by making clarifying and conforming changes to previously amended text.

It would be unjust and inequitable to continue to impose in-person trading requirements on non-SQT ROTs without counting orders entered electronically given that their ability to trade other than by the use of orders has substantially diminished over the years. Making the changes proposed herein will remove impediments to and perfect the mechanism of a free and open market and a national market system by eliminating an in-person trading requirement that non-SQT ROTs will have difficulty meeting given the current electronic trading environment, thus enabling them to continue making markets by open outcry, to the extent they are able, to the benefit of investors. Investors and the public interest are protected by including as market makers those individuals who, while unable or unwilling to invest resources necessary for streaming, are able to provide liquidity in the open outcry trading that does remain on the floor of the Exchange. The changes that conform rule text to an earlier Exchange amendment benefit investors and the public interest by providing clarity and eliminating potential confusion.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

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

No written comments were either solicited or received.

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 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 the 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–Phlx–2012–40 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2012–40. 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 Web site (*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 Web site 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 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the Exchange's principal office. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–Phlx–2012–40 and should be submitted on or before May 4, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–8877 Filed 4–12–12; 8:45 am]

BILLING CODE 8011–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66772; File No. SR–MSRB–2012–05]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change Consisting of a Restatement of an Interpretive Notice Concerning the Application of MSRB Rule G–17 to Sophisticated Municipal Market Professionals

April 9, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''the Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 26, 2012, the Municipal Securities Rulemaking Board (''Board'' or ''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 is filing with the SEC a proposed rule change consisting of a restatement of an interpretive notice (the ''Existing SMMP Notice'' and the ''Restated SMMP Notice,'' respectively) concerning the application of MSRB Rule G–17 (on conduct of municipal securities and municipal advisory activities) to sophisticated municipal market professionals (''SMMPs''). Because of the relationship between the proposed rule change and FINRA Rule 2111 (on suitability), the MSRB requests that the proposed rule change be made effective on July 9, 2012, which is the date on which FINRA Rule 2111 will become effective.

The text of the proposed rule change is available on the MSRB's Web site at *www.msrb.org/Rules-and-Interpretations/SEC-Filings/2012-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

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

[2] 17 CFR 240.19b–4.

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

Existing Definition of SMMP

Under the Existing SMMP Notice, a dealer is permitted to treat an institutional customer [3] as an SMMP if the dealer has reasonable grounds for concluding the following and other known facts do not contradict such a conclusion:

- The customer has timely access to the publicly available material facts concerning a municipal securities transaction;
- The customer is capable of independently evaluating the investment risk and market value of the municipal securities at issue; and
- The customer is making independent decisions about its investments in municipal securities.

Although the Existing SMMP Notice permits a dealer to have an investor attest to SMMP status ''as a means of streamlining the dealers' process for determining that the customer is an SMMP,'' it also provides that a dealer may not rely on such an attestation if the dealer knows or has reason to know that the investor lacks sophistication concerning a municipal securities transaction based on a number of factors set forth in the notice.

Access to Material Facts. As to the first part of the definition of SMMP, access to material facts, the Existing SMMP Notice provides that a dealer's analysis may depend on the customer's resources to investigate the transaction (*e.g.,* research analysts) and the customer's ready access to established industry sources for disseminating material information concerning the transaction (*e.g.,* the predecessors of the MSRB's Electronic Municipal Market Access (''EMMA'') System and the MSRB's Real-Time Trade Reporting System (''RTRS''), rating agency data, and other indicative data sources).

Independent Evaluation of Investment Risk and Market Value. As to the second part of the definition of SMMP, independent evaluation of risk and market value, the Existing SMMP Notice identifies the following relevant factors:

- The customer's use of one or more consultants, investment advisers, research analysts or bank trust departments;
- The customer's general level of experience in municipal securities markets and specific experience with the type of municipal securities under consideration;
- The customer's ability to understand the economic features of the municipal security;
- The customer's ability to independently evaluate how market developments would affect the municipal security under consideration; and
- The complexity of the municipal security or securities involved.

Independent Investment Decisions. As to the third part of the definition, independent investment decisions, the Existing SMMP Notice provides that such a determination will depend on the nature of the relationship between the dealer and the institutional customer and provides that the following considerations may be relevant:

- Any written or oral understanding that exists between the dealer and the institutional customer regarding the nature of the relationship between the dealer and the institutional customer and the services to be rendered by the dealer;
- The presence or absence of a pattern of acceptance of the dealer's recommendations;
- The use by the institutional customer of ideas, suggestions, market views, and information relating to municipal securities obtained from sources other than the dealer; and
- The extent to which the dealer has received from the institutional customer current comprehensive portfolio information in connection with discussing potential municipal securities transactions or has not been provided important information regarding the institutional customer's portfolio or investment objectives.

Application of Existing SMMP Definition

The Existing SMMP Notice addresses a dealer's obligations to an SMMP under Rule G–17 (on fair dealing), Rule G–18 (on execution of transactions), Rule G–19 (on suitability), and Rule G–13 (on quotations).

Rule G–17. Just prior to the adoption of the Existing SMMP Notice, the SEC approved another MSRB notice [4] in which the MSRB interpreted Rule G–17 to require brokers, dealers, and municipal securities dealers (''dealers'') to disclose to customers at or before the time of trade all material facts about a transaction known by the dealer, as well as all material facts about a security reasonably accessible to the market from established industry sources.[5] The Existing SMMP Notice provides that, when a dealer effects a non-recommended secondary market transaction with an SMMP, its affirmative Rule G–17 disclosure duty concerning material facts available from established industry sources will be deemed satisfied. The Existing SMMP Notice does not alter a dealer's duty not to engage in deceptive, dishonest, or unfair practices under Rule G–17 or under the federal securities laws. In essence, it puts the dealer's disclosure obligations to SMMPs when effecting non-recommended secondary market transactions on a par with inter-dealer disclosure obligations. The Existing SMMP Notice provides that, as in the case of an inter-dealer transaction, in a transaction with an SMMP, a dealer's intentional withholding of a material fact about a security, when the information is not accessible through established industry sources, may constitute an unfair practice that violates Rule G–17.

Rule G–18. Rule G–18 provides that each dealer, when executing a transaction in municipal securities for or on behalf of a customer as agent, must make a reasonable effort to obtain a price for the customer that is fair and reasonable in relation to prevailing market conditions. The Existing SMMP Notice provides that a dealer effecting a non-recommended secondary market agency transaction to an SMMP is not required to take further actions to ensure that the transaction is effected at a fair and reasonable price, if its services have been explicitly limited to providing anonymity, communication, order matching, and/or clearance functions and the dealer does not exercise discretion as to how or when a transaction is executed. The Existing SMMP Notice then states that this interpretation of Rule G–18 is

[3] For purposes of the Existing SMMP Notice, an institutional customer is defined as ''an entity, other than a natural person (corporation, partnership, trust, or otherwise), with total assets of at least $100 million invested in municipal securities in the aggregate in its portfolio and/or under management.''

[4] MSRB Interpretive Notice Regarding Rule G–17, On Disclosure of Material Facts (March 20, 2002) (the ''2002 Rule G–17 Notice'').

[5] The 2002 Rule G–17 Notice was updated in 2009 to reflect, among other things, the addition of EMMