwithstanding the obligation of a syndicate manager to deliver the standard disclosures and transaction-specific disclosures under the Revised Interpretive Notice, nothing in the Revised Interpretive Notice would prohibit an underwriter from making a disclosure in order to, for example, comply with another regulatory or statutory obligation.

[30] In light of, and consistent with, these obligations placed on the syndicate manager, only the syndicate manager must maintain and preserve records of the applicable disclosures it delivers in accordance with MSRB rules.

[31] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Amending the Nature, Timing, and Manner of Disclosures—Syndicate Manager Responsibility for the Standard Disclosures and Transaction-Specific Disclosures* and notes 102 *et. seq. infra,* and *Summary of Comments Received in Response to the Request for Comment—Amending the Nature, Timing, and Manner of Disclosures—Syndicate Manager Responsibility for the Standard Disclosures and Transaction—Specific Disclosures* and notes 169 *et. seq. infra.*

[32] For the avoidance of any doubt, the proposed change would apply to all applicable timeframes for the development of a syndicate, including situations when an underwriter—later syndicate manager—has previously delivered the disclosures prior to the formation of the syndicate and also when a syndicate manager delivers the disclosures concurrent with or after the formation of the syndicate.

[33] As currently stated in the 2012 Interpretive Notice and Implementation Guidance, nothing in the Revised Interpretive Notice would preclude—or require—a syndicate manager from delivering each of the dealer-specific conflicts to the issuer as part of a single package of disclosures, if the syndicate manager and other co-managing underwriters of the syndicate so agreed.

[34] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Clarification of the Meaning of* ''*Recommendation*'' and related notes 131 *et. seq. infra.,* and *Summary of Comments Received in Response to the Request for Comment—Guidance Regarding Meaning of* ''*Recommendation*'' and related notes 219 *et. seq. infra.*

[35] In proposing this change the MSRB draws upon, by analogy, the analysis applicable to dealers making recommendations to customers under

the MSRB's summary of comments below,[36] the MSRB considered, and ultimately determined not to, adopt the standard that has been developed for purposes of municipal advisor recommendations under Rule G–42, on the duties of non-solicitor municipal advisors.[37]

v. Establish a ''Reasonably Likely'' Standard for Disclosure of Potential Material Conflicts of Interest

The 2012 Interpretive Notice currently requires the underwriter to disclose to the issuer any actual material conflicts of interest and any potential material conflicts of interest. As described in the Implementation Guidance, the requirement to provide such disclosure is triggered if: The new issue is sold in a negotiated underwriting; the matter to be disclosed represents a conflict of interest, either in reality or potentially; and any such actual or potential conflict of interest is material. These aspects of the 2012 Interpretive Notice would remain applicable under the Revised Interpretive Notice. However, the proposed rule change provides that an underwriter's potential material conflict of interest must be disclosed as part of the dealer-specific disclosures if, but only if, the potential material conflict of interest is ''reasonably likely'' to mature into an actual material conflict of interest during the course of that specific transaction. This revision would narrow the dealer-specific disclosures currently required under the 2012 Interpretive Notice from all potential material conflicts to those potential material conflicts that meet this more focused standard.

As further described below in the MSRB's summary of comments, the MSRB believes this amendment will benefit issuers and underwriters alike by reducing the volume of disclosure that must to be provided to those conflicts that are most concrete and probable.[38] Underwriters will benefit from this change by no longer having to draft and deliver longer disclosures that identify and describe remote or hypothetical conflicts that are unlikely to materialize during the course of a given transaction. The MSRB believes that issuers will also benefit from this change because they will no longer have to review and analyze such longer-form disclosures, which will allow them to focus their time and other resources to the consideration of those material conflicts that are present, or reasonably likely to be present, during the course of the transaction, and, thereby, not expend time and resources discerning likely dealer conflicts from unlikely conflicts, or otherwise evaluating potential material conflicts that are not reasonably likely to materialize during the course of the transaction.

Additionally, the proposed rule change will not diminish an underwriter's fair dealing obligation to update, or otherwise supplement, its dealer-specific disclosures in circumstances when a previously undisclosed potential conflict of interest later ripens into an actual material conflict of interest. Thus, the MSRB believes that the proposed rule change does not compromise municipal entity protection, because municipal entity issuers would continue to receive timely information about all material conflicts of interest that ripen during the course of a transaction. More specifically, at or before the time an underwriter is engaged, issuers would continue to receive a dealer-specific disclosure describing any actual material conflicts of interest that are present at that time and any potential material conflicts of interest that, based on the reasonable judgement of the dealer at that time, are likely to mature into an actual material conflict of interest—assuming there are any such actual material conflicts of interest or potential material conflicts of interest.[39] Thereafter, an underwriter's fair dealing obligation would continue to require it to deliver an updated or supplemental dealer-specific disclosure for any actual material conflict of interest or potential material conflict of interest that has not been previously disclosed to the issuer and arising after the triggering of the initial dealer-specific disclosure.[40]

vi. Clarify That Underwriters Are Not Obligated To Provide Written Disclosure of Conflicts of Other Parties

As outlined above, the 2012 Interpretive Notice requires underwriters to provide issuers with certain standard disclosures, dealer-specific disclosures, and transaction-specific disclosures, when and if applicable. By their respective definitions, the standard disclosures cover generic conflicts of interest that could apply to any underwriter in any underwriting; the dealer-specific disclosures are the actual material conflicts of interest and potential material conflicts of interest generally unique to a specific underwriter; and

MSRB Rule G–19, on the suitability of recommendations and transactions. While Rule G–19 does not apply to the recommendations made by underwriters to issuers in connection with new issues of municipal securities for the reasons discussed below, the Revised Interpretive Notice draws, by analogy, on the analysis of when a dealer has made recommendation under Rule G–19. As discussed in existing MSRB guidance, this analysis under Rule G–19 is informed by the related suitability standard promulgated by the Financial Industry Regulatory Authority (FINRA). More specifically, when proposed amendments to Rule G–19 were approved in March 2014, the MSRB noted that ''[g]iven the extensive interpretive guidance surrounding FINRA Rule 2111 [on suitability] and the impracticality and inefficiency of republishing each iteration of that guidance, substantively similar provisions of Rule G–19 will be interpreted in a manner consistent with FINRA's interpretations of Rule 2111.'' *See* Release No. 34–71665; 77 FR 14321 (March 7, 2014) (File No. SR–MSRB–2013–07) (Mar. 7, 2014) and MSRB Regulatory Notice 2014–07 (March 2014). FINRA's suitability guidance has long provided that the determination of whether a ''recommendation'' has been made is an objective rather subjective inquiry. *See* FINRA Notice to Members 01–23 (March 2001). In guidance relating to FINRA Rules 2090 and 2011, FINRA reiterated this prior guidance, stating that an important factor in this inquiry ''is whether—given its content, context and manner of presentation—a particular communication from a firm or associated person to a customer reasonably would be viewed as a suggestion that the customer take action or refrain from taking action regarding a security or investment strategy.'' *See* FINRA Regulatory Notice 11–02 (Know Your Customer and Suitability) (January 2011). Rule G–19 in this situation does not directly apply to a recommendation made by an underwriter to an issuer in transactions involving the sale by the issuer of a new issue of its securities, because, by its terms, Rule G–19 governs recommendations to ''customers,'' and MSRB Rule D–9 provides that an issuer is not a ''customer'' within the meaning of that rule in the case of a sale by it of a new issue of its securities. *See* MSRB Rule D–9 (available here) and related interpretive guidance (available here).

[36] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Clarification of the Meaning of* ''*Recommendation*'' and related notes 131 *et. seq. infra.,* and *Summary of Comments Received in Response to the Request for Comment—Guidance Regarding Meaning of* ''*Recommendation*'' and related notes 219 *et. seq. infra.*

[37] *See* FAQs Regarding MSRB Rule G–42 and Making Recommendations (June 2018) (hereinafter, the ''G–42 FAQs'').

[38] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Amending the Nature, Timing, and Manner of Disclosures—Disclosure of Potential Material Conflicts of Interest* and related notes 98 *et. seq. infra,* and *see also Summary of Comments Received in Response to the Request for Comment—Amending the Nature, Timing, and Manner of Disclosures—Disclosure of Potential Material Conflicts of Interest* and related notes 161 *et. seq. infra.*

[39] In the absence of any such actual material conflict of interest or potential material conflict of interest, an underwriter would not have a fair dealing obligation under the Revised Interpretive Notice to disclose the absence of such a conflict, but may choose to provide an affirmative written statement regarding the absence of such conflicts at its discretion (*e.g.,* for the benefit of establishing a written record of such absence).

[40] For example, the 2012 Interpretive Notice states: ''. . . a conflict 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.' '' This concept would remain applicable under the Revised Interpretive Notice.

the transaction-specific disclosures relate to the specific financing structure recommended by an underwriter. None of the requirements in the 2012 Interpretive Notice prescribe that the underwriter must provide the issuer with written disclosures on the part of any other transaction participants, including issuer personnel, but does not expressly state this fact. In response to the concern of a commenter more fully described in the MSRB's summary of comments below,[41] the MSRB believes that this express clarification is warranted to avoid potential misinterpretation of the disclosure requirements of the proposed rule change. Accordingly, the proposed rule change would expressly state that underwriters are not required to make any written disclosures on the part of issuer personnel or any other parties to the transaction as part of the standard disclosures, dealer-specific disclosures, or the transaction-specific disclosures.

vii. Clarify That Disclosures Must Be ''Clear and Concise''

The 2012 Interpretive Notice currently requires disclosures to be ''designed to make clear to such official the subject matter of such disclosures and their implications for the issuer.'' The proposed rule change would clarify that an underwriter's disclosures must be delivered in a ''clear and concise'' manner, which the MSRB believes is consistent with, and substantially equivalent to, the standard currently articulated in the 2012 Interpretive Notice. Nevertheless, in response to the concern of commenters more fully described in the MSRB's summary of comments below, the MSRB believes that this clarification is warranted to provide further guidance to all stakeholders regarding the accessibility and readability of an underwriter's disclosures.

viii. Update the Definition of Municipal Entity

The 2012 Interpretive Notice currently provides a definition of ''municipal entity'' that references Section 15B(e)(8) under the Exchange Act.[42] Notably, the 2012 Interpretive Notice does not reference the definition of municipal entity under Exchange Act Rule 15Ba1–1, because the 2012 Interpretive Notice was issued prior to the effectiveness of the Commission's permanent registration regime for ''municipal advisors'' pursuant to the amendments to Section 15B of the Exchange Act effectuated by Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act[43] (collectively, the ''Final MA Rules''), including Exchange Act Rule 15Ba1–1.[44] Exchange Act Rule 15Ba1–1 defines a ''municipal entity'' to mean: ''any State, political subdivision of a State, or municipal corporate instrumentality of a State or of a political subdivision of a State, including—(1) Any agency, authority, or instrumentality of the State, political subdivision, or municipal corporate instrumentality; (2) 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 (3) Any other issuer of municipal securities.'' [45] Relatedly, Rule G–42 includes this same reference to the definition of municipal entity as used in the Final MA Rules.

In light of the Commission's definition contained in the Final MA Rules and the MSRB's definition of ''municipal entity'' as used under Rule G–42, the proposed rule change would incorporate a specific reference to this rule definition, in addition to the general statutory definition, to avoid any confusion about the scope of the Revised Interpretive Notice and to promote harmonization with the Final MA Rules and Rule G–42. In relevant part, the Revised Interpretive Notice would read, ''. . . the term 'municipal entity' is used as defined by Section 15B(e)(8) of the Securities Exchange Act of 1934 (the 'Exchange Act'), 17 CFR 240.15Ba1–1(g), and other rules and regulations thereunder.''

C. Require an Additional Standard Disclosure Regarding the Engagement of Municipal Advisors

The 2012 Interpretive Notice currently requires an underwriter to make five discrete statements regarding the underwriter's role as part of the standard disclosures, including a disclosure that, ''unlike a municipal advisor, the underwriter does not have a fiduciary duty to the issuer under the federal securities laws and is, therefore, not required by federal law to act in the best interest of the issuer without regard to its own or other interests.'' [46] The proposed rule change would incorporate a new standard disclosure that ''the issuer may choose to engage the services of a municipal advisor with a fiduciary obligation to represent the issuer's interests in the transaction.'' As a standard disclosure, this additional disclosure would be subject to the same principles for its timing as the other similar standard disclosures (*i.e.,* at or before the time the underwriter has been engaged to perform the underwriting services) and separate delivery as the other standard disclosures (*i.e.,* separately identified when provided with the transaction-specific disclosures and/or dealer-specific disclosures). In response to the concern of commenters more fully described in the MSRB's summary of comments below,[47] the MSRB believes that this additional disclosure will further clarify the distinctions between an underwriter—who is subject to a duty of fair dealing when providing advice regarding the issuance of municipal securities to municipal entities—and a municipal advisor—who is subject to a federal statutory fiduciary duty when providing advice regarding the issuance of municipal securities to municipal entities—and, thereby, promotes the protection of municipal entity issuers in accordance with the MSRB's statutory mandate at a relatively minimal burden to underwriters.

[41] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Amending the Nature, Timing, and Manner of Disclosures—Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties* and related note 114, and *Summary of Comments Received in Response to the Request for Comment—Amending the Nature, Timing, and Manner of Disclosures—Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties* and related notes 194 *et. seq. infra.*

[42] The 2012 Interpretive Notice states: ''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.' ''

[43] Public Law 111–203 § 975, 124 Stat. 1376 (2010).

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

[45] *See* Exchange Act Rule 15Ba1–1(g).

[46] *See* note 27 *supra* for the other four disclosures currently required under the 2012 Interpretive Notice.

[47] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Underwriter Discouragement of Use of Municipal Advisor; Addition of a New Standard Disclosure Regarding the Engagement of Municipal Advisors* and related notes 134 *et. seq. infra,* and *Summary of Comments Received in Response to the Request for Comment—Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor* and related notes 201 *et. seq. infra.*

D. Permit Email Read Receipt To Serve as Issuer Acknowledgement

The 2012 Interpretive Notice currently requires underwriters to attempt to receive written acknowledgement of receipt by the official of the issuer other than by evidence of automatic email receipt. The proposed rule change would permit an email read receipt to serve as the issuer's acknowledgement under the Revised Interpretive Notice.[48] The proposed rule change would define the term ''email read receipt'' to mean ''an automatic response generated by a recipient issuer official confirming that an email has been opened.'' The proposed rule change would also clarify that, ''[w]hile an email read receipt may generally be an acceptable form of an issuer's written acknowledgement under this notice, an underwriter, may not rely on such an email read receipt as an issuer's written acknowledgement where such reliance is unreasonable under all of the facts and circumstances, such as where the underwriter is on notice that the issuer official to whom the email is addressed has not in fact received or opened the email.''

In response to the concern of commenters more fully described in the MSRB's summary of comments below,[49] the MSRB believes that this amendment will ease the burden of the acknowledgement requirement on underwriters and issuers alike, as both issuer and underwriter commentators indicated that an underwriter's fair dealing obligation to obtain a written acknowledgement, as currently defined under the 2012 Interpretive Notice, creates burdens without offsetting benefits.[50] The MSRB believes that underwriters would benefit from this change by being able to more efficiently obtain issuer acknowledgement of the disclosures electronically through the automated process of an email system, while issuers that desire to provide such acknowledgement to an underwriter can similarly take advantage of the efficiency of the email system to electronically reply to an underwriter's electronic request. At the same time, under the Revised Interpretive Notice, issuers would still have the choice not to provide acknowledgement to an underwriter in this manner by opting not to send an email read receipt in response to the underwriter's email communication.

Moreover, the MSRB believes that this proposed change will not compromise issuer protection, because, like any other form of acknowledgement under the Revised Interpretive Notice, the proposed rule change would require the email read receipt to come from an issuer official that is not party to a conflict, based on the underwriter's knowledge, and either has been specifically identified by the issuer to receive such disclosure communications or, in the absence of such specific identification, is an issuer official who the underwriter reasonably believes has the authority to bind the issuer by contract with the underwriter. Similarly, the proposed rule change would provide that an underwriter may not rely on an email read receipt as the issuer's written acknowledgement when such reliance is unreasonable under all of the facts and circumstances. Accordingly, the proposed change will not compromise issuer protection because an underwriter still must meet the overarching fair dealing obligation of Rule G–17 when relying on an email read receipt, and, thus, an underwriter cannot reasonably rely on email read receipts as written acknowledgement when the particular facts and circumstances indicate that doing so would be deceptive, dishonest, or unfair, as in the case where an underwriter is on notice that the issuer official to whom the email is addressed has not in fact received or opened the email.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2) of the Act,[51] which provides that:

> The Board shall propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.

Section 15B(b)(2)(C) of the Act[52] provides that the MSRB's rules shall:

> . . . be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

The proposed rule change is consistent with Section 15B(b)(2)(C) of the Exchange Act[53] because it will protect issuers of municipal securities from fraudulent and manipulative acts and practices, remove impediments to and perfect the mechanism of a free and open market, and promote just and equitable principles of trade, and promote the protection of municipal entities, for the reasons set forth below.

A. Defining the Various Categories of Underwriter Disclosures and Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs Into the Revised Interpretive Notice

The proposed rule change would promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market through its amendment of the 2012 Interpretive Notice to define the various categories of underwriter disclosures and through the incorporation of the content of the Implementation Guidance and FAQs. These amendments promote equitable principles of trade and the removal of impediments to and perfection of the mechanism of a free and open market by allowing underwriters to reference and review a single consolidated document with uniform terms under Rule G–17, which facilitates the efficient determination of any applicable fair dealing obligations and, thereby, allows for more efficient and less burdensome compliance. At the same time, this amendment does not compromise issuer protection, because these amendments to the 2012 Interpretive Notice are primarily of a technical nature that do not alter the substance of the information delivered to issuers of municipal securities.

[48] While an email read receipt would serve as acknowledgement of disclosures delivered for purposes of an underwriter's fair dealing obligations under the Revised Interpretive Notice, the MSRB does not intend to create any implication or inference that an email read receipt may serve as an acknowledgment for any other regulatory purposes.

[49] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Email Read Receipt as Issuer Acknowledgement* and related notes 125 *et. seq. infra.,* and *Summary of Comments Received in Response to the Request for Comment—Email Read Receipt as Issuer Acknowledgement* and related notes 213 *et. seq. infra.*

[50] *See, e.g.,* SIFMA Letter I, at p. 17 (''SIFMA and its members strongly believe that the issuer's acknowledgement of receipt of disclosures do not provide any benefit, create significant burdens and should be eliminated'').

[51] 15.U.S.C. 78*o*–4(b)(2).

[52] 15 U.S.C. 78*o*-4(b)(2)(C).

[53] 15.U.S.C. 78*o*–4(b)(2).

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

i. Assign the Syndicate Manager the Exclusive Responsibility for the Standard Disclosures and Transaction-Specific Disclosures

The proposed rule change would promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market by amending the 2012 Interpretive Notice to obligate only the syndicate manager—or the sole underwriter, as the case may be—to deliver the standard disclosures and transaction-specific disclosures, and eliminating the concept that the disclosures must be provided ''on behalf of'' any other members of the syndicate. This would remove impediments to and perfect the mechanism of a free and open market by eliminating certain redundant and generic disclosures currently delivered by underwriters to issuers that provide little, if any, novel informational benefits to issuers, but do create non-trivial compliance and record-keeping burdens on underwriters. The amendment will also promote the goal of protecting municipal entity issuers because issuers will be able to more efficiently evaluate the information contained in the disclosures they do receive, rather than having to differentiate generic and duplicative disclosures from disclosures that are more particularized to the facts and circumstances of the transaction.

ii. Require the Separate Identification of the Standard Disclosures

The proposed rule change would prevent fraudulent and manipulative acts and practices and promote the protection of municipal entity issuers by amending the 2012 Interpretive Notice to require the separate identification and formatting of the standard disclosures by underwriters. This would prevent fraudulent and manipulative acts and practices and promote the protection of municipal entity issuers because issuers will be able to more efficiently differentiate an underwriter's dealer-specific disclosures and transaction-specific disclosures from an underwriter's standard disclosures, and, thereby, more efficiently evaluate those disclosures that are unique to a given underwriting firm and transaction type from those that are more generic and common to all underwriting relationships.

iii. Clarify the Meaning of ''Recommendation'' for Purposes of Disclosures Related to Complex Municipal Securities Financings

The proposed rule change would promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market by amending the 2012 Interpretive Notice to define the analysis applicable to when an underwriter has made a recommendation triggering the obligation to deliver complex municipal securities financing disclosures. The 2012 Interpretive Notice does not currently define what constitutes a ''recommendation'' for these purposes. The absence of a definition creates a burden for underwriters to appropriately interpret and operationalize the 2012 Interpretive Notice. Clarifying the applicable definition would eliminate any legal ambiguity under the Revised Interpretive Notice regarding the applicable standard for determining when a recommendation of a complex municipal securities financing has been made. For similar reasons, the proposed change will promote just and equitable principles of trade by clarifying the circumstances when underwriters must provide these particularized transaction-specific disclosures to issuers, which will reduce the compliance burden for all dealers who act as underwriters.

iv. Establish a ''Reasonably Likely'' Standard for Disclosure of Potential Material Conflicts of Interest

The proposed rule change would remove impediments to and perfect the mechanism of a free and open market by amending the 2012 Interpretive Notice to more narrowly define which potential material conflicts of interest must be disclosed by underwriters. The disclosures regarding remote and unlikely conflicts provide little, if any, actionable informational benefits to issuers, but do create non-trivial compliance and record-keeping burdens on underwriters. The proposed rule change would prevent fraudulent and manipulative acts and practices and also promote the protection of municipal entity issuers by facilitating issuers' ability to more efficiently evaluate and consider those potential material conflicts of interest that are most concrete and probable, rather than having to differentiate likely material conflicts of interest from a longer inventory of conflicts that includes remote material conflicts of interest that are hypothetical and unlikely to materialize during the course of the transaction.

As further described below in the MSRB's summary of comments, the MSRB believes this amendment will benefit market participants by reducing the volume of disclosure that must be provided to those conflicts that are most concrete and probable.[54] Moreover, the MSRB believes that the proposed rule change does not compromise municipal entity protection, and may in fact bolster issuer protection, by providing more focused and actionable information to issuers. The MSRB believes that issuers will benefit from this change because they will no longer have to review and analyze longer-form disclosures discussing potential material conflicts of interest that are not reasonably likely to materialize during the course of the transaction. Streamlining the disclosures in this way will allow issuers to focus their time and other resources to the consideration of those material conflicts that are currently present and/or reasonably likely to be present during the course of the transaction.

Additionally, the proposed rule change will not diminish an underwriter's fair dealing obligation to update, or otherwise supplement, its dealer-specific disclosures in circumstances when a previously undisclosed potential conflict of interest later ripens into an actual material conflict of interest.[55] An underwriter must provide disclosure to the issuer regarding the actual presence of a material conflict that arises during the course of the transaction in accordance with the following timelines:

- If an actual material conflict of interest is present at the time the underwriter is engaged, then the underwriter must disclose the conflict at or before the time the underwriter is so engaged.
- If a conflict of interest does not rise to the level of an actual material conflict of interest at the time of the underwriter's initial engagement, but is reasonably likely to mature into an actual material conflict of interest during the course of the transaction

[54] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Amending the Nature, Timing, and Manner of Disclosures* and related notes 96 *et. seq. infra,* and *Summary of Comments Received in Response to the Request for Comment—Amending the Nature, Timing, and Manner of Disclosures* and related notes 159 *et. seq. infra.*

[55] The FAQs presently state that dealer-specific conflicts of interest ''discovered or arising after engagement'' must be disclosed ''[a]s soon as practicable after discovered and with sufficient time for the issuer to evaluate the conflict and its implication.''

between the issuer and the underwriter, then the underwriter must disclose the conflict as a potential material conflict of interest at or before the time the underwriter is so engaged.

• If the material conflict of interest is not present at the time of the underwriter's initial engagement, and the underwriter reasonably determines at that time that a conflict of interest is not likely to mature into an actual material conflict of interest during the course of the transaction, then the underwriter would not have a fair dealing obligation under this notice to disclose the conflict upon its engagement. But, for example, if that same undisclosed conflict later ripened into an actual material conflict of interest during the course of the transaction, then the underwriter would continue to have a fair dealing obligation under the Revised Interpretive Notice to disclose the conflict as soon as practicable after it arises or upon its discovery by the dealer.

In this regard, the Revised Interpretive Notice would not diminish the amount of information provided to an issuer about the presence of any actual material conflicts of interest as compared to the 2012 Interpretive Notice. It may only change the timing by which certain of those conflicts of interest are first disclosed to an issuer.[56]

To the degree that the Revised Interpretive Notice does result in a change in timing, the MSRB believes that the proposed rule change provides more actionable information to issuers regarding such conflicts, even if at a potentially later date, and, thereby, any detriment to issuers in regard to timing under the Revised Interpretive Notice generally would be positively offset in terms of issuers' increased informational certainty. While issuers may have less time to act in such scenarios, issuers would have the benefit of knowing that the conflicts being disclosed are more concrete and non-hypothetical.

Thus, the MSRB believes that the proposed rule change does not compromise municipal entity protection, and may in fact bolster issuer protection, by providing more actionable information to issuers, because issuers would continue to receive timely information about all material conflicts of interest that are present during the course of the transaction, and, more importantly, the revised standard eliminates some of the uncertainty regarding how an issuer should evaluate an underwriter's conflicts disclosure. Specifically, if the underwriter provides a material conflict disclosure to an issuer, then, under the Revised Interpretive Notice, the issuer is certain that the material conflict is actually present and/or reasonably likely to be present during the course of the transaction, rather than a mere hypothetical potential conflict. Thereby, issuers will benefit by not expending time and resources in distinguishing likely dealer conflicts from unlikely conflicts, or otherwise evaluating potential material conflicts of interest that are not reasonably likely to materialize during the course of the transaction.

v. Clarify That Underwriters Are Not Obligated To Provide Written Disclosures Regarding the Conflicts of Other Parties to the Transaction

The proposed rule change would remove impediments to and perfect the mechanism of a free and open market by amending the 2012 Interpretive Notice to clarify that underwriters are not obligated to provide written disclosures regarding the conflicts of issuer personnel or other parties to the transaction as part of the standard disclosures, dealer-specific disclosures, or the transaction-specific disclosures. The 2012 Interpretive Notice does not expressly state this fact, although the MSRB understands that the 2012 Interpretive Notice by its terms was not intended to create such a burden of written disclosure. Accordingly, the amendments providing this technical clarification in the Revised Interpretive Notice would reduce ambiguity regarding the nature of disclosures to be made under the 2012 Interpretive Notice and, thereby, reduce the burden on dealers that may be operating with such ambiguity.

vi. Clarify That Disclosures Must Be Clear and Concise

The proposed rule change would remove impediments to and perfect the mechanism of a free and open market by amending the 2012 Interpretive Notice to clarify that disclosures must be made in a clear and concise manner. These amendments promote equitable principles of trade and the removal of impediments to and perfection of the mechanism of a free and open market by granting underwriters clarity regarding the standard by which the disclosures will be evaluated. The 2012 Interpretive Notice does not currently express this standard by its terms, although the MSRB understands that this standard is consistent with the 2012 Interpretive Notice. Accordingly, providing this technical clarification in the Revised Interpretive Notice would reduce ambiguity regarding the application of the 2012 Interpretive Notice and, thereby, reduce the burden on dealers that may be operating with such ambiguity.

C. Require an Additional Standard Disclosure Regarding the Engagement of Municipal Advisors

The proposed rule change would prevent fraudulent and manipulative acts and practices and promote the protection of municipal entity issuers by amending the 2012 Interpretive Notice to require underwriters to incorporate a new standard disclosure that ''the issuer may choose to engage the services of a municipal advisor with a fiduciary obligation to represent the issuer's interests in the transaction.'' This proposed change would augment current disclosures by further emphasizing to an issuer the arm's-length, commercial nature of the underwriting relationship and expressly informing the issuer that it may obtain the advice of a municipal advisor, who serves as a fiduciary to the issuer, rather than relying solely upon the advice of an underwriter, who may have commercial interests that differ from the issuer's best interests.

D. Permit Email Read Receipt To Serve as Issuer Acknowledgement

Finally, the proposed rule change would remove impediments to and perfect the mechanism of a free and open market, and facilitate transactions in municipal securities, by amending the 2012 Interpretive Notice under Rule G–17 to permit an email read receipt to serve as the issuer's acknowledgement

[56] As an illustration of this point, in the factual scenario discussed in the last bullet above, an underwriter may have identified the conflict as a potential material conflict of interest under the terms of the 2012 Interpretive Notice's broader disclosure standard, which requires an underwriter to disclose any potential material conflict of interest, not just those that are reasonably likely. Consequently, under the terms of the 2012 Interpretive Notice, the underwriter may have incorporated the conflict into its initial dealer-specific disclosure as a potential conflict and so delivered notice of the conflict to the issuer at or before the time of the underwriting engagement.

Under the proposed rule change, the same conflict would still be disclosed to the issuer, but the timing of its initial disclosure to the issuer could be delayed until no later than the conflict ripening into an actual material conflict of interest. In such a scenario, an issuer would receive notice of such a conflict at a potentially later date into the transaction under the Revised Interpretive Notice than under the 2012 Interpretive Notice, and, correspondingly, the amount of time an issuer would have to analyze and react to such a conflict would be abridged as a result. However, by knowing such conflicts are concrete and non-hypothetical, an issuer may not need as much time to act to analyze and resolve any such conflict. Moreover, the MSRB believes that differing timing outcomes exemplified by this scenario described in the last bullet above, in actuality, would occur relatively infrequently.

of receipt of the applicable disclosures. For purposes of the Revised Interpretive Notice, the term ''email read receipt'' would mean an automatic response generated by a recipient issuer official confirming that an email has been opened. This amendment would remove impediments to and perfect the mechanism of a free and open market by improving the efficiency of the disclosure process by allowing underwriters to seek, and issuers to provide, acknowledgement electronically through the built-in, automatic process of an email system. In those instances where a municipal entity is familiar with an underwriter's disclosures, because, for example, it frequently utilizes the underwriter in the sale of its municipal securities, the issuer can choose to affirm an email read receipt to provide electronic acknowledgement of receipt of the underwriter's disclosures, rather than taking the additional time to recognize such receipt by, for example, returning a signature execution of a hard copy acknowledgement.[57] This potential for increased efficiency and added flexibility removes impediments to and perfects the mechanism of a free and open market, and facilitates transactions in municipal securities, by flexibly permitting underwriters and issuers to utilize additional electronic methods to seek and provide, respectively, acknowledgements in a less-burdensome manner.[58]

Moreover, an email read receipt enables an issuer to respond to an underwriter's request for an acknowledgement that more efficiently ensures the issuer is only providing an acknowledgement of receipt, rather than agreeing to legal terms beyond receipt confirmation. The MSRB understands that issuers can be hesitant to provide a signature acknowledgement to a hard-copy receipt of disclosures out of an abundance of caution that providing such a signature may be an execution of legal terms beyond the acknowledgement of receipt, and, relatedly, issuers oftentimes seek legal counsel before providing a signature acknowledgement in such circumstances to ensure that the execution of an underwriter disclosure does not legally bind them to any terms. Allowing for an email read receipt to constitute acknowledgement may help alleviate issuer concerns in such circumstances and, thereby, save issuers from spending the time and resources to more fully evaluate whether a hard copy execution of an underwriter disclosure may legally commit an issuer to more than just a mere acknowledgement of having received a disclosure. Accordingly, the proposed rule change would eliminate the need for underwriters to repeatedly request a hard-copy, signature execution of an acknowledgement from an issuer in such circumstances where the issuer has determined not to provide such a hard-copy execution, but will provide an email read receipt, and also would eliminate the need for issuers to respond to such repeated underwriter requests for hard-copy acknowledgements.[59] This potential reduction in issuer and underwriter burdens removes impediments to and perfects the mechanism of a free and open market, and facilitates transactions in municipal securities, by enabling the more efficient execution of municipal securities transactions.

At the same time, the MSRB believes that this proposed amendment would not compromise municipal entity issuer protection, because underwriters would be required under the Revised Interpretive Notice to attempt to receive written acknowledgement by an official identified as the issuer's primary contact for the receipt of such disclosures. Thus, under the Revised Interpretive Notice, if an underwriter wanted to rely on an email read receipt as written acknowledgement, then the underwriter would have a fair dealing obligation to receive the email read receipt from a specific official identified as the issuer's primary contact for the receipt of such disclosures. In the absence of such an issuer's designation of a primary contact, the underwriter would have a fair dealing obligation to receive an email read receipt from an issuer official that the underwriter reasonably believes has authority to bind the issuer by contract with the underwriter. Moreover, the Revised Interpretive Notice would not permit an underwriter to rely on an email read receipt as an issuer's acknowledgement where such reliance is unreasonable under all of the facts and circumstances, such as where the underwriter is on notice that the issuer official to whom the email is addressed has not in fact received or opened the email.

The electronic delivery of the disclosures to such an official in either scenario (*i.e.,* in a scenario in which an issuer has identified a specific primary contact, or in the alternative scenario in which no such identification has been made by an issuer, and, so, the underwriter must make a reasonable determination about an issuer official with the requisite authority) ensures that the issuer's decision of whether to provide acknowledgement by means of an email read receipt is made by an official with the authority and ability to make such decisions on the issuer's behalf. Stated differently, not any email read receipt will suffice under the Revised Interpretive Notice, as the proposed rule change would permit an email read receipt only from certain issuer officials to satisfy an underwriter's fair dealing obligation.

In proposing this change to the acknowledgement requirement, the MSRB notes that Rule G–42, which was adopted subsequent to the 2012 Interpretive Notice, does not require an acknowledgement from an issuer or obligated person client of the client's receipt of the applicable conflict and disciplinary event disclosures under Rule G–42(b), nor in the case of disclosures required to be made by a municipal advisor who has given inadvertent advice under Supplementary Material. 07 to Rule G–42, so long as the municipal advisor has a reasonable belief that the documentation was in fact received by the client.[60] In view of the MSRB's experience with disclosures under Rule G–42, where no client acknowledgement is expressly required, the MSRB believes that it is appropriate,[61] and consistent with the protection of issuers, to adopt a revised acknowledgement standard as part of the Revised Interpretive Guidance.

Additionally, the MSRB believes that this proposed amendment would not compromise municipal entity issuer protection because recipients of such an automatic email read receipt request would still have the option to not

[57] The MSRB understands that personnel of certain frequent issuers may desire more flexible methods to provide acknowledgment of receipt. *See, e.g.,* NAMA Letter I, at p. 2 (''Issuers currently acknowledge receiving disclosures from underwriters. This practice should continue, and should allow for issuers to execute acknowledgment as they see fit.'').

[58] *Id.*

[59] The FAQs provide that, ''[i]f an authorized issuer official agrees to proceed with the underwriting after receipt of the disclosures but will not provide a written acknowledgment, an underwriter must document specifically why it was unable to obtain such written acknowledgment.'' The MSRB understands that some underwriters will repeatedly ask for an issuer's acknowledgement, despite having been told no such acknowledgement will be provided, in order to comply with this guidance.

[60] *See* Exchange Act Release No. 34–76753 (December 23, 2015), 80 FR 81614, at 81617 note 18 (December 30, 2015) (''While no acknowledgement from the client of its receipt of the documentation would be required, the MSRB notes that a municipal advisor must, as part of the duty of care it owes its client, reasonably believe that the documentation was received by its client.'').

[61] *Id.*

provide this form of acknowledgement. Thus, if an issuer official did not desire to provide such an email read receipt, for whatever reason, then the underwriter would continue to have the obligation to seek acknowledgement by other means in order to document why it was unable to obtain such acknowledgement, as currently required under the 2012 Interpretive Notice.

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

Section 15B(b)(2)(C) of the Exchange Act requires that MSRB rules not be designed to impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[62] The MSRB has considered the economic impact of the proposed rule change, including a comparison to reasonable alternative regulatory approaches.[63] The MSRB does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The MSRB's proposed amendments to the 2012 Interpretive Notice are intended to update and streamline certain obligations specified in the 2012 Interpretive Notice and, thereby, benefit issuers and underwriters alike by reducing the burdens associated with those obligations, including the obligation of underwriters to make, and the burden on issuers to acknowledge and review, written disclosures that are duplicative, itemize risks and conflicts that are unlikely to materialize during the course of a transaction, and/or are not unique to a particular transaction or underwriting engagement. The MSRB believes that the overall impact of the proposed rule change will improve market practices, better protect issuers, and reduce the burdens on market participants.

Based on the feedback of some market participants, the 2012 Interpretative Notice has created unintended consequences in the market. For example, certain market participants, including issuers and underwriters, have indicated their belief that the disclosure obligations specified in the 2012 Interpretive Notice have led to the delivery of voluminous disclosures with mostly boilerplate information. Similarly, market participants have indicated that the disclosure obligations specified in the 2012 Interpretive Notice place a significant burden on underwriters to draft and deliver disclosures that are dense and otherwise difficult or inefficient for issuers to utilize in making informed decisions about the issuance of municipal securities, and also inadvertently bury disclosures of important conflicts and risks. Commenters also stated that the duplicative nature of some disclosures unnecessarily increases the overall volume of disclosures and, equally important, increases the likelihood that an issuer will receive similar information in a non-uniform or redundant manner, which makes it more difficult for an issuer to evaluate the information included in the disclosures it receives.[64]

The MSRB believes the proposed rule change is necessary to update and streamline the burdens placed on market participants and to increase the efficiency of certain market practices, such as enhancing the ability of issuers to efficiently and properly evaluate the risks associated with a given transaction, and, thereby, improving the protection of issuers. The MSRB further believes that the proposed rule change will provide clarity to underwriters regarding the scope of their regulatory obligations to municipal entity issuers by expressly affirming and defining certain significant concepts in the Revised Interpretive Notice.

Identifying and Evaluating Reasonable Alternative Regulatory Approaches

The MSRB has assessed alternative approaches to amend the 2012 Interpretative Notice and has determined that the respective amendments in the proposed rule change are superior to these alternatives.

To clarify the nature, timing, and manner of disclosures of conflicts of interest, the MSRB considered strictly limiting the dealer-specific disclosures required under the Revised Interpretive Notice to only an underwriter's actual material conflicts of interest (rather than an underwriter's actual material conflicts of interest and potential material conflicts of interest, as prescribed in the proposed rule change).[65] Eliminating the requirement for an underwriter to make disclosures regarding its potential material conflicts of interest would reduce the overall regulatory burden on dealers, but also delay the timing of disclosures regarding material conflicts of interest that are known at the outset of the engagement as being likely to materialize during the course of the transaction until such time as the conflicts in fact arise and, thereby, compromise certain protections currently afforded to issuers under the 2012 Interpretive Notice.[66] Accordingly, the MSRB determined that such an alternative was inferior and did not incorporate this alternative regulatory approach into the Revised Interpretive Notice.

The MSRB also considered amending the 2012 Interpretative Notice to permit issuers to opt out of receiving certain disclosures required under the 2012 Interpretive Notice. The 2012 Interpretive Notice does not provide such an opt-out process and, as a result, underwriters are generally required to deliver the applicable disclosures to an issuer regardless of an issuer's preference in this regard. The MSRB declined to incorporate this alternative regulatory approach into the Revised Interpretive Notice, because it was concerned that it may increase the likelihood that an issuer who has opted-out of certain disclosures may not receive all the information necessary to evaluate a given underwriting relationship and/or transaction structure.[67] Based on certain comments it received, the MSRB is persuaded that the risks associated with such an opt-out concept outweigh the potential benefits.[68]

The MSRB also considered amending the 2012 Interpretative Notice to incorporate the meaning of ''recommendation'' under Rule G–42, on duties of non-solicitor municipal advisors, which describes a two-prong analysis for determining whether advice is a recommendation for purposes of that rule (a ''G–42 Recommendation''). The relevant guidance under Rule G–42 provides the following two-prong analysis for such a G–42 Recommendation:

First, the [municipal advisor's] advice must exhibit a call to action to proceed with a

[62] 15 U.S.C. 78*o*–4(b)(2)(C).

[63] *Id.*

[64] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Amending the Nature, Timing, and Manner of Disclosures* and related notes 96 *et. seq. infra; see also Summary of Comments Received in Response to the Request for Comment—Amending the Nature, Timing, and Manner of Disclosures* and related notes 159 *et. seq. infra.*

[65] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Amending the Nature, Timing, and Manner of Disclosures—Disclosure of Potential Material Conflicts of Interest* and related notes 98 *et. seq. infra,* and *Summary of Comments Received in Response to the Request for Comment—Amending the Nature, Timing, and Manner of Disclosures—Disclosure of Potential Material Conflicts of Interest* and related notes 161 *et. seq. infra.*

[66] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Issuer Opt-Out* and *Summary of Comments Received in Response to the Request for Comment—Issuer Opt-Out.*

[67] *Id.*

[68] *Id.*

municipal financial product or an issuance of municipal securities and second, the [municipal advisor's] advice must be specific as to what municipal financial product or issuance of municipal securities the municipal advisor is advising the [municipal entity client or obligated person client] to proceed with.[69]

However, as discussed in more detail below, the MSRB declined to incorporate this G–42 Recommendation standard into the Revised Interpretive Notice, because of the likelihood that issuers may receive less disclosures on the risks associated with complex municipal securities financings under this standard.[70]

The MSRB considered amending the 2012 Interpretative Notice to eliminate all requirements regarding an issuer's acknowledgement of receipt of the disclosures. However, the MSRB believes that such an alternative approach would eliminate an important issuer protection and increase overall risks in the market without significant offsetting benefits.[71] Instead, to reduce the burden on underwriters and issuers alike, the proposed rule change incorporates into the Revised Interpretive Notice the concept that an underwriter may substantiate its delivery of a required disclosure by an email read receipt.[72]

The MSRB also considered amending the 2012 Interpretive Notice to only obligate the syndicate manager, rather than each underwriter in the syndicate, to make the dealer-specific disclosures. The 2012 Interpretive Notice currently requires each underwriter to deliver such disclosures. The MSRB declined to incorporate this alternative regulatory approach into the Revised Interpretive Notice, because the elimination of this requirement would mean that issuers would no longer receive the benefit of this disclosure from each underwriter in the syndicate and the omission of this unique and tailored information would eliminate an issuer protection without a significant offsetting benefit to the market.

Lastly, the MSRB considered amending the 2012 Interpretive Notice to create different disclosure tiers based on the particular characteristics of an issuer, such as the issuer's size, knowledge, issuance frequency, or experience of issuer personnel. At this time, the MSRB believes that there are significant drawbacks to such an approach that outweigh possible benefits, including the ongoing costs and difficulties of ensuring that a given issuer remained in an appropriate disclosure tier and whether such tiers could be adequately drawn in a definitive fashion that would reduce regulatory burdens without harming overall issuer protection. Accordingly, the MSRB declined to incorporate this alternative regulatory approach into the Revised Interpretive Notice.

Assessing the Benefits and Costs of the Proposed Rule Change

The MSRB's regulation of the municipal securities market is designed to protect investors, municipal entities, obligated persons, and the public interest by promoting a fair and efficient municipal securities market. The proposed rule change is intended, in part, to reduce burdens on underwriters without decreasing benefits to municipal entity issuers or otherwise diminishing municipal entity issuer protections. The MSRB's analysis below shows that the proposed amendments accomplish this objective. For the purpose of this analysis, the baseline is the current 2012 Interpretative Notice.

A. Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs Into the Revised Interpretive Notice

Since this is primarily a technical change from the 2012 Interpretative Notice, the MSRB does not believe there are any significant costs relevant to market participants. However, the MSRB believes that incorporating the Implementation Guidance and FAQs into the Revised Interpretive Notice will promote more efficient dealer compliance in that dealers will only have to reference a single regulatory notice in the future, rather than three separate notices.

B. Amending Nature, Timing, and Manner of Disclosures

i. Define Certain Categories of Underwriter Disclosures

The MSRB believes the added definitions of standard disclosures, transaction-specific disclosures, and dealer-specific disclosures in the proposed rule change would clarify the categories of disclosures and assist underwriters with their compliance with certain new standards in the Revised Interpretive Notice. The MSRB does not believe there is any associated cost to underwriters as a result of these changes, as the changes are more in the nature of a technical amendment.

ii. Assign the Syndicate Manager the Exclusive Responsibility for the Standard Disclosures and Transaction-Specific Disclosures

At present, the 2012 Interpretative Notice allows, but does not require, a syndicate manager to make the standard disclosures and transaction-specific disclosures on behalf of the other syndicate members. The MSRB understands that in accordance with current market practices, the syndicate manager rarely, if ever, provides disclosures for the other syndicate members, and, so, issuers typically receive separate disclosures from other underwriters in the syndicate.

The Revised Interpretive Notice would require the syndicate manager (or the sole underwriter as the case may be) to provide the standard disclosures and transaction-specific disclosures, and eliminate the obligation for the other syndicate members to make these disclosures.[73] The MSRB believes this amendment will alleviate certain burdens associated with the duplication of disclosures where there is a syndicate. The MSRB further believes that this amendment will reduce the likelihood of issuers receiving duplicative standard disclosures and transaction-specific disclosures in potentially inconsistent manners. Ultimately, the MSRB believes such a requirement would simplify issuers' review of standard disclosures and transaction-specific disclosures and allow them to more closely analyze any dealer-specific disclosures that may be received. The MSRB also believes that this amendment will make the process

[69] G–42 FAQs, at p. 2 (note 37 supra).

[70] *See* related discussion under *Proposed Rule Change—Amending the Nature, Timing, and Manner of Disclosures—Clarification of the Meaning of ''Recommendation''; see also Summary of Comments Received in Response to the Concept Proposal—Amending the Nature, Timing, and Manner of Disclosures—Clarification of the Meaning of ''Recommendation''* and *Summary of Comments Received in Response to the Request for Comment—Amending the Nature, Timing, and Manner of Disclosures—Clarification of the Meaning of ''Recommendation''*.

[71] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Email Read Receipt as Issuer Acknowledgement* and related notes 125 *et. seq. infra,* and *Summary of Comments Received in Response to the Request for Comment—Email Read Receipt as Issuer Acknowledgement* and related notes 213 *et. seq. infra.*

[72] *Id.*

[73] *See* related discussion under *Proposed Rule Change—Amending the Nature, Timing, and Manner of Disclosures—Assign the Syndicate Manager the Exclusive Responsibility for the Standard Disclosures and Transaction-Specific Disclosures; see also Summary of Comments Received in Response to the Concept Proposal—Amending the Nature, Timing, and Manner of Disclosures—Syndicate Manager Responsibility for Standard Disclosures and Transaction-Specific Disclosures* and related notes 102 *et. seq. infra,* and *Summary of Comments Received in Response to the Request for Comment—Amending the Nature, Timing, and Manner of Disclosures—Syndicate Manager Responsibility for Standard Disclosures and Transaction-Specific Disclosures* and related notes 169 *et. seq. infra.*

procedurally easier for dealers participating in an underwriting syndicate, because they only have a fair dealing obligation under the Revised Interpretive Notice to deliver their dealer-specific disclosures, if any existed, and would have no obligation to deliver the standard disclosures or transaction-specific disclosures.

iii. Require the Separate Identification of the Standard Disclosures

The proposed rule change would create a new requirement for underwriters that, when providing the various disclosures in the same document, an underwriter would have to clearly identify the standard disclosures. The MSRB believes this amendment will help prevent the disclosures regarding underwriter conflicts and transaction risks from being disclosed within other more boilerplate information.[74] The MSRB believes that the benefits of this amended requirement will be to provide clarity to issuers; diminish certain information asymmetries between underwriters and issuers;[75] reduce the burden of disclosure for syndicate members; and make it easier for issuers to assess the conflicts of interest and risks associated with a given transaction. The costs to dealers for clearly identifying and separating the standard disclosures from the dealer-specific and transaction-specific disclosures should be minimal, and the MSRB believes that the benefits would outweigh the costs.[76]

iv. Clarify the Meaning of ''Recommendation'' for Purposes of Disclosures Related to Complex Municipal Securities Financings

The 2012 Interpretative Notice 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. In relevant part, the 2012 Interpretive Notice states:

> The level of disclosure required may vary according to the issuer's knowledge or experience with the proposed financing structure or similar structures, capability of evaluating the risks of the recommended financing, and financial ability to bear the risks of the recommended financing, in each case based on the reasonable belief of the underwriter. In all events, the underwriter must disclose any incentives for the underwriter to recommend the complex municipal securities financing and other associated conflicts of interest.

The proposed rule change would clarify what constitutes a recommendation by adopting a definition for ''recommendation'' from analogous dealer guidance from Rule G–19.[77] As discussed further below, the MSRB believes many underwriters are already familiar with the practical application of this language,[78] and, as a result, the MSRB believes there would be no major implicit or explicit costs associated with the clarification of recommendation, as the MSRB believes the volume of the disclosures generally would remain the same. However, underwriters should experience the benefit of more efficient regulatory compliance by having an expressly defined standard.

v. Establish a ''Reasonably Likely'' Standard for Disclosure of Potential Material Conflicts of Interest

The 2012 Interpretative Notice requires each underwriter to disclose any potential material conflict of interest. The proposed rule change would amend the 2012 Interpretive Notice to require an underwriter to disclose any potential material conflict of interest that is reasonably likely to mature into an actual material conflict of interest during the course of that specific transaction.[79] Potential material conflicts of interest that are not reasonably likely (or do not have such a significant probability) to mature into an actual material conflict of interest during the transaction between the issuer and the underwriter are not required to be disclosed to the issuer at the outset of the engagement. The MSRB believes that a given potential material conflict of interest may have various chances of ripening into an actual material conflict of interest and, at a general level, can reflect a low likelihood, moderate likelihood, or high likelihood of occurring at any given point in time. The proposed rule change should reduce the length and complexity of a dealer's initial dealer-specific disclosures, as the MSRB understands that underwriters presently are inclined to disclose a potential material conflict of interest to an issuer as part of its dealer-specific disclosures even when such conflict is not reasonably likely to mature into an actual material conflict of interest during the course of the transaction because there is some remote likelihood.

The MSRB acknowledges that one potential cost to issuers of this proposed change would be the lost opportunity to evaluate potential material conflicts of interest that, according to the reasonable judgement of the dealer, are not likely to mature into an actual material conflict of interest. Consequently, there is a chance that the proposed change would hinder the issuer's ability to conduct a full risk assessment,

[74] *See* related discussion under *Proposed Rule Change—Amending the Nature, Timing, and Manner of Disclosures—Require the Separate Identification of the Standard Disclosures; see also Summary of Comments Received in Response to the Concept Proposal—Amending the Nature, Timing, and Manner of Disclosures—Require the Separate Identification of the Standard Disclosures* and *Summary of Comments Received in Response to the Request for Comment—Amending the Nature, Timing, and Manner of Disclosures—Require the Separate Identification of the Standard Disclosures.*

[75] In economics, information asymmetry refers to transactions where one party has more or better information than the other.

[76] *See* related discussion under *Proposed Rule Change—Amending the Nature, Timing, and Manner of Disclosures—Require the Separate Identification of the Standard Disclosures; see also Summary of Comments Received in Response to the Concept Proposal—Amending the Nature, Timing, and Manner of Disclosures—Require the Separate Identification of the Standard Disclosures* and *Summary of Comments Received in Response to the Request for Comment—Amending the Nature, Timing, and Manner of Disclosures—Require the Separate Identification of the Standard Disclosures.*

[77] *See* related discussion under *Proposed Rule Change—Amending the Nature, Timing, and Manner of Disclosures—Clarify the Meaning of Recommendation for Purposes of Disclosures Related to Complex Municipal Securities Financings; see also Summary of Comments Received in Response to the Concept Proposal—Clarification of the Meaning of* ''*Recommendation*'' and related notes 131 *et. seq. infra,* and *Summary of Comments Received in Response to the Request for Comment—Guidance Regarding Meaning of* ''*Recommendation*'' and related notes 219 *et. seq. infra.* As further discussed herein, the proposed rule change would clarify that a communication by an underwriter is a ''recommendation'' that triggers the obligation to deliver a complex municipal securities financing disclosure if—given its content, context, and manner of presentation—the communication reasonably would be viewed as a call to action to engage in a complex municipal securities financing or reasonably would influence an issuer to engage in a particular complex municipal securities financing.

[78] *Id.* In the absence of an express standard in the 2012 Interpretive Notice, it is likely that at least some underwriters are already applying a form of this standard in determining whether a ''recommendation'' has been made.

[79] *See* related discussion under *Proposed Rule Change—Amending the Nature, Timing, and Manner of Disclosures—Establish a Reasonably Likely Standard for Disclosure of Potential Material Conflicts of Interest; see also Summary of Comments Received in Response to the Concept Proposal—Amending the Nature, Timing, and Manner of Disclosures—Disclosure of Potential Material Conflicts of Interest* and related notes 98 *et. seq. infra,* and *Summary of Comments Received in Response to the Request for Comment—Amending the Nature, Timing, and Manner of Disclosures—Disclosure of Potential Material Conflicts of Interest* and related notes 161 *et. seq. infra.*

particularly around the decision of whether to engage a particular underwriter for a given transaction.[80]

Nevertheless, the MSRB believes the benefits of the proposed change outweigh its potential costs, as this change will both reduce the burden placed on underwriters and also reduce the volume of disclosures received by issuers, while continuing to ensure that issuers are notified in writing of relevant conflicts of interest, and, thereby, promoting the protection of issuers by facilitating the ability of issuers to more efficiently evaluate and consider those potential material conflicts of interest that are most concrete and probable. Issuers would not have to review potential material conflicts of interest that are not reasonably likely to ripen 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 diminished. With the proposed rule change, issuers should be able to discern which conflicts of interest present actual material risks or material risks that are reasonably likely to actually develop during the course of the transaction, therefore reducing asymmetric information between the underwriters and issuers. Relatedly, excluding potential material conflicts of interest that are unlikely to occur would create initial/upfront costs to underwriters since underwriters would have to amend their policies and procedures to specify what constitutes a ''reasonably likely'' potential material conflict of interest, though the MSRB believes that such costs would be minor and are justified by offsetting benefits.

vi. Clarify That Underwriters Are Not Obligated To Provide Written Disclosure of Conflicts of Other Parties

None of the requirements in the 2012 Interpretative Notice require the underwriter to provide the issuer with disclosures on the part of any other transaction participants, including issuer personnel. However, the MSRB received comments requesting clarification on this point,[81] and the proposed rule change would provide a clarification that underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction. This clarification should reduce the burden on firms that were mistakenly under the impression that underwriters are required to disclose the conflicts of other transaction participants, as well as provide clarity to regulatory authorities examining and enforcing MSRB rules. Assuming underwriters are already compliant with the 2012 Interpretative Notice, there are no implicit or explicit economic benefits or costs associated with the clarification in the proposed rule change. To the degree that regulators may be inappropriately interpreting and applying the 2012 Interpretative Notice in connection with examination and enforcement proceedings, regulators and underwriters will benefit from the clarification in that it should reduce the amount of time spent on such activity.[82]

vii. Clarify That Disclosures Must Be ''Clear and Concise''

Assuming underwriters are already compliant with the requirements under the 2012 Interpretative Notice, the MSRB believes there are no implicit or explicit economic benefits or costs associated with not amending the statement from the 2012 Interpretive Notice that ''disclosures must be made in a manner designed to make clear to such officials the subject matter of such disclosures and their implications to the issuer'' [83] and amending the 2012 Interpretive Notice to further clarify that, consistent with the existing language, disclosures must be drafted in a ''clear and concise manner.'' [84]

C. Require an Additional Standard Disclosure Regarding the Engagement of Municipal Advisors

The 2012 Interpretative Notice prohibits an underwriter from recommending that an issuer not retain a municipal advisor. By supplementing this language with the requirement that underwriters affirmatively state in their standard disclosures that ''the issuer may choose to engage the services of a municipal advisor with a fiduciary obligation to represent the issuer's interests in the transaction,'' the proposed rule change would further promote an issuer's understanding of the distinct roles of an underwriter and a municipal advisor.[85] Moreover, the MSRB believes that coupling this amendment with the incorporation of the existing language from the Implementation Guidance will promote issuer protection in the market by further ensuring that issuers are able to more freely evaluate their potential engagements with municipal advisors without undue bias.[86]

The possible benefits of this proposed change are demonstrated by a study from 2006, showing that an issuer's use of a financial advisor in the municipal bond issuance process reduces underwriter gross spreads, provides statistically significant borrowing costs savings, and lower reoffering yields.[87]

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[80] For example, if a potential material conflict of interest is first omitted from the dealer-specific disclosures—because the dealer correctly deems the risk to be possible, but not reasonably likely—and the conflict of interest, in actuality, has a higher likelihood and, ultimately, ripens into an actual material conflict of interest during the course of the transaction, then the dealer would still be required to timely disclose the conflict of interest when it ripens into an actual material conflict. However, the failure to disclose this possible conflict of interest at the first delivery of the dealer-specific disclosures, as currently required under the 2012 Interpretative Notice, may result in an inadequate due diligence performed by the issuer on the underwriter due to the information asymmetry between the issuer and the underwriter. *See Id.*

[81] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Amending the Nature, Timing, and Manner of Disclosures—Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties* and related note 114 and *Summary of Comments Received in Response to the Request for Comment—Amending the Nature, Timing, and Manner of Disclosures—Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties* and related notes 194 *et. seq. infra.*

[82] SIFMA expressed concern that ''regulators conflate conflicts of interest.'' *See* SIFMA Letter I, at p. 7 note 15 (''We also note that, in some cases, it appears that regulators conflate conflicts of interest that might exist on the part of other parties to a financing, including in particular conflicts on the part of issuer personnel, with conflicts on the part of the underwriter, and therefore regulators appear to expect that the conflicts disclosure under the [2012 Interpretive Notice] should include these conflicts of other parties. SIFMA and its members request that the MSRB clarify that the [2012 Interpretive Notice] does not require the underwriter to disclose conflicts on the part of parties other than the underwriter.'').

[83] *See* related discussion under *Proposed Rule Change—Amending the Nature, Timing, and Manner of Disclosures—Clarify that Disclosures Must Be Clear and Concise; see also Summary of Comments Received in Response to the Concept Proposal—Amending the Nature, Timing, and Manner of Disclosures—Clarity of Disclosures* and related notes 117 *et. seq. infra,* and *Summary of Comments Received in Response to the Request for Comment – Amending the Nature, Timing, and Manner of Disclosures—Clarity of Disclosures* and related notes 196 *et. seq. infra.*

[84] As indicated by one commenter, this standard should minimize any re-drafting of existing disclosure templates. *See* SIFMA Letter II, at p. 6 (stating a clear and concise standard ''is in line with the MSRB's disclosure principles as well as the goals of the retrospective review'').

[85] *See* related discussion under *Proposed Rule Change—Require an Additional Standard Disclosure Regarding the Engagement of Municipal Advisors; see also Summary of Comments Received in Response to the Concept Proposal—Underwriter Discouragement of Use of Municipal Advisor; Addition of a New Standard Disclosure Regarding the Engagement of Municipal Advisors* and related notes 134 *et. seq. infra,* and *Summary of Comments Received in Response to the Request for Comment—Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor* and related notes 201 *et. seq. infra.*

[86] *Id.*

[87] Vijayakumar Jayaraman and Kenneth N. Daniels, ''The Role and Impact of Financial

The results of the study are consistent with the interpretation that the monitoring and information asymmetry reduction roles of financial advisors potentially reduce the perceived risk for issuers. 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.[88] Given that an underwriter does not have the same fiduciary responsibility of a municipal advisor, the MSRB believes that clarifying the distinct roles of underwriters and municipal advisors should continue to improve market practices and further ensure that an issuer's decision to engage a municipal advisor is made without undue interference, which may obscure the issuer's overall evaluation of the costs and benefits of municipal advisory services.

As to the potential costs of compliance, underwriters would have to affirmatively state in their standard disclosures that an issuer may choose to engage the services of a municipal advisor with a fiduciary obligation to represent the issuer's interests in the transaction. Therefore, underwriters would incur additional cost associated with revising their policies and procedures (a one-time upfront cost) and delivering the statement in their standard disclosures during a transaction. Beyond this update to their standard disclosures and any related updates to their policies and procedures, the MSRB does not believe there will be any further ongoing implementation costs to underwriters.

D. Permit Email Read Receipt To Serve as Issuer Acknowledgement

Currently, the 2012 Interpretative Notice requires underwriters to attempt to receive written acknowledgement of receipt of the disclosures by an official of the issuer. The proposed rule change would allow for an email read receipt to serve as an acknowledgement.[89] The MSRB believes that the acknowledgement requirement continues to have value to ensure that issuers receive the disclosures. Allowing for an email read receipt to constitute written acknowledgement should reduce burdens on underwriters (including syndicate managers, when there is a syndicate) and on issuers, in that underwriters and issuers will no longer be required to follow up with written acknowledgements when such receipt is utilized. Nevertheless, underwriters should expect minor initial upfront costs (which are optional) associated with the implementation of the use of email read receipts, and related compliance, supervisory, training, and record-keeping procedures. However, the MSRB believes that the benefits associated with the reduced burden of spending time to obtain written acknowledgement would accrue over time and should exceed the initial costs.

Effect on Competition, Efficiency and Capital Formation

The MSRB believes that the proposed amendments to the 2012 Interpretative Notice as reflected in the Revised Interpretive Notice should improve the municipal securities market's operational efficiency by promoting consistency in underwriters' disclosures to issuers and promoting greater transparency. At present, the MSRB is unable to quantitatively evaluate the magnitude of the efficiency gains or the cost of compliance with the new requirements, but believes the benefits outweigh the costs. Additionally, the MSRB believes that the proposed rule change should also reduce confusion and risk to both underwriters and issuers; reduce information asymmetry between underwriters and issuers; and allow issuers to make more informed financing decisions. Therefore, the proposed amendments to the 2012 Interpretative Notice would improve capital formation. Finally, since the proposed rule change would be applicable to all underwriters, it would not have a negative impact on market competition.

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

The MSRB published the Concept Proposal on June 5, 2018 and published the Request for Comment on November 16, 2018. The Concept Proposal sought public comment on various aspects of the 2012 Interpretive Notice, including the benefits and burdens of the 2012 Interpretive Notice at a general level, and how the 2012 Interpretive Notice might be amended to ensure that it continues to achieve its intended purpose in light of current practices in the municipal securities market.

The Request for Comment incorporated the comments received on the Concept Proposal by providing specific amendments to the text of the 2012 Interpretive Notice. Additionally, through a series of questions, the MSRB sought more specific feedback from market participants in the Request for Comment regarding how the 2012 Interpretive Notice might be improved to remove unnecessary burdens on market participants, while at the same time ensuring that it continues to achieve its intended purpose.

The following discussion summarizes the comments received in response to the Concept Proposal and the Request for Comment and sets forth the MSRB's responses thereto. The discussion does not provide specific responses for every comment, as, for example, when the MSRB only received a high-level general comment on a topic area. Comments to the Concept Proposal are discussed first and comments to the Request for Comment are discussed in the immediately following section. The summary includes cross-references from the discussion of the Concept Proposal to the discussion of the Request for Comment, and vice versa, in order to identify the discussion of comments received on the same or similar topics for ease of review. For topics that were incorporated into the Concept Proposal, but subsequently not incorporated into the Request for Comment, the discussion below incorporates a footnote statement indicating that no further discussion of the topic is included in the summary of comments to the Request for Comment, along with a brief summary discussion of any significant comments received to the Request for Comment.

I. Summary of Comments Received in Response to the Concept Proposal

The MSRB received five comment letters in response to the Concept Proposal.[90] Each of the commenters generally indicated their support of the retrospective review of the 2012 Interpretive Notice as outlined in the Concept Proposal and each had specific suggestions on how the 2012 Interpretive Notice could be improved, as discussed further below.

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.

[88] Allen, Arthur and Donna Dudney, ''Does the Quality of Financial Advice Affect Prices?'' The Financial Review 45, 2010.

[89] *See* related discussion under *Proposed Rule Change—Permit Email Read Receipt to Serve as Issuer Acknowledgement; see also* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Email Read Receipt as Issuer Acknowledgement* and related notes 125 *et. seq. infra,* and *Summary of Comments Received in Response to the Request for Comment—Email Read Receipt as Issuer Acknowledgement* and related notes 213 *et. seq. infra.*

[90] *See* note 8 *supra.*

A. Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs Into a Single Interpretive Notice

i. General Comments Encouraging the Consolidation of the Implementation Guidance and the FAQs

SIFMA's response to the Concept Proposal stated that, if the MSRB were to amend the 2012 Interpretive Notice, ''. . . it would be critical to incorporate or otherwise preserve the guidance included in the Implementation Guidance and FAQs, with any modifications appropriate in light of the changes to the [2012 Interpretive Notice].'' [91] SIFMA further elaborated on this request, indicating that the Implementation Guidance provides a ''deeper understanding'' of the 2012 Interpretive Notice and that the FAQs provide important guidance in ''response to questions raised by underwriters based on their experience with initial implementation'' of the 2012 Interpretive Notice.[92] No other commenters on the Concept Proposal addressed this issue.[93] In response to SIFMA's comments, the MSRB proposed to incorporate the substance of the Implementation Guidance and FAQs into the Request for Comment, along with certain conforming edits and supplemental modifications to address other proposed amendments.[94]

ii. Modification of Implementation Guidance's Language Regarding the ''No Hair-Trigger''

As stated above, the Implementation Guidance provides the following regarding the timing and delivery of disclosures under the 2012 Interpretive Notice:

> The timeframes set out in the Notice 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 in the [2012 Interpretive Notice]. 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. Thus, the timeframes set out in the [2012 Interpretive Notice] are not intended to establish hair-trigger tripwires resulting in technical rule violations so long as underwriters act in substantial compliance with such timeframes and have met the key objectives for providing such disclosures under the [2012 Interpretive Notice].

SIFMA's comment letter on the Concept Proposal urged the MSRB to reconfirm this language, stating SIFMA's belief that the language is a critical acknowledgement of the market reality that transactions rarely proceed on uniform timelines. Like the incorporation of the other language from the Implementation Guidance and FAQs described above, the MSRB agrees that this language provides an important supplementary gloss to the language of the 2012 Interpretive Notice. However, the MSRB believed at the time that it drafted the Request for Comment that it was worthwhile to propose certain modifications to this language in order to solicit additional input regarding the practical effects of the language in the market and, in particular, its practical impact on dealer compliance. Accordingly, the MSRB incorporated modified language in the Request for Comment by omitting its final sentence (*i.e.,* deleting the statement that, ''. . . the timeframes set out in the [2012 Interpretive Notice] are not intended to establish hair-trigger tripwires resulting in technical rule violations so long as underwriters act in substantial compliance with such timeframes and have met the key objectives for providing such disclosures under the [2012 Interpretive Notice].''). In effect, the Request for Comment proposed withdrawing this particular language of the Implementation Guidance.[95]

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

Each of the five commenters on the Concept Proposal offered improvements to the nature, timing, and manner of disclosures required under the 2012 Interpretive Notice. At a more general level, several commenters shared the view that the municipal securities market would benefit from reducing the volume and ''boilerplate'' nature of the disclosures required under the 2012 Interpretive Notice, as there was a shared belief among these commenters that the level of disclosure required by the 2012 Interpretive Notice, in many respects, overly burdened underwriters and issuers alike without any offsetting benefits.[96]

i. Disclosures Concerning the Contingent Nature of Underwriting Compensation

The 2012 Interpretive Notice requires underwriters to disclose the contingent nature of their underwriting compensation. The Concept Proposal requested feedback on this topic. SIFMA commented that disclosures concerning the contingent nature of underwriting compensation should be eliminated, because contingent underwriting compensation effectively is a universal practice. In response, the MSRB incorporated a proposed amendment into the Request for Comment that would require the disclosure concerning the contingent nature of underwriting compensation to be incorporated into an underwriter's standard disclosures, in acknowledgement of the fact that contingent compensation is a nearly-universal practice, yet continues to present an inherent conflict of interest. The Request for Comment clarified, however, that if a dealer were to underwrite an issuer's offering with an alternative compensation structure, the dealer would need to both indicate in its transaction-specific disclosures that the information included in its standard disclosure on underwriter compensation does not apply and also explain the alternative compensation structure as part of its transaction-specific disclosures, to the extent that such alternative compensation structure also presents a conflict of interest.[97]

[91] SIFMA Letter I, at p. 4.

[92] *Id.,* at pp. 3–4.

[93] It should be noted that the MSRB did not seek specific comment on this topic in the Concept Proposal.

[94] As further discussed herein, the MSRB ultimately chose to incorporate these amendments into the proposed rule change. This general concept of incorporating the substantive language of the Implementation Guidance and FAQs into the Revised Interpretive Notice is not discussed again under the Summary of Comments Received in Response to the Request for Comment, but the MSRB does provide a summary of comments received in response to the incorporation of particular concepts and language from the Implementation Guidance and FAQs (*e.g.,* comments regarding whether the no-hair trigger language should be incorporated into the Revised Interpretive Notice).

[95] The proposed rule change reincorporates this language with certain revisions, as further discussed herein. *See* related discussion under *Summary of Comments Received in Response to the Request for Comment—Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs into a Single Interpretive Notice—Reincorporation of the ''No Hair-Trigger'' Language from the Implementation Guidance* and related notes 157 *et. seq. infra.*

[96] In this regard, GFOA commented that the disclosures currently required ''are often boilerplate and cumbersome.'' GFOA Letter I, at p. 1. NAMA similarly commented that ''disclosures are buried within lengthy documents that contain hypothetical potential conflicts and risks.'' NAMA Letter I, at p. 1. Similarly, SIFMA encouraged the MSRB to ''be cognizant of the substantial compliance burden on underwriters and complaints expressed by some issuers regarding excessive documentation resulting from the [2012 Interpretive Notice]'' and ''more precisely define the content of and the process for providing the disclosures required by the [2012 Interpretive Notice].'' SIFMA Letter I, at p. 5.

[97] Ultimately, the proposed rule change did not incorporate this amendment to the 2012 Interpretive Notice, as further discussed herein. *See* related discussion under *Summary of Comments*

ii. Disclosure of Potential Material Conflicts of Interest

The 2012 Interpretive Notice requires an underwriter to disclose certain actual material conflicts of interest and potential material conflicts of interest (*i.e.,* the dealer-specific disclosures), including certain conflicts regarding payments received from third parties, profit-sharing arrangements with investors, credit default swap activities, and/or incentives related to the recommendation of a complex municipal securities financing. Several commenters to the Concept Proposal suggested that the dealer-specific disclosures, as currently required, cause underwriters to deliver overly voluminous disclosures, which do not differentiate the most concrete and probable material conflicts from those that are merely possible.

From the dealer perspective, SIFMA stated its belief that ''issuers in many cases are receiving excessive amounts of disclosures of potential and often remote conflicts that are of little or no practical relevance to issuers or the particular issuances and would benefit from more focused disclosure on conflicts that actually matter to them.'' [98] BDA concurred, stating its belief that ''one of the factors that contributes to the length and complexity of Rule G–17 Disclosures is that underwriters disclose all potential conflicts of interests instead of known, actual conflicts of interests.'' [99] Similarly, GFOA stated that ''the documents are full of non-material potential disclosures where key material disclosures are not highlighted nor flagged, and in many cases buried in the information provided.'' [100]

Based on these comments, the MSRB proposed an amendment to the 2012 Interpretive Notice in the Request for Comment clarifying that a dealer would have a fair obligation to disclose a potential material conflict of interest if, but only if, it is ''reasonably foreseeable'' that such a conflict would mature into an actual material conflict of interest during the course of a specific transaction between the issuer and the underwriter. The MSRB believed that the revision would preserve the requirement that issuers continue to receive disclosures regarding potential material conflicts of interest, while narrowing the amount of potential material conflicts to eliminate the need for those disclosures that are highly remote and generally unlikely to ripen into actual material conflicts of interest.[101]

iii. Syndicate Manager Responsibility for the Standard Disclosures and Transaction-Specific Disclosures

Under the 2012 Interpretive Notice, a syndicate manager may make the standard disclosures and transaction-specific disclosures on behalf of other syndicate members. The Concept Proposal requested feedback on how often this option has been utilized and whether such option was effective. The MSRB received four specific comments in response. BDA commented that large, frequent issuers receive so many disclosures because co-managers of a syndicate do not exercise their ability to collectively make the required disclosures in this manner and, further, recommended that the MSRB amend the 2012 Interpretive Notice to provide that ''co-managers have no requirement to deliver any Rule G–17 disclosures except for the circumstance where the co-manager has a discrete conflict of interest that materially impacts its engagement with the issuer.'' [102] The Florida Division of Bond Finance also recognized the issue of duplication when there is a syndicate,[103] and NAMA stated its belief that syndicate members should not be allowed to provide boilerplate disclosures when they are provided by the syndicate manager.[104] Finally, SIFMA noted that dealers do not consistently utilize the option of having a syndicate manager make the standard and transaction-specific disclosures on behalf of other co-managing underwriters in the syndicate, and suggested that this may be the result because it is procedurally easier for a co-managing underwriter to provide these disclosures when delivering their dealer-specific disclosures, or because it may be more difficult or risky from a compliance perspective to rely on the syndicate manager.[105]

Given the stated positions of these commenters that disclosures provided by co-managing underwriters in a syndicate often are duplicative and, therefore, voluminous, the MSRB incorporated a proposed amendment into the Request for Comment requiring, rather than permitting, the standard disclosures and transaction-specific disclosures to be made by a syndicate manager on behalf of the syndicate. The MSRB believed that such a revision would promote market efficiency by reducing the amount of duplicative disclosures that underwriters in a syndicate must deliver and, consequently, the number of duplicative disclosures that an issuer must acknowledge and review.[106]

iv. Alternative to the Transaction-by-Transaction Delivery of the Disclosures Proposed in the Request for Comment

The 2012 Interpretive Notice currently requires underwriters to provide issuers all of the disclosures on a transaction-by-transaction basis. In response to the Concept Proposal, 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 would 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

Received in Response to the Request for Comment—Amending the Nature, Timing, and Manner of Disclosures—Disclosures Concerning the Contingent Nature of Underwriting Compensation and related notes 159 *et. seq. infra.*

[98] SIFMA Letter I, at p. 7.

[99] BDA Letter I, at p. 2.

[100] GFOA Letter I, at p. 1.

[101] Ultimately, the proposed rule change incorporates a version of this concept, but refined to a ''reasonably likely'' standard, rather than a ''reasonably foreseeable'' standard, as further discussed herein. *See* related discussion under *Summary of Comments Received in Response to the Request for Comment—Amending the Nature, Timing, and Manner of Disclosures—Disclosure of Potential Material Conflicts of Interest* and notes 161 *et. seq. infra.*

[102] BDA Letter I, at pp. 2–3.

[103] Florida Division of Bond Finance Letter (stating ''such disclosures are duplicative when multiple underwriters are involved in the same transaction'').

[104] NAMA Letter I, at p. 2.

[105] SIFMA Letter I, at p. 14 (''One reason this may be the case is that each syndicate member is obligated to provide its own disclosure of actual or potential conflicts of interest, and it is often procedurally easier to combine role disclosures and conflicts disclosures into a single document. Another reason may be that a particular underwriter has determined not to rely on another firm's actions to meet the underwriter's own regulatory obligations, or only permits such reliance upon confirmation that the syndicate manager has provided the required disclosure and has found that providing its own disclosure may be administratively easier than obtaining confirmation of the syndicate manager's disclosure.'').

[106] Ultimately, the proposed rule change incorporates a version of this concept, but with certain refinements, as further discussed herein. *See* related discussion under *Summary of Comments Received in Response to the Request for Comment—Amending the Nature, Timing, and Manner of Disclosures—Syndicate Manager Responsibility for the Standard Disclosures and Transaction-Specific Disclosures* and notes 169 *et. seq. infra.*

on offerings during the next 12 months).[107] 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 a permissible alternative and that an underwriter could continue to provide its disclosures on a transaction-by-transaction basis. Relatedly, and as previously mentioned, GFOA indicated in its response to the Concept Proposal that providing non-material or boilerplate disclosures annually might improve the disclosure process.[108] NAMA's response to the Concept Proposal stated its belief that 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 Interpretive Notice unchanged.

The MSRB was persuaded by SIFMA's suggestion to allow for an alternative to a transaction-by-transaction approach to disclosure, but also thought that NAMA's concern about the need to allow for updates and other supplementary material merited incorporation into any such alternative approach. Accordingly, the MSRB incorporated proposed amendments to the 2012 Interpretive Notice in the Request for Comment that would have permitted standard disclosures to be furnished to an issuer one time and then subsequently referenced and reconfirmed in future offerings, unless the issuer requests that the standard disclosures be made on a transaction-by-transaction basis.[109]

v. Separate Identification of the Standard Disclosures

The Concept Proposal asked for general feedback on alternative approaches for the delivery of the disclosures required under the 2012 Interpretive Notice. Among other comments discussed herein, GFOA suggested that the MSRB emphasize the current obligation within the 2012 Interpretive Notice requiring underwriters to identify generic or boilerplate disclosures.[110] Similarly, NAMA stated that the MSRB should ''ensure that underwriters provide material transaction risks and conflicts disclosures in a manner that is easily identifiable by the issuer (including various members of the issuing entity's internal finance team and governing body),'' [111] and the Florida Division of Bond Finance stated that ''the disclosures provided to issuers are boilerplate, and may inadvertently bury disclosures of specific conflicts and risks within pages of nonmaterial information and legalese.'' [112] Accordingly, the MSRB incorporated a requirement in the Request for Comment that would have required clear identification of each category of disclosures and separated them by placing the standard disclosures in an appendix or attachment. The MSRB suggested that such a change would allow issuers to discern and focus on the disclosures most important to them.[113]

vi. Clarification That Underwriters Are Not Obligated To Provide Written Disclosure of Conflicts of Other Parties

As previously stated, the 2012 Interpretive Notice requires underwriters to provide issuers with the standard, dealer-specific, and transaction-specific disclosures. In its response to the Concept Proposal, SIFMA commented that, in some cases, it appears that other regulators conflate conflicts of interest that might exist on the part of other parties to a financing, including, in particular, conflicts of issuer personnel,[114] and, therefore, those other regulators appear to expect that the conflicts disclosure under the 2012 Interpretive Notice should include these conflicts of interest of other parties. SIFMA requested clarification on this point.[115] In response, the MSRB incorporated a proposed amendment in the Request for Comment that explicitly stated that ''underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction.'' [116]

vii. Clarity of Disclosures

The 2012 Interpretive Notice requires that disclosures 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. In their comments to the Concept Proposal, GFOA encouraged the MSRB to require the disclosures be provided in a ''plain English'' manner,[117] and NAMA indicated that the disclosures should be presented in a straight-forward manner.[118] Believing that the standard for the manner of disclosures currently in the 2012 Interpretive Notice are consistent and substantially similar to GFOA's proposed ''plain English'' standard, the MSRB proposed amendments to the 2012 Interpretive Notice in the Request for Comment that explicitly clarified that the disclosures be drafted in plain English.[119]

viii. Disclosures Regarding Third-Party Marketing Arrangements

SIFMA's comment letter on the Concept Proposal encouraged the MSRB to eliminate the dealer-specific disclosures regarding third-party marketing arrangements, stating that ''we do not believe that the conflicts disclosure requirement under the 2012

[107] SIFMA Letter I, at p. 10–11.

[108] GFOA Letter I, at p. 2.

[109] The Request for Comment further clarified that, if the original standard disclosure needed to be amended, the syndicate manager would be permitted to deliver such amended standard disclosures. Similarly, in cases where such syndicate members may, themselves, subsequently be syndicate managers or sole underwriters, the Request for Comment would have allowed them to reference and reconfirm prior disclosures made on their behalf. Ultimately, the proposed rule change does not incorporate a version of this concept for the reasons discussed herein. *See* related discussion under *Summary of Comments Received in Response to the Request for Comment—Amending the Nature, Timing, and Manner of Disclosures—Alternative to the Transaction-by-Transaction Delivery of the Disclosures* as Proposed in the Request for Comment and related notes 183 *et. seq. infra.*

[110] GFOA Letter I, at p. 2.

[111] NAMA Letter I, at p. 2.

[112] Florida Division of Bond Finance Letter.

[113] Ultimately, the proposed rule change incorporates a version of this concept, as further discussed herein. *See* related discussion under *Summary of Comments Received in Response to the Request for Comment—Amending the Nature, Timing, and Manner of Disclosures—Separate Identification of the Standard Disclosures* and related notes 189 *et. seq. infra.*

[114] *See* SIFMA Letter I, at p. 7 note 15 (''We also note that, in some cases, it appears that regulators conflate conflicts of interest that might exist on the part of other parties to a financing, including in particular conflicts on the part of issuer personnel, with conflicts on the part of the underwriter, and therefore regulators appear to expect that the conflicts disclosure under the [2012 Interpretive Notice] should include these conflicts of other parties. SIFMA and its members request that the MSRB clarify that the [2012 Interpretive Notice] does not require the underwriter to disclose conflicts on the part of parties other than the underwriter.'').

[115] *Id.*

[116] Ultimately, the proposed rule change incorporates a version of this concept, but with certain refinements, as further discussed herein. *See* related discussion under *Summary of Comments Received in Response to the Request for Comment—Amending the Nature, Timing, and Manner of Disclosures—Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties* and related notes 194 *et. seq. infra.*

[117] GFOA Letter I, at p. 2.

[118] NAMA Letter I, at p. 2 (stating, ''. . . information should be presented in a straight forward manner, with other general disclosures presented separately from the statements and discussions of material transaction risks and conflicts disclosures (including [the] statement that the underwriter does not have a fiduciary duty to the issuer)'').

[119] *See* related discussion under *Summary of Comments Received in Response to the Request for Comment—Amending the Nature, Timing, and Manner of Disclosures—Clarity of Disclosures* and related notes 196 *et seq. infra.*

Guidance is the appropriate mechanism for ensuring that issuers understand the participation of such third-parties.'' [120] SIFMA argued that these disclosure requirements should be eliminated because ''the use of retail distribution agreements is not an activity involving suspicious payments to a third party and does not increase costs to issuers; rather, it simply passes on a discounted rate to a motivated dealer, which is commonly available to dealers after the bonds have become free to trade in any event, notwithstanding any agreement.'' [121]

The MSRB chose not to incorporate this amendment into the Request for Comment and did not incorporate any such amendment into the proposed rule change. While the MSRB agrees with SIFMA's point that third-party marketing agreements are not inherently ''suspicious'' activity, the MSRB believes that such agreements 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. The MSRB believes that it remains important for underwriters to disclose this information to issuers and, accordingly, did not propose any such changes in the Request for Comment and is not proposing any such change to this aspect of the 2012 Interpretive Notice in the proposed rule change.[122]

ix. Disclosures Regarding Credit Default Swaps

The 2012 Interpretive Notice specifically references an underwriter's engagement in certain credit default swap activities as a potential material conflict of interest that would require disclosure to the issuer. Similar to its request that the MSRB eliminate the disclosure requirements regarding third-party marketing arrangements, SIFMA also requested that the MSRB eliminate this specific reference to credit default swaps. 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.[123] 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. The MSRB believes that it remains important for underwriters to disclose this information to issuers and, accordingly, did not propose any such changes in the Request for Comment and is not proposing any such change to this aspect of the 2012 Interpretive Notice in the proposed rule change.[124]

C. Email Read Receipt as Issuer Acknowledgement

The 2012 Interpretive Notice requires underwriters to attempt to receive written acknowledgement of receipt of the disclosures by an official of the issuer (other than by automatic email 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.

In its response to the Concept Proposal, SIFMA commented that this requirement creates a significant burden for underwriters with no corresponding benefit to issuers.[125] SIFMA encouraged the MSRB to eliminate the acknowledgement requirement.[126] To address this issue, SIFMA recommended that receipt of an email return receipt should be conclusive proof of delivery if other transaction documentation has also been provided to the same email address.[127] GFOA did not comment on this issue of changing the form or type of acknowledgement, but did indicate that frequent issuers are burdened by the acknowledgement requirement in that they must ''tackle and acknowledge the paperwork'' many times.[128] NAMA stated its belief that the acknowledgement requirement should remain in place, but provide greater flexibility to allow ''issuers to execute acknowledgements as they see fit.'' [129]

Based on such comments, the MSRB proposed in the Request for Comment to retain the acknowledgement requirement, but allow for email delivery of the disclosures to the official of the issuer identified as the primary contact for the issuer and provide that an automatic email receipt confirming electronic delivery of the applicable disclosures may be a means to satisfy the acknowledgement requirement.[130]

D. Clarification of the Meaning of ''Recommendation''

Under the 2012 Interpretive Notice, whether an underwriter must make the transaction-specific disclosures, as well as the type of transaction-specific disclosures it must deliver, depends on whether the underwriter recommends certain financing structures to the issuer. In its response to the Concept Proposal, SIFMA requested clarification as to whether the MSRB's guidance on the meaning of ''recommendation'' under 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 (*i.e.,* a G–42 Recommendation) applies when determining whether an underwriter has recommended a complex municipal securities financing.[131] More specifically, the relevant guidance under Rule G–42 provides the following

[120] SIFMA Letter I, at p. 8.

[121] *Id.*

[122] This concept is not discussed again under the *Summary of Comments Received in Response to the Request for Comment.* The MSRB did not receive any further significant comments on this concept subsequent to the Request for Comment other than SIFMA's reiteration that these disclosures should be eliminated. SIFMA Letter II, at pp. 4–5, note 12.

[123] SIFMA Letter I, pp. 8–9.

[124] Given that the MSRB did not incorporate this particular concept into the proposed rule change, this concept is not discussed again under the *Summary of Comments Received in Response to the Request for Comment.* The MSRB did not receive any further significant comments on this concept subsequent to the Request for Comment other than SIFMA's reiteration that these disclosures should be eliminated. SIFMA Letter II, at pp. 4–5, note 12.

[125] SIFMA Letter I, at p. 13 (stating, ''. . . we believe the requirement for the underwriter to attempt to receive an issuer acknowledgment and the efforts to document cases where the issuer does not provide such acknowledgment create a significant degree of non-productive work on the part of underwriter personnel and provide no value to the issuer, but often produce unwanted follow-up inquiries from the underwriter'').

[126] *Id.*

[127] *Id.*

[128] GFOA Letter I, at p. 2. Relatedly, GFOA's comments to the Concept Proposal also stated that certain ''boilerplate disclosures'' could be provided on an annual basis for frequent issuers, indicating that a more flexible approach to the acknowledgement of at least boilerplate disclosures could alleviate burdens on such issuers. *Id.*

[129] NAMA Letter I, at p. 2.

[130] The proposed rule change incorporates a version of this concept, but with certain refinements that would distinguish email read receipts—which would be permitted to serve as acknowledgement under the Revised Interpretive Notice—from email delivery receipts—which would not be permitted to serve as acknowledgement under the Revised Interpretive Notice, but may be used to evidence the timing of such disclosures—all as further discussed herein. *See* related discussion under *Summary of Comments Received in Response to the Request for Comment—Email Read Receipt as Issuer Acknowledgement* and related notes 213 *et seq. infra.*

[131] SIFMA Letter I, at p. 9.

two-prong analysis for a G–42 Recommendation:

> First, the [municipal advisor's] advice must exhibit a call to action to proceed with a municipal financial product or an issuance of municipal securities and second, the [municipal advisor's] advice must be specific as to what municipal financial product or issuance of municipal securities the municipal advisor is advising the [municipal entity client or obligated person client] to proceed with.[132]

Persuaded by SIFMA's request for clarification on this point, the MSRB proposed an amendment to the 2012 Interpretive Notice in the Request for Comment clarifying that ''[f]or purposes of determining when an underwriter recommends a financing structure, the MSRB's guidance on the meaning of 'recommendation' under Rule G–42, on duties of non-solicitor municipal advisors is applicable'' and seeking further input on this issue.[133]

E. Underwriter Discouragement of Use of Municipal Advisor; Addition of a New Standard Disclosure Regarding the Engagement of Municipal Advisors

The 2012 Interpretive Notice currently states that ''[t]he underwriter must not recommend that the issuer not retain a municipal advisor.'' In their responses to the Concept Proposal, 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. More specifically, GFOA's comment asked the MSRB to amend the 2012 Interpretive Notice to require underwriters to ''affirmatively state'' both that ''issuers may choose to hire a municipal advisor to represent their interests in a transaction'' and also that underwriters are ''to take no actions to discourage issuers from engaging a municipal advisor.'' [134] Similarly, NAMA asked that the MSRB amend the 2012 Interpretive Notice to include a statement that: ''[t]he underwriter may not make direct or indirect statements to the issuer that the issuer not hire a municipal advisor or otherwise make statements to deter the use of a municipal advisor or blur the distinction between the underwriting and municipal advisor functions and/or duties.'' [135]

The MSRB attempted to address NAMA's and GFOA's comments to the Concept Proposal by incorporating existing language from the Implementation Guidance, as described above, which states 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 believed that, as a practical matter, this would address the concerns of NAMA and GFOA.[136]

F. Disclosures to Conduit Borrowers

As discussed above, the 2012 Interpretive Notice specifies underwriters' fair-dealing obligations to issuers, but does not apply specific requirements to underwriters dealing with conduit borrowers. At the same time, the Implementation Guidance expressly acknowledges that underwriters must deal fairly with all persons, including conduit borrowers, and that a dealer's fair-dealing obligations to a conduit borrower depends on the specifics of the dealer's relationship with the borrower and other facts and circumstances specific to the engagement.

The Concept Proposal requested feedback on whether the MSRB should extend the requirements enumerated in the 2012 Interpretive Notice to underwriters' fair dealing obligations with conduit borrowers. Providing this feedback, GFOA stated in its comment letter on the Concept Proposal its belief 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.[137] SIFMA indicated in its response to the Concept Proposal 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.[138] SIFMA, otherwise, did not comment on whether that common practice should be required under Rule G–17.

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. The MSRB understands that the level of engagement between underwriters and conduit borrowers is not consistent across the market, 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 connected to a conduit borrower seeking financing. The MSRB declined to address these issues in the Request for Comment—and continues to decline to incorporate such obligations into the proposed rule change—because the issues presented by the relationship between underwriters and conduit borrowers are unique enough to merit their own full consideration apart from this retrospective review.[139] Accordingly, the MSRB may consider this issue of the fair dealing obligations underwriters owe to conduit borrowers at a later date.

G. Tiered Disclosure Requirements Based on Issuer Characteristics

The 2012 Interpretive Notice applies to underwriters in their dealings with all issuers in the same manner. The Concept Proposal posed the question whether there should be different disclosure obligations for different classes of issuers. In response, 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.[140] Similarly, SIFMA noted in its response to the Concept Proposal 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

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[132] G–42 FAQs, at p. 2 (note 39 supra).

[133] Ultimately, the proposed rule change does define the term ''recommendation,'' but not in relation to the interpretive guidance issued under Rule G–42 as first proposed in the Concept Proposal, as further described herein. *See Summary of Comments Received in Response to the Request for Comment—Guidance Regarding Meaning of* ''*Recommendation*'' and related notes 219 *et seq. infra.*

[134] GFOA Letter I, at p. 3.

[135] NAMA Letter I, at p. 3.

[136] Ultimately, the proposed rule change does incorporate these concepts, but also incorporates a new standard disclosure regarding an issuer's choice to engage a municipal advisor, as further discussed herein. *See* related discussion under *Summary of Comments Received in Response to the Request for Comment—Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice to Engage a Municipal Advisor* and related notes 201 *et seq. infra.*

[137] GFOA Letter I, at p. 2.

[138] SIFMA Letter I, at p. 16.

[139] This concept is not discussed again under the *Summary of Comments Received in Response to the Request for Comment.* The MSRB did receive one comment from SIFMA on this concept in response to the Request for Comment, which stated SIFMA's belief that the Revised Interpretive Notice should not require disclosures to conduit borrowers. SIFMA Letter II, at pp. 5–6.

[140] Florida Division of Bond Finance Letter.

personnel, as well as the issuer's engagement of the advice of an independent registered municipal advisor (''IRMA'').[141] Relatedly, BDA commented that the disclosure obligations of the 2012 Interpretive Notice should not apply if an issuer has an IRMA with respect to the same aspects of an issuance of municipal securities.[142]

BDA's response to the Concept Proposal further stated that its belief that there should not be different obligations for different types of issuers for two reasons. First, because even the personnel of large issuers that frequently issue municipal securities ''change regularly'' and so continue to need the disclosures; and, second, because the uniform requirement allows for a ''consistent, standard process for dealers.'' [143] In their responses to the Concept Proposal, NAMA indicated that it does not support the varying of underwriters' responsibilities for different issuers,[144] and GFOA stated its belief 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.[145]

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 Interpretive Notice or that would materially relieve burdens for underwriters or issuers, and requiring different disclosure standards for different issuers may have unintended consequences that compromise issuer protections. In light of these considerations, the MSRB did not propose any classification of, and varied disclosure requirements for, issuers in the Request for Comment, nor is it proposing to do so in the proposed rule change.[146]

On the more specific topic of SIFMA's and BDA's comments regarding the IRMA exemption, the MSRB 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. The MSRB believes that many of the disclosures are so fundamental that they should not be optional and that issuers should always have the benefit of receiving them. For example, even if an IRMA assists an issuer in understanding the role and responsibilities of the underwriter, the MSRB believes that an underwriter should still be required to make the representations regarding its role in the transaction. For transaction-specific disclosures, the MSRB does not believe that an issuer's retention of an IRMA should obviate the need to provide transaction-specific disclosure—particularly, disclosures regarding complex municipal securities financings—because the transaction-specific disclosures would continue to serve the crucial purpose of highlighting important risks for an issuer to discuss with its municipal advisor. However, in response to SIFMA's and BDA's comments, the Request for Comment incorporated the concepts that the level of transaction-specific disclosures can vary over time and, among other factors, an underwriter may consider the issuer's retention of an IRMA when assessing the issuer's level of knowledge and experience with a given type of transaction.[147]

H. Issuer Opt-Out

Under the 2012 Interpretive Notice, 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 Concept Proposal, 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 that it has addressed many of commenters concerns regarding the need for an issuer opt-out through other proposed amendments to the 2012 Interpretive Notice. Accordingly, the MSRB did not incorporate such an opt-out concept into the Request for Comment, nor is it proposing to do so in the proposed rule change.[148]

I. Evaluating Issuer Sophistication and the Delivery of the Transaction-Specific Disclosures

The 2012 Interpretive Notice provides that, absent unusual circumstances or features, the typical fixed rate offering may be presumed to be well understood by issuer personnel, 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 in connection with a negotiated offering. Conversely, the 2012 Interpretive Notice allows for a variance in the level of disclosure required for complex municipal securities financings based on the reasonable belief of the underwriter regarding: The issuer's knowledge or experience with the proposed financing structure or similar structures; the issuer's capability of evaluating the risks of the recommended financing; and the issuer's financial ability to bear the risks of the recommended financing.

SIFMA's comment letter on the Concept Proposal stated its belief that all transaction-specific disclosures, for negotiated offerings of fixed rate and complex municipal securities financings, should be triggered by the same standard, which would create the possibility that an underwriter 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 Interpretive Notice 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

[141] SIFMA Letter I, at p. 12 (In terms of factoring in the engagement of an IRMA, SIFMA stated that, ''. . . if the issuer is relying on the advice of a municipal advisor that meets the independent registered municipal advisor exemption . . . and the underwriter invokes the IRMA exemption to the SEC's registration rule for municipal advisors,'' the underwriter should be able to factor this into its analysis regarding the appropriate level of disclosure.).

[142] BDA Letter I, at p. 2.

[143] BDA letter I, at p. 1.

[144] NAMA Letter I, at pp. 1–2.

[145] GFOA Letter I, at p. 2.

[146] This concept is not discussed again under the *Summary of Comments Received in Response to the Request for Comment.* The MSRB did receive a comment on this concept in response to the Request for Comment. SIFMA reiterated that tiered disclosure requirements may be beneficial issuers and underwriters. SIFMA Letter II, at p. 9.

[147] *See* related discussion under *Summary of Comments Received in Response to the Request for Comment—Tiered Disclosure Requirements Based on Issuer Characteristics* and related note 229 *infra.*

[148] *See* related discussion under *Summary of Comments Received in Response to the Request for Comment—Issuer Opt-Out* and related note 231 *infra.*

corresponding risks are very difficult to remedy after the transaction. Accordingly, the MSRB did not incorporate such a concept into the Request for Comment, nor is it proposing to do so in the proposed rule change.[149]

J. EMMA as a Tool for Disclosures

The 2012 Interpretive Notice requires underwriters to deliver in writing the required disclosures. In response to a question in the Concept Proposal 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 in its response to the Concept Proposal 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.[150] In their responses to the Concept Proposal, SIFMA stated that using EMMA would not be appropriate in light of the information disclosed,[151] and NAMA stated that it would undermine the purpose of the 2012 Interpretive Notice by requiring issuers to have to seek out the disclosures instead of receiving them directly.[152] Accordingly, the MSRB did not incorporate such a concept into the Request for Comment, nor is it proposing to do so in the proposed rule change.[153]

II. Summary of Comments Received in Response to the Request for Comment

The MSRB received five comment letters in response to the Request for Comment.[154] Each of the commenters generally indicated their support of the retrospective review of the 2012 Interpretive Notice as outlined in the Request for Comment and each had specific suggestions on how the proposed amendments to the 2012 Interpretive Notice incorporated into the Request for Comment could be improved, as discussed further below.

A. Consolidating the 2012 Interpretive Notice, the Implementation Guidance, and the FAQs Into a Single Interpretive Notice

In response to the Request for Comment, the MSRB received comments from GFOA, NAMA, BDA and SIFMA on the MSRB's proposal of amending the 2012 Interpretive Notice to consolidate the Implementation Guidance and the FAQs into a single publication. Commenters were generally supportive of the inclusion of the Implementation and the FAQs, but had specific suggestions in supplementing, revising, and/or deleting the proposed amendments, which are discussed below.

i. Inclusion of Language Regarding Underwriters' Fair Dealing Obligations to Other Parties in a Municipal Securities Financing

As previously discussed, the Request for Comment incorporated existing language from the Implementation Guidance that:

> 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.

BDA's response to the Request for Comment stated its belief that this this inclusion is ''unnecessary'' and will make compliance with the proposed rule change ''burdensome.'' [155] The MSRB believes that the proposed change merely reiterates Rule G–17's general principle of fair dealing in relation to a dealer's municipal securities activities and so is a useful and necessary reminder to dealers of their obligations to other parties participating in a given municipal securities transaction. Moreover, given that this language is taken from the existing Implementation Guidance, the MSRB believes that it should not create a new compliance burden for underwriters, as it should be incorporated into existing policies, procedures, and training. Accordingly, the MSRB incorporated this language into the proposed rule change with a slight modification to clarify that a dealer's fair dealing obligation under Rule G–17 extends only as far as its municipal securities activities. In relevant part, the Revised Interpretive Notice would read:

> The fair practice duties outlined in this notice are those duties that a dealer owes to a municipal entity when the dealer underwrites a 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 in the course of the dealer's municipal securities activities.

ii. Inclusion of Language Regarding a Reasonable Basis for Underwriter Representations

The Request for Comment incorporated existing language from the Implementation Guidance stating:

> 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.

BDA objected to the inclusion of this language in its response to the Request for Comment as redundant, in that the language is ''already covered in the existing language'' of the 2012 Interpretive Notice.[156] The MSRB understands BDA's comment to suggest that, because the 2012 Interpretive Notice already addresses the requirement for an underwriter to have a reasonable basis for its representations, the Implementation Guidance language is a superfluous addition. The MSRB believes that this language from the Implementation Guidance generally provides an important illustrative gloss on Rule G–17's general principle of fair dealing in relation to a dealer's specific obligations regarding certain representations and the assumptions upon which such representations are based. Moreover,

[149] *See* related discussion under *Summary of Comments Received in Response to the Request for Comment—Tiered Disclosure Requirements Based on Issuer Characteristics* and related note 229 *infra.*

[150] GFOA Letter I, at p. 3.

[151] SIFMA Letter I, at pp. 8, 19–20.

[152] NAMA Letter I, at p. 2.

[153] This concept is not discussed again under the *Summary of Comments Received in Response to the Request for Comment.* The MSRB did receive a specific comment on this concept from NAMA, which was supportive of not using EMMA as a means to satisfy the G–17 requirement. NAMA Letter II, at p. 2.

[154] *See* note 10 *supra.*

[155] BDA Letter II, at p. 1.

[156] BDA Letter II, at p. 2.

given that this language is taken from the existing Implementation Guidance, the MSRB believes that it should not create a new compliance burden for underwriters, as it should be incorporated into existing policies, procedures, and training.

Accordingly, the MSRB incorporated this language into the proposed rule change as generally proposed in the Request for Comment with one minor exception. The MSRB omitted the statement that, ''[t]he 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.'' The MSRB agrees with BDA that this language is redundant and potentially confusing. In relevant part, the Revised Interpretive Notice would read as follows:

> 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. 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.

iii. Reincorporation of the ''No Hair-Trigger'' Language From the Implementation Guidance

As described above, the Request for Comment did not incorporate the existing language from the Implementation Guidance providing that, ''. . . the timeframes set out in the [2012 Interpretive Notice] are not intended to establish hair-trigger tripwires resulting in technical rule violations so long as underwriters act in substantial compliance with such timeframes and have met the key objectives for providing such disclosures under the [2012 Interpretive Notice].'' SIFMA ''strongly objected'' to the omission of this language, stating that the ''language has been an important reassurance to our members who have acted in substantial compliance with prescribed timeframes despite transactions that have proceeded along unforeseen timelines and pathways.'' [157] SIFMA argued that this statement in the Implementation Guidance has benefited dealers and regulators alike, by preserving valuable time and resources, and, more importantly, that it should be retained ''as-is'' unless the MSRB ''can point to prevalent abuses.'' [158] The other commenters to the Request for Comment did not address the omission of this language. The MSRB is persuaded by SIFMA's concerns and believes there is a benefit to preserving aspects of the existing language from the Implementation Guidance, as it should be incorporated into existing policies, procedures, and training.

Accordingly, the proposed rule change would incorporate this concept from the Implementation Guidance into the Revised Interpretive Notice with certain clarifying and conforming edits to the language in order to promote consistency with the other amendments and to emphasize the facts and circumstances nature of the scope of an underwriter's fair dealing obligation under the Revised Interpretive Notice. In relevant part, the Revised Interpretive Notice would read as follows:

> The MSRB acknowledges that not all transactions proceed along the same timeline or pathway. The timeframes expressed herein should be viewed in light of the overarching goals of Rule G–17 and the purposes that the disclosures are intended to serve as further described in this notice. The various timeframes set out in this notice are not intended to establish strict, hair-trigger tripwires resulting in mere technical rule violations, so long as an underwriter acts in substantial compliance with such timeframes and meets the key objectives for providing disclosure under the notice. Nevertheless, an underwriter's fair dealing obligation to an issuer of municipal securities in particular facts and circumstances may demand prompt adherence to the timelines set out in this notice. Stated differently, if an underwriter does not timely deliver a disclosure and, as a result, the issuer: (i) Does not have clarity throughout all substantive stages of a financing regarding the roles of its professionals, (ii) is not aware of conflicts of interest promptly after they arise and well before the issuer effectively becomes fully committed—either formally (*e.g.,* through execution of a contract) or informally (*e.g.,* due to having already expended substantial time and effort)—to completing the transaction with the underwriter, and/or (iii) does not have the information required to be disclosed with sufficient time to take such information into consideration and, thereby, to make an informed decision about the key decisions on the financing, then the underwriter generally will have violated its fair-dealing obligations under Rule G–17, absent other mitigating facts and circumstances.

[157] SIFMA Letter II, at p. 5.

[158] *Id.*

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

Each of the five commenters on the Request for Comment offered improvements to the nature, timing, and manner of disclosures required under the 2012 Interpretive Notice. At a more general level, commenters continued to share the view that the municipal securities market would benefit from reducing the volume and ''boilerplate'' nature of the disclosures required under the 2012 Interpretive Notice as generally proposed in the Request for Comment.

i. Disclosures Concerning the Contingent Nature of Underwriting Compensation

As described above, the Request for Comment proposed an amendment to the 2012 Interpretive Notice that would require underwriters to deliver disclosures concerning the contingent nature of their underwriting compensation in their standard disclosures.[159] To the degree that an underwriter's compensation on a particular transaction deviates from the structure described in the standard disclosures, under the language of the Request for Comment, the dealer would need to indicate in its transaction-specific disclosures that the information included in the standard disclosure on underwriter compensation does not apply and explain the alternative compensation structure as part of the transaction-specific disclosures, to the extent that such alternative compensation structure also presents a conflict of interest.

In its response to the Request for Comment, SIFMA indicated its belief that the proposed changes in the Request for Comment are contrary to the goals of the retrospective review, because ''it would invariably result in more standardized and generic disclosures that may district from more specific ones.'' [160] SIFMA stated its preference to retain the current method of providing the disclosures. The MSRB did not receive any other comments on this proposed change and is persuaded by SIFMA's concerns. The MSRB believes that retaining the existing requirements regarding the disclosures of underwriter's compensation would be consistent with the goals of the retrospective review and not harm current municipal entity issuer protections. Accordingly, the proposed

[159] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Amending the Nature, Timing, and Manner of Disclosures—Disclosures Concerning the Contingent Nature of Underwriting Compensation* and related notes 97 *et. seq. supra.*

[160] *Id.,* at p. 8.

rule change does not adopt the Request for Comment's approach to the disclosure of underwriter compensation and proposes to retain the existing requirements and structure under the 2012 Interpretive Notice.

ii. Disclosure of Potential Material Conflicts of Interest

As previously described, the Request for Comment proposed certain revisions to the 2012 Interpretive Notice clarifying 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 that specific transaction between the issuer and the underwriter.[161] The MSRB received several comments to the Request for Comment on this proposed change. GFOA and the City of San Diego supported the revision, while SIFMA continued to advocate for the elimination of this category of disclosure altogether. More specifically, GFOA stated that this ''reasonably foreseeable'' standard should be used, because continuing to require the disclosure of all potential material conflicts of interest ''could diminish the meaningful inclusions that issuers need to know.'' [162] The City of San Diego indicated that the reasonably foreseeable standard provided a reasonable ''limit'' to what constitutes a potential material conflict of interest and indicated that the MSRB should not set a standard with ''a greater likelihood.'' [163]

On the other hand, SIFMA reiterated its concern that the disclosure requirement, ''. . . be limited to actual, and not merely potential, material conflicts of interest, or in the very least, a highly likely standard.'' [164] SIFMA stated that continuing to require the disclosure of potential material conflicts of interest would be ''unnecessary, distracting, and does not advance the goal of the retrospective review'' and suggested that the proposed reasonably foreseeable standard ''would be exceedingly difficult to implement and monitor from a compliance standpoint.'' [165] SIFMA's response to the Request for Comment further explained that, because any potential material conflict of interest that ripens into an actual conflict prior to the execution of the bond purchase agreement must be disclosed under the 2012 Interpretive Notice, the advance disclosure of such potential material conflicts of interest are unnecessary and distracting. Moreover, SIFMA stated that the consequence of misjudging whether and when a potential conflict of interest becomes material is too great, and, consequently, the reasonably foreseeable standard proposed in the Request for Comment would not reduce the volume of disclosures provided to issuers, as underwriters ''would be inclined,'' out of an abundance of caution or otherwise, to deliver the same level of disclosure as they currently deliver under the 2012 Interpretive Notice.[166] SIFMA encouraged the MSRB to either eliminate the category of potential material conflicts altogether or, in the alternative, adopt a ''highly likely'' standard for those potential material conflicts of interest that must be disclosed.[167]

As indicated in the Request for Comment, the MSRB believes that the disclosure of material conflicts of interest remains significant to an issuer's evaluation of the dealer providing underwriting services, which justifies the obligation for underwriters to continue to provide these disclosures.[168] To the degree that an underwriter has knowledge that a material conflict of interest does not currently exist, but is reasonably likely to ripen into an actual material conflict of interest during the course of the underwriting transaction, the MSRB believes that the municipal securities market is best served by the underwriter providing advanced notification to the issuer of the likelihood of such material conflict of interest, rather than waiting to disclose the conflict until it has ripened into an actual conflict.

At the same time, the MSRB understands from issuers and dealers that the disclosures required under the 2012 Interpretive Notice can result in a long list of generic boilerplate disclosures with little actionable information, and which may distract an issuer's attention from conflicts of interest that are more concrete and specific to the transaction's participants, facts and circumstances. In this regard, the MSRB is persuaded by SIFMA's concerns that the Request for Comment's proposed ''reasonably foreseeable'' standard could be difficult to implement from a compliance perspective and so may not serve the goal of reducing boilerplate disclosure regarding potential material conflicts of interest and facilitating the more focused disclosure of the most likely and immediate conflicts.

Accordingly, the proposed rule change incorporates a ''reasonably likely'' standard to define what potential material conflicts of interest must be disclosed in advance of ripening into an actual material conflict of interest during the course of a transaction. The MSRB believes that a reasonably likely standard appropriately balances competing policy interests, including by ensuring that issuers continue to benefit from the disclosure of potential material conflicts of interest, while at the same time attempting to reduce the volume of disclosures received by issuers and focusing the content of the disclosures to those conflicts that are more concrete and probable.

iii. Syndicate Manager Responsibility for the Standard Disclosures and Transaction-Specific Disclosures

As described above, the Request for Comment proposed an amendment to the 2012 Interpretive Notice that would require, rather than permit, the standard disclosures and transaction-specific disclosures to be made by a syndicate manager ''on behalf of'' the other syndicate members.[169] The MSRB

[161] *See* related discussion under *Summary of Comments Received in Response to the Concept Release—Amending the Nature, Timing, and Manner of Disclosures—Disclosure of Potential Material Conflicts of Interest* and related notes 98 *et. seq. infra.*

[162] GFOA Letter II, at p. 2.

[163] City of San Diego Letter.

[164] SIFMA Letter II, at p. 4.

[165] *Id.,* pp. 4–5.

[166] *Id.*

[167] *Id.*

[168] For example, the MSRB notes the requirements to disclose conflicts of interest—including potential material conflicts of interest—under the 2012 Interpretive Notice may serve as an important tool for the issuer and underwriter to discuss and address other disclosure obligations that may arise in the course of a primary offering of municipal securities. *See, e.g.,* Exchange Act Release No. 34–33741, ''Statement of the Commission Regarding Disclosure Obligations of Municipal Securities Issuers and Others'' (Mar. 9, 1994) (the ''SEC's 1994 Interpretive Release''), 59 FR 12748, at p. 12751 (March 17, 1994) (stating that ''. . . revelations about practices in the municipal securities offering process have highlighted the potential materiality of information concerning financial and business relationships, arrangements or practices, including political contributions, that could influence municipal securities offerings. . . . For example, such information could indicate the existence of actual or potential conflicts of interest, breach of duty, or less than arm's length transactions. Similarly, these matters may reflect upon the qualifications, level of diligence, and disinterestedness of financial advisors, underwriters, experts and other participants in an offering. Failure to disclose material information concerning such relationships, arrangements or practices may render misleading statements made in connection with the process, including statements in the official statement about the use of proceeds, underwriter's compensation and other expenses of the offering.'').

[169] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Amending the Nature, Timing, and Manner of Disclosures—Syndicate Manager*

received specific comments from the City of San Diego, SIFMA, and BDA on this proposed change. As discussed below, the City of Sand Diego questioned the proposed change and encouraged the MSRB to retain a version of the existing requirements under the 2012 Interpretive Notice,[170] while BDA and SIFMA supported the proposed change, but encouraged the MSRB to adopt clarifying amendments to the concept. The following provides a separate discussion regarding the MSRB's rationale for: Assigning to the syndicate manager's the sole obligation to deliver the standard disclosures and transaction-specific disclosures where a syndicate is formed; continuing to require co-managing underwriters in the syndicate to disclose in writing any applicable dealer-specific conflicts of interest; and the elimination of the Request for Comment's ''on behalf of'' concept related to the syndicate manager's obligation to deliver the standard disclosures and transaction-specific disclosures.

1. Amending the 2012 Interpretive Notice To Require the Syndicate Manager To Make the Standard Disclosures and Transaction-Specific Disclosures

The City of San Diego objected to the inclusion of the proposed change and encouraged the MSRB to adopt a standard that would ensure each syndicate member is ''responsible for delivering the standard and transaction specific disclosures'' and ''required to obtain acknowledgement of receipt from the issuer.'' [171] The City of San Diego reasoned that the burden placed on issuers of receiving multiple disclosures is manageable, even for frequent issuers.

As outlined above, the MSRB remains persuaded by the comments to the Concept Proposal from BDA, NAMA, and the Florida Division of Bond Finance that requiring, rather than merely allowing, the syndicate manager to deliver the standard disclosures and transaction-specific disclosures is an efficient way to reduce the duplication of disclosures received by issuers where a syndicate is formed. The MSRB understands that in many instances syndicate members may be reluctant to rely on the syndicate manager's delivery of the disclosures, as currently permitted by the 2012 Interpretive Guidance, because confirming delivery of its disclosures provides greater regulatory certainty that it has met its fair dealing obligations to the issuer. Additionally, the MSRB continues to be persuaded by GFOA's comment on the Concept Proposal that ''issuers who may be frequently in the market have to tackle and acknowledge the paperwork many times.'' [172] Accordingly, the proposed rule change incorporates the concept of only obligating the syndicate manager to provide the standard disclosures and transaction-specific disclosures where a syndicate is formed.

2. Declining To Amend the 2012 Interpretive Notice To Require Only the Syndicate Manager To Provide the Dealer-Specific Disclosures

In contrast to the City of San Diego's view on this topic, BDA's comment on the Request for Comment encouraged the MSRB to go even further in reducing an underwriter's disclosure obligations by only requiring the syndicate manager to have an obligation to deliver the dealer-specific disclosures, and eliminating the obligation that co-managers must deliver their individual dealer-specific disclosures. BDA cautioned the MSRB that continuing to require dealers who serve as co-managers to provide the dealer-specific conflicts of interest result in ''roughly the same number of disclosures to issuers as currently is the case.'' [173] BDA reasoned that, ''[a]s a practical matter, conflicts of interest tend to be specific to dealers in that each dealer has specific arrangements that create the conflict,'' yet the disclosures of only the syndicate manager's dealer-specific conflicts of interest are sufficient, because ''the role of co-manager does not entail the kind of active discussions with an issuer to merit disclosure by all co-managers of their specific conflicts.'' [174]

The MSRB understands BDA's concern that continuing to require co-managing underwriters to deliver their dealer-specific disclosures may not advance the goal of seeking to reduce the volume of disclosures to issuers.[175] The MSRB, however, continues to be persuaded by comments to the Concept Proposal and the Request for Comment that non-boilerplate disclosures regarding specific material conflicts of interest must be received by an issuer from each underwriter in the syndicate. While the general uniformity of the standard disclosures and the transaction-specific disclosures lend themselves to a single delivery in most circumstances, the MSRB believes that the relative uniqueness of the dealer-specific disclosures require a delivery obligation on the part of each co-managing underwriter. A co-managing underwriter's failure to deliver such disclosures could result in an issuer being unable to fully evaluate such co-managing underwriter's engagement in the syndicate and to make any appropriate disclosures to investors about the municipal securities offering. Accordingly, the MSRB declines to incorporate BDA's suggestion into the proposed rule change that only the syndicate manager is obligated to deliver the dealer-specific disclosures. Relatedly, the proposed rule change would not amend the guidance that, while each co-managing underwriter in the syndicate must disclose any applicable dealer-specific conflicts of interest, a co-managing underwriter has no obligation to affirmatively disclose in writing the absence of such conflicts.[176]

3. Clarifying That an Underwriter That Becomes a Syndicate Manager is Not Required To Make the Standard Disclosures and Transaction-Specific Disclosures on Behalf of Co-Managing Underwriters

SIFMA's response to the Request for Comment ''welcome[d] this proposal to reduce oftentimes duplicative disclosures to issuers,'' but also requested certain refinements to it.[177] Specifically, SIFMA was concerned that the proposed change would require the syndicate manager to ''affirmatively state'' that the standard disclosures are provided ''on behalf of the other syndicate members.'' [178] SIFMA suggested that this would be problematic in instances when an underwriter may need to provide the disclosures in order to meet the deadlines proposed in the 2012 Interpretive Notice, but co-managing

Responsibility for the Standard Disclosures and Transaction-Specific Disclosures and notes 102 *et. seq. supra.*

[170] City of San Diego Letter, at p 1.

[171] *Id.*

[172] GFOA Letter I, at p. 1.

[173] BDA Letter II, at p. 3.

[174] *Id.*

[175] The MSRB also notes that pursuant to the existing requirements under the 2012 Interpretive Notice and the FAQs, a co-managing underwriter would not have an obligation to deliver an affirmative statement in writing to the issuer indicating that no such dealer-specific conflicts exist, although a co-managing underwriter is not prohibited from doing so. The MSRB believes that one benefit of not requiring a co-managing underwriter to deliver such a disclosure is that issuers should be able to focus on the dealer-specific disclosures it does receive.

[176] For the avoidance of doubt, the proposed rule change would preserve the ability of an underwriter to deliver an affirmative statement providing that the underwriter does not have an actual material conflict of interest or potential material conflicts of interest subject to disclosure. Moreover, the proposed rule change incorporates the reminder in the Implementation Guidance that underwriters are obligated to disclose such conflicts of interest arising after the time of engagement with the issuer.

[177] SIFMA Letter II, at pp. 8–9.

[178] *Id.*

underwriters have not yet been appointed and/or the underwriter is uncertain whether such a syndicate will be formed. SIFMA encouraged the MSRB to reconsider this ''on behalf of'' language to ensure that an underwriter is not required to suggest the appointment of co-managing underwriters in such instances or, presumably, to otherwise provide disclosures on behalf of a non-existent or still-forming syndicate.

Similarly, BDA encouraged the MSRB to clarify the timing of a syndicate manager's delivery of disclosures, requesting specifics regarding the scenario in which an ''underwriter may deliver the standard disclosures and transaction-specific disclosures well before a syndicate is formed.'' [179] BDA stated that the amendments should ''clarify that standard disclosures and transaction-specific disclosures delivered by a syndicate manager can be delivered before a syndicate is formed and that the syndicate manager is not required to deliver new disclosures after a syndicate is formed or new syndicate members are added.'' [180]

The MSRB is persuaded by the scenarios that SIFMA and BDA describe and believes that requiring a syndicate manager to make the standard disclosures and the transaction-specific disclosures ''on behalf of'' the other members of the syndicate may unnecessarily be understood as requiring underwriters to deliver disclosures on behalf of non-existent syndicate members or otherwise defeat the purpose of the retrospective review by requiring an underwriter to re-deliver disclosures that had been provided, but delivered without such ''on behalf of'' language, in order to fulfill the dealer's fair dealing obligations to the issuer.[181] Accordingly, the proposed rule change would strike the '' on behalf of'' language as generally proposed in the Request for Comment and would expressly clarify that, in those instances in which an underwriter has provided the standard disclosures and/or transaction-specific disclosures prior to the formation of the syndicate, it would suffice that the disclosures have been delivered and no affirmative statement that such disclosures are made ''on behalf of'' any future co-managing underwriter would be necessary.[182]

iv. Alternative to the Transaction-by-Transaction Delivery of the Disclosures as Proposed in the Request for Comment

As further described above, the MSRB incorporated proposed amendments to the 2012 Interpretive Notice in the Request for Comment that permitted underwriters to provide standard disclosures to an issuer one time and then subsequently refer to and reconfirm those disclosures.[183] The MSRB received specific comments from GFOA, NAMA, the City of San Diego, and SIFMA regarding this proposal and each comment was generally critical of the MSRB's proposed approach. GFOA's comment on the Request for Comment stated that the MSRB's proposal is ''problematic'' and encouraged the MSRB to adopt an approach ''mandat[ing] that disclosures are provided to issuers for each transaction, to ensure that the issuers are aware of the fair dealing requirement for each issuance of securities.'' [184] Similarly, NAMA opposed any amendments that would eliminate the requirement for underwriters to provide disclosures for each transaction or otherwise allowed underwriters to reference back to previously provided disclosures. The City of San Diego agreed, stating that ''[i]t is most straight forward to require disclosures on a transaction by transaction basis.'' [185] SIFMA appreciated the MSRB's attempt to respond to its request to provide an alternative manner of disclosure, but expressed concern that the MSRB's proposal ''complicates matters even further.'' [186] SIFMA concluded that the MSRB's alternative proposal would be ''operationally burdensome'' and ''do little to reduce the volume and nature of the paperwork.'' [187] SIFMA reiterated its original suggestion for an annual disclosure process ''with bring-downs as necessary during the succeeding year.'' [188]

Given the lack of support from commenters regarding the MSRB's proposal, the MSRB did not incorporate the concept into the proposed rule change and declines to incorporate a different concept into the proposed rule change regarding an alternative to the transaction-by-transaction delivery of the disclosures, such as SIFMA's suggestion of annual disclosure process with bring-downs. The MSRB is persuaded by the comments from GFOA, NAMA, and City of San Diego that a transaction-by-transaction approach to disclosure better ensures that issuers and their personnel are apprised of an underwriter's fair dealing obligations for each offering.

v. Separate Identification of the Standard Disclosures

The MSRB incorporated a requirement in the Request for Comment that underwriters clearly identify each category of disclosure and generally separate them by placing the standard disclosures in an appendix or attachment.[189] The MSRB suggested that such a change would allow issuers to discern and focus on the disclosures most important to them. The MSRB received several specific comments on this proposed change. GFOA's response to the Request for Comment supported the separation of disclosures, stating: ''[w]hen determining clarity and communication of disclosures, standard disclosures should be discussed separately from specific transaction and underwriter disclosures.'' [190] NAMA similarly supported the separation of the standard disclosures from the transaction-specific disclosures as a way to highlight key items to its issuer clients.[191] SIFMA suggested that the ''separation of actual and non-standard disclosures is a reasonable proposal.'' [192] Accordingly, the proposed rule change incorporates the separation of the standard disclosures

[179] BDA Letter II, at p. 3.

[180] *Id.*

[181] Here, the MSRB contemplates scenarios in which an underwriting syndicate unexpectedly forms subsequent to the delivery of the standard disclosures and/or transaction-specific disclosures and desires to clarify that underwriters are not obliged to re-deliver such disclosures ''on behalf of'' the syndicate in order to meet their fair dealing obligations. The proposed rule change is intended to clarify that a syndicate manager is not required to re-deliver any disclosures previously provided to an issuer upon the subsequent or concurrent formation of a syndicate. Notwithstanding this obligation, and for the avoidance of doubt, to the extent that the content of those disclosures may need to be supplemented or amended to account for a change in circumstances, an underwriter is still permitted to deliver such a supplement or amendment. As stated in the FAQs, ''unless directed otherwise by an issuer, an underwriter 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.''

[182] The proposed rule change is intended to similarly permit a syndicate manager to provide the standard disclosures and/or transaction-specific disclosures concurrent with or after the formation of the syndicate without the reference to the ''on behalf of'' language.

[183] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Amending the Nature, Timing, and Manner of Disclosures—Alternative to the Transaction-by-Transaction Delivery of the Disclosures* and related notes 107 *et. seq. supra.*

[184] GFOA Letter II, at pp. 1–2.

[185] City of San Diego Letter, at p. 1.

[186] SIFMA Letter II, at p. 7.

[187] *Id.,* at p. 8.

[188] *Id.*

[189] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Amending the Nature, Timing, and Manner of Disclosures—Separate Identification of the Standard Disclosures* and related notes 110 *et. seq. infra.*

[190] GFOA Letter II, at p. 1.

[191] NAMA Letter II, at p. 2.

[192] SIFMA Letter II, at pp. 3–4.

from the transaction-specific disclosures and dealer-specific disclosures.[193]

vi. Clarification That Underwriters Are Not Obligated To Provide Written Disclosure of Conflicts of Other Parties

The Request for Comment incorporated a proposed amendment to the 2012 Interpretive Notice in order to expressly emphasize that underwriters are not required to make any disclosures on the part of issuer personnel or any other parties to the transaction.[194] The MSRB received one specific comment on this topic. More specifically, SIFMA's response to the Request for Comment ''welcome[d]'' the MSRB's proposed clarification.[195] The MSRB believes that this clarification is warranted to avoid any misinterpretation of the disclosure requirements of the proposed rule change. Accordingly, the proposed rule change would incorporate this language as generally proposed in the Request for Comment with supplemental language specifically clarifying that the an underwriter has no obligation to make any written disclosures described therein on the part of issuer personnel or any other parties to the transaction, as the standard disclosures, transaction-specific disclosures, and dealer-specific disclosures are limited to underwriter conflicts.

vii. Clarity of Disclosures

The MSRB proposed amendments to the 2012 Interpretive Notice in the Request for Comment that explicitly clarified that the disclosures be drafted in ''plain English.'' [196] The MSRB received several comments on this topic in response to the Request for Comment. The City of San Diego, GFOA and NAMA each supported the requirement that the disclosures be drafted in plain English, while SIFMA objected to the incorporation of this particular standard.

Of those in support of the standard, notably, the City of San Diego encouraged the MSRB to require underwriters to state whether their descriptions of certain complex municipal securities financing structures can be explained in plain English and, if not, to explicitly state that fact within the disclosure to alert an issuer that it may need to ask more questions.[197] In contrast, SIFMA objected to the inclusion of a plain English standard, stating its belief that the standard would be ''susceptible to different interpretations'' and the formal adoption of such a standard would defeat the purposes of the retrospective review by causing underwriters to ''completely redo all manner of their G–17 disclosures.'' [198] As an alternative, SIFMA suggested that the MSRB adopt a ''clear and concise'' standard.[199]

As discussed above, the MSRB's intent of incorporating the ''plain English'' standard into the Request for Comment was merely to formalize a substantially equivalent standard to the one presently required under the 2012 Interpretive Notice. The MSRB did not intend to create a substantively different standard that would require underwriters to redraft their existing disclosure language. Consequently, the MSRB is persuaded by SIFMA's concerns that the adoption of a ''plain English'' standard may defeat the purposes of the retrospective review, because it would require underwriters to redraft existing disclosures to meet, in SIFMA's view, a new and elusive standard. For similar reasons, the MSRB is declining to incorporate the City of San Diego's suggestion, at this time, that would require underwriters to explicitly state if a disclosure could not be provided in plain English. Rather, the MSRB is persuaded by SIFMA's alternative proposal that the MSRB adopt a ''clear and concise'' standard. The MSRB believes that this addition is warranted to provide further clarification on the accessibility and readability of the disclosures required under the proposed rule change. Moreover, the MSRB believes that such a ''clear and concise'' standard is appropriate, because it has been adopted in other contexts related to the issuance of municipal securities, and, as a result, should be relatively familiar to issuers and underwriters alike.[200] Accordingly, the MSRB proposed rule change incorporates a clear and concise standard and omits any specific reference to plain English.

C. Inclusion of Existing Language Regarding the Discouragement of an Issuer's Engagement of a Municipal Advisor and Incorporation of a New Standard Disclosure Regarding the Issuer's Choice To Engage a Municipal Advisor

As discussed above, the Request for Comment incorporated existing language from the Implementation Guidance stating that ''underwriters may not discourage issuers from using a municipal advisor or otherwise imply that the hiring of a municipal advisor would be redundant because the sole underwriter or underwriting syndicate can provide the services that a municipal advisor would.'' [201] BDA and SIFMA objected to the inclusion of this language, while GFOA and NAMA encouraged the MSRB to adopt even stronger requirements in this regard.

BDA objected to the inclusion of the language from the Implementation Guidance as redundant. Specifically, BDA stated that this language from the Implementation Guidance is ''entirely covered'' by the 2012 Interpretive Notice's statement that underwriters not ''recommend issuers not retain a municipal advisor.'' [202] SIFMA also thought that the proposed language was not necessary, and further stated that it would have unintended consequences by limiting ''otherwise permissible advice, such as describing what services can and cannot be provided, between underwriters and their [issuer] clients

[193] As discussed above, the MSRB reiterates, but is not amending at this time, the existing language from the 2012 Interpretive Notice that disclosures must be ''designed to make clear'' to issuer officials ''the subject matter of such disclosures and their implications for the issuer.'' Thus, an underwriter's fair dealing obligation requires it to identify and separate transaction-specific disclosures from dealer-specific disclosures to the extent possible without putting form over substance, as in the case of failing to fully discuss a conflict in a disclosure because it may not fit squarely into one category of disclosure versus another.

[194] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Amending the Nature, Timing, and Manner of Disclosures—Clarification that Underwriters Are Not Obligated to Provide Written Disclosure of Conflicts of Other Parties* and related note 114.

[195] SIFMA further asked the MSRB to provide examples of how the 2012 Interpretive Notice does not apply to other parties. Specifically, SIFMA requested ''examples of conflicts of other parties that would not need to be disclosed.'' SIFMA Letter II, at p. 4. The MSRB is open to SIFMA's request for examples, but believes that it is premature to provide such examples prior to the approval of the amended language in the proposed rule change. Given the facts and circumstances nature of such examples, the MSRB believes that it can better respond to SIFMA's request, assuming approval of the proposed change, through an FAQ or other compliance resource at a later date, if there is a continuing need for such examples.

[196] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Amending the Nature, Timing, and Manner of Disclosures—Clarity of Disclosures* and related notes 117 *et. seq. infra.*

[197] City of San Diego Letter, at p. 2.

[198] SIFMA Letter II, at p. 6.

[199] *Id.*

[200] For example, the SEC has stated that, ''[l]ike other disclosure documents, official statements need to be clear and concise to avoid misleading investors through confusion and obfuscation.'' *See* the SEC's 1994 Interpretive Release, at p. 12753.

[201] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Underwriter Discouragement of Use of Municipal Advisor; Addition of a New Standard Disclosure Regarding the Engagement of Municipal Advisors* and related notes 134 *et. seq. supra.*

[202] BDA Letter II, at p. 2 (''The BDA believes that the additional sentence is entirely covered by the existing sentence that precedes the new sentence. Any underwriter who discourages an issuer from retaining a municipal advisor for any reasons would be making already a prohibited recommendation to do so.'').

for fear of implying that a [municipal advisor] may be redundant.'' [203] SIFMA further stated its belief that the language may create a ''bias'' against underwriter-only transactions that ''could confuse issuers and discourage an issuer's flexibility to control the cost and scope of its financings in cases where it chooses not to use a [municipal advisor].'' [204] SIFMA requested the MSRB eliminate the proposed language; clarify that neither municipal advisors, nor underwriters may misrepresent the services and duties that the other is permitted to provide; and prohibit municipal advisors from misrepresenting that there is a regulatory requirement for an issuer to hire a municipal advisor.[205]

Conversely, in their responses to the Request for Comment, GFOA and NAMA each indicated that the proposed language was helpful, but encouraged the MSRB to go beyond just incorporating the language of the Implementation Guidance by adopting new, stronger prohibitions regarding underwriters deterring the engagement of municipal advisors. GFOA restated its request that the MSRB include a requirement that ''underwriters affirmatively state that issuers may choose to hire a municipal advisor to represent their interests in a transaction.'' [206] NAMA stated that its members are ''aware of instances where both underwriters and bond counsel directly deter the use of a municipal advisor or bond counsel dictates who the municipal advisor should be.'' [207]

The MSRB is persuaded by the comments from GFOA and NAMA about deal participants improperly dissuading issuers from considering the engagement of a municipal advisor and unfairly influencing issuers to engage one particular municipal advisor over another. However, the MSRB also believes there is merit to BDA and SIFMA's concerns, particularly regarding how further prohibitions may unintendedly chill otherwise valid underwriter advice and, thus, deprive issuers of the full benefit of an underwriters' expertise and experience in the market.

Given that the language prohibiting underwriters from discouraging the engagement of a municipal advisor or implying a redundancy of services provided by a municipal advisor is taken from the existing Implementation Guidance, the MSRB believes that underwriters should already be familiar with the practical application of this language. The MSRB further believes that the language should already have been incorporated into existing policies, procedures and training and, as a result, should not significantly increase the regulatory burden on underwriters. Equally important, the MSRB does not believe that the statements are redundant, as BDA contends, because they add an important gloss on the general fair dealing obligation of underwriters. As the additional language makes clear, a recommendation not to engage a municipal advisor can come in many express or implied forms, including, but not limited to, express communications discouraging the use of a municipal advisor or by strong implication of the redundancy of a given municipal advisor's services.

The MSRB believes there is potential merit to SIFMA's concerns that the proposed language may chill certain underwriter communications with issuers regarding municipal advisors and/or create a bias against underwriter only transactions that could lead to increased issuer borrowing costs. Nevertheless, the MSRB finds GFOA's comments to the Concept Proposal and Request for Proposal to be most persuasive on this topic, particularly in light of the MSRB's statutory mandate to protect municipal entities.[208] In this way, municipal entity issuers, as represented by GFOA, desire the prohibitions on such underwriter communications to be strengthened, rather than relaxed. Moreover, while GFOA's comments did not directly address SIFMA's concerns regarding the possible negative effects that this proposed change may have on issuer decision-making, the MSRB generally understands GFOA's view to be that, at this time, the risks that an issuer misunderstands the distinctions between a municipal advisor's role and an underwriter's role, and/or that an issuer is unduly persuaded by an underwriter against the engagement of a municipal advisor, generally outweighs the risks that an underwriter will be compelled, out of an abundance of caution or otherwise, to abstain from certain conversations with an issuer during the course of a negotiated offering, or that an issuer may uninformedly decline an underwriter-only transaction to the detriment of its borrowing costs by engaging a municipal advisor.

In terms of SIFMA's other comments, the MSRB agrees that ''neither [municipal advisors] nor underwriters may misrepresent the services and duties that the other is permitted to provide,'' and that municipal advisors cannot make a misrepresentation regarding ''a regulatory requirement for an issuer to hire a [municipal advisor].'' [209] However, the MSRB does not believe that the proposed rule change is the appropriate vehicle to address potential misrepresentations by municipal advisors, as the proposed rule change is limitedly focused on underwriters' fair dealing obligations to issuers, not the duties of loyalty and care that municipal advisors owe to their municipal entity clients.[210] Accordingly, the MSRB declines to incorporate SIFMA's suggestions on these particular matters into the proposed rule change.[211]

For these reasons, the MSRB is incorporating into the Revised Interpretive Notice language from the Implementation Guidance that ''underwriters may not discourage issuers from using a municipal advisor or otherwise imply that the hiring of a municipal advisor would be redundant because the sole underwriter or underwriting syndicate can provide the services that a municipal advisor would,'' as generally proposed in the Request for Comment. Beyond this, the proposed rule change would incorporate GFOA's and NAMA's requests to further bolster the disclosures regarding an issuer's choice to engage a municipal advisor by incorporating a new disclosure into an underwriter's standard disclosures. Specifically, the

[203] SIFMA Letter II, at p. 6.

[204] *Id.*

[205] *Id.*

[206] GFOA Letter II, at p. 2.

[207] NAMA Letter II, at p. 3.

[208] In terms of municipal entity protection, the MSRB is further persuaded by academic evidence finding that issuers obtain real economic benefits from using municipal advisors. *See* note 87 *supra* and related discussion in the *Self-Regulatory Organization's Statement on Burden on Competition.*

[209] SIFMA Comment Letter II, at p. 7.

[210] *See* Rule G–42. More specific to SIFMA's concern that a municipal advisor may misrepresent a regulatory requirement for an issuer to hire a municipal advisor, the MSRB notes that an issuer may be subject to state or local jurisdictional statutes, regulations, or other policies that may dictate such a requirement (*i.e.,* if and when a municipal entity may or must engage a municipal advisor). To the degree that there is an actual jurisdictional requirement for a municipal entity to engage a municipal advisor, consistent with its duties of care and loyalty, a municipal advisor may accurately communicate such jurisdictional requirements to a municipal entity issuer.

[211] As a threshold matter, however, the MSRB notes that Rule G–42, on the duties of non-solicitor municipal advisors, requires a municipal advisor to conduct its municipal advisory activities with a municipal entity client in accord with a duty of care and a duty of loyalty. Absent potential exculpating facts and circumstances, knowingly misrepresenting the services of an underwriter or the regulatory requirements applicable to a municipal entity client would be a violation of a municipal advisor's duty of care and/or duty of loyalty.

proposed rule change would require an underwriter to inform an issuer that ''the issuer may choose to engage the services of a municipal advisor to represent its interests in the transaction'' in a similar format and at the same time as the underwriter delivers certain other disclosures currently required under the 2012 Interpretive Notice.[212]

D. Email Read Receipt as Issuer Acknowledgement

The Request for Comment proposed a change to the acknowledgement requirement of the 2012 Interpretive Notice that would allow for an automatic email return receipt to satisfy the acknowledgement requirement, as more fully described above.[213] The MSRB received several supportive comments specific to this proposed change. NAMA and SIFMA each expressed their support of the proposed change. Specifically, NAMA stated that it was ''. . . pleased that the [Request for Comment] . . . would continue to mandate a form of acknowledgement from issuers that the disclosures are received, even through an email return receipt.'' [214] SIFMA similarly expressed its support for the incorporation into the Request for Comment of the concept that an automatic email return receipt could ''evidence receipt of the underwriter disclosures.'' [215] The City of San Diego was similarly supportive, stating that ''a read receipt should be permitted so long as the underwriter has delivered the disclosure to the issuer designated primary contact.'' [216] Notably, GFOA did not directly address this particular issue in its response to the Request for Comment, but did reiterate its preference that ''[t]ransaction specific and material underwriter conflicts of interest should be provided for each issuance of securities.'' [217]

Based on these comments, 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 repeatedly seek a particularized form of acknowledgement, which an issuer may not provide. Accordingly, the proposed rule change would incorporate this change as generally proposed in the Request for Comment with additional emphasis and clarifications on three important aspects of the proposed change to the acknowledgement requirement.

First, the proposed rule change would provide greater clarity regarding what type of automatic email receipt can meet an underwriter's fair dealing obligation to obtain written acknowledgement of an issuer's receipt of the applicable disclosures. Specifically, the proposed rule change would make clear that an automatic email *read* receipt must be obtained, rather than a mere automatic email *delivery* receipt, in order to meet the proposed rule change's acknowledgement obligations. The proposed rule change would define the term ''email read receipt'' to mean an automatic response generated by a recipient issuer official confirming that an email has been opened. An email delivery receipt that simply shows that a disclosure was successfully delivered fails to demonstrate whether the recipient actually received the disclosure in a working email inbox folder or if, for example, the disclosure was in fact delivered to a spam or junk file folder. An email delivery receipt that does not confirm that a recipient has in fact opened the email communication would not satisfy an underwriter's fair dealing obligation to obtain acknowledgement regarding the receipt of disclosures under the Revised Interpretive Notice.[218]

Second, the proposed rule change would clarify that while an email read receipt may generally be an acceptable form of an issuer's written acknowledgement under the Revised Interpretive Notice, an underwriter, would not be able to rely on an email read receipt as an issuer's written acknowledgement where such reliance is unreasonable under all of the facts and circumstances, such as where the underwriter is on notice that the issuer official to whom the email is addressed has not in fact received or opened the email. If an underwriter is on notice that, for example, an issuer official has not in fact received and/or opened an email with the applicable disclosures, despite having received an affirmative email read receipt confirmation, then the underwriter would not have met its fair dealing obligation under the Revised Interpretive Notice to obtain written acknowledgement from the issuer. This language in the proposed rule change is intended to ensure that disclosures are in fact delivered to an issuer, and, thereby, issuer protection is not compromised.

Finally, the proposed rule change would emphasize that an underwriter's fair dealing obligation to obtain an issuer's written acknowledgement can be satisfied by an email read receipt, but only if such email read receipt is from an appropriate issuer official. The Revised Interpretive Notice would state the underwriter has a fair dealing obligation to obtain such an email read receipt from the official of the issuer identified as the primary contact for receipt of such disclosures. In the absence of such identification, the underwriter would have a fair dealing obligation to receive an email read receipt from an issuer official that the underwriter reasonably believes has authority to bind the issuer by contract with the underwriter. Only email read receipts from such officials would meet an underwriter's fair dealing obligation under the Revised Interpretive Notice. Thus, the Revised Interpretive Notice would require underwriters to pay particular attention to the recipient providing an email read receipt. The additional emphasis in the proposed rule change is intended to ensure that disclosures are in fact delivered to the appropriate issuer personnel, and, thereby, issuer protection is not compromised by the return of an email read receipt from inappropriate issuer personnel.

E. Guidance Regarding Meaning of ''Recommendation''

The Request for Comment proposed an amendment to the 2012 Interpretive Notice and requested comment on whether the use of the recommendation analysis applicable to a G–42 Recommendation should be applicable to the determination of whether an underwriter is recommending a complex municipal securities financing.[219] As currently provided in MSRB guidance, a G–42 Recommendation depends on the following ''two-prong'' analysis:

First, the [municipal advisor's] advice must exhibit a call to action to proceed with a municipal financial product or an issuance of municipal securities and second, the [municipal advisor's] advice must be specific as to what municipal financial product or

[212] Like the existing, similar disclosures regarding the underwriter's role, the proposed rule change would require the underwriter to deliver this new disclosure at or before the time the underwriter has been engaged to perform underwriting services.

[213] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Email Read Receipt as Issuer Acknowledgement* and related notes 125 *et. seq. supra.*

[214] NAMA Letter II, at p. 2.

[215] SIFMA Letter II, at p. 2.

[216] City of San Diego Letter, at p. 2.

[217] GFOA Letter II, at p. 2.

[218] Although, the proposed rule change would make clear that such an email delivery receipt can still be used to evidence the timing regarding an underwriter's attempt to timely deliver a disclosure.

[219] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Clarification of the Meaning of ''Recommendation''* and related notes 131 *et seq. supra.*

issuance of municipal securities the municipal advisor is advising the [municipal entity client or obligated person client] to proceed with.[220]

The MSRB received several comments on this topic. SIFMA's response to the Request for Comment stated its appreciation for the proposed change,[221] while GFOA's and NAMA's responses cautioned the MSRB on the adoption of such a standard. More specifically, GFOA questioned whether this standard is ''the most appropriate'' and stated its belief that the proposed standard in the Request for Comment ''could prevent some issuers from receiving the right information they need to determine what financing structures are best for their government.'' [222] NAMA's response to the Request for Comment stated that the G–42 Recommendation analysis ''is not the right standard'' for this context.[223] NAMA cautioned that, ''[a]pplying the G–42 [R]ecommendation[] standard to underwriter G–17 disclosures creates a false regulatory parity that is not appropriate given the MSRB's mission to protect issuers and the very different roles and duties that municipal advisors and underwriters have to issuers.''

The MSRB understands GFOA's and NAMA's comments to be grounded in a concern that municipal advisors have a baseline fiduciary duty to protect the interests of municipal entity issuers, whereby any municipal advisor communication constituting advice to or on behalf of a municipal entity issuer must be in the best interests of the municipal entity client without regard to the financial or other interests of the municipal advisor. In contrast, underwriters have a more limited fair dealing obligation. Building upon this distinction, the MSRB's two-pronged analysis under Rule G–42 is primarily intended to clarify when a municipal advisor has additional suitability and record-keeping obligations when making a particular type of recommendation (*i.e.,* a G–42 Recommendation) [224] to a municipal client and is not the analysis for more generally determining when a communication constitutes ''advice'' because it ''involves a recommendation.'' [225] In consequence, GFOA's and NAMA's comments indicate their shared concern that, compared to the current disclosure obligations under the 2012 Interpretive Notice, issuers may receive less disclosure under the G–42 Recommendation standard and, thereby, have less information available to evaluate complex transactions.[226]

The MSRB is persuaded by GFOA's and NAMA's concerns that issuers may receive less disclosure under the G–42 Recommendation standard than issuers currently receive under the 2012 Interpretive Notice and, therefore, the MSRB has not incorporated the G–42 Recommendation standard in the proposed rule change. At the same time, the MSRB is still persuaded by SIFMA's comment on the Concept Proposal that the MSRB should clarify the standard that determines whether an underwriter has made a ''recommendation'' of a municipal securities financing to an issuer in a negotiated offering.

Accordingly, the proposed rule change expressly clarifies that the analysis to determine if an underwriter has made a ''recommendation'' triggering the complex municipal securities financing disclosures is whether—given its content, context, and manner of presentation—a particular communication from an underwriter to an issuer reasonably would be viewed as a call to action or reasonably would influence an issuer to engage in a complex municipal securities financing. This analysis to determine whether a recommendation has been made is not dissimilar to the analysis for municipal advisors,[227] and borrows an objective rather than subjective inquiry analysis applicable to dealers in the context of MSRB Rule G–19, on suitability of recommendations and transactions, and, in this way, the MSRB believes it should be familiar to dealers.

F. Disclosures to Conduit Borrowers

As discussed above, the MSRB declined to incorporate an amendment into the Request for Comment that would explicitly extend the requirements of the 2012 Interpretive Notice to the fair dealing obligations underwriters owe to conduit borrowers. The MSRB received a single specific comment from SIFMA on this topic, which supported the MSRB's approach in the Request for Comment. The proposed rule change does not include any changes in this regard.[228]

G. Tiered Disclosure Requirements Based on Issuer Characteristics

As discussed above, the MSRB declined to incorporate an amendment into the Request for Comment that would classify issuers into differing disclosure requirements based on various issuer characteristics, nor otherwise tailor the disclosure requirements applicable to specific categories of issuers.[229] However, in response to requests from SIFMA and BDA regarding assessing the level of knowledge and experience of the issuer in order to determine the appropriate level of disclosure regarding a recommended financing structure, the Request for Comment incorporated the concept that, among other factors, an underwriter may consider the issuer's retention of an IRMA when assessing the issuer's level of knowledge. The Request for Comment provided:

Among other factors, a sole underwriter or syndicate manager (when there is an

[220] *See* G–42 FAQs (note 37 *supra*).

[221] SIFMA Letter II, at p. 2 (stating, ''[w]e appreciate that the MSRB has proposed adopting some of the suggestions we made in our comment letter to the MSRB's [Concept Proposal], including . . . clarifying the applicability of MSRB Rule G–42's two-prong analysis to a recommendation for complex municipal financings . . .'').

[222] GFOA Letter II, at p. 2.

[223] NAMA Letter II, at p. 2.

[224] *See* the G–42 FAQs, at p. 2 (providing that, ''. . . in order for a communication by a municipal advisor to be a G–42 Recommendation, it must, as a threshold matter, be advice and that advice must meet both prongs of a two-prong analysis. First, the advice must exhibit a call to action to proceed with a municipal financial product or an issuance of municipal securities and second, the advice must be specific as to what municipal financial product or issuance of municipal securities the municipal advisor is advising the MA Client to proceed with.'').

[225] The definition of the advice standard pursuant to Exchange Act Rule 15Ba1–1(d)(1)(ii), as adopted, ''does not exclude information that involves a recommendation.'' Registration of Municipal Advisors, Release No. 34–70462 (Sept. 20, 2013), 78 FR 67467, at 67480 (Nov. 12, 2013). Additionally, the Commission stated that, ''. . . for purposes of the municipal advisor definition, the Commission believes that the determination of whether a recommendation has been made is an objective rather than a subjective inquiry. An important factor in this inquiry is whether, considering its content, context and manner of presentation, the information communicated to the municipal entity or obligated person reasonably would be viewed as a suggestion that the municipal entity or obligated person take action or refrain from taking action regarding municipal financial products or the issuance of municipal securities.'' *Id.*

[226] As one illustration of the possible distinctions in outcomes, if an underwriter presents a range of possible financing structures, but does not advise the issuer to proceed with any one specific structure, it may be ambiguous whether the underwriter met the second prong of the G–42 Recommendation analysis (*i.e.,* whether the underwriter was *specific* enough as to what particular financing structure the issuer should proceed with). Under the Revised Interpretive Notice, if such a presentation reasonably would be viewed as a suggestion that the issuer take action regarding a financing structure or reasonably would influence the issuer to engage in a financing structure, then the underwriter would be deemed to have a made a recommendation regarding that financing structure and, thereby, triggered the applicable disclosure requirements.

[227] *See* note 35 *supra* and related discussion.

[228] *See* discussion *supra* under *Self-Regulatory Organization's Statement on Burden on Competition—Identifying and Evaluating Reasonable Alternative Regulatory Approaches.*

[229] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Tiered Disclosure Requirements Based on Issuer Characteristics* and related note 140 *supra.*

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.

To further illustrate this point regarding the various factors involved in determining the appropriate level of disclosure, the Request for Comment also integrated existing language from the Implementation Guidance suggesting that the level of transaction-specific disclosures can vary over time, particularly if an issuer's personnel become more or less experienced with a given structure. In this regard, the Request for Comment provided:

> 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.

BDA objected to the inclusion of this language regarding the replacement of issuer personnel leading to increased disclosure, stating that, ''[i]n the abstract, there is no way to determine whether the level should increase or not because it will depend on many factors.'' [230] The MSRB agrees with BDA's objection that the level of disclosure required in any given situation depends on numerous factors specific to that set of facts and circumstances and so the example provided from the Implementation Guidance may lead to confusion. For similar reasons, the MSRB also believes that the Request for Comment's language regarding an issuer's IRMA may similarly lead to confusion.

Accordingly, the proposed rule change does not incorporate this language from the Implementation Guidance regarding the replacement of issuer personnel and, for similar reasons, does not incorporate the language from the Request for Comment regarding an issuer's engagement of an IRMA, as the concepts may lead to more, rather than less, confusion regarding the underwriter's obligation to reasonably determine the level of transaction-specific disclosures required. However, the proposed rule change does incorporate existing language from the Implementation Guidance regarding the variability of such disclosures, providing:

> The level of disclosure required may vary according to the issuer's knowledge or experience with the proposed financing structure or similar structures, capability of evaluating the risks of the recommended financing, and financial ability to bear the risks of the recommended financing, in each case based on the reasonable belief of the underwriter. In this way, the level of disclosure to be provided to a particular issuer also can vary over time.

H. Issuer Opt-Out

As discussed above, the MSRB did not incorporate an issuer opt-out concept into the Request for Comment that would give issuer's the option of declining to receive certain disclosures from underwriters.[231] GFOA's and NAMA's response to the Request for Comment supported the omission of this concept. Accordingly, the proposed rule change does not incorporate such an opt-out concept.

The MSRB considered the above-noted comments in formulating the proposed rule change herein.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period of up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MSRB- 2019–10 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–MSRB–2019–10. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MSRB–2019–10 and should be submitted on or before August 30, 2019.

For the Commission, pursuant to delegated authority.[232]

Jill M. Peterson,

Assistant Secretary.

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[230] BDA Letter II, at p. 2.

[231] *See* related discussion under *Summary of Comments Received in Response to the Concept Proposal—Issuer Opt-Out* and related note 148 *supra.*

[232] 17 CFR 200.30–3(a)(12).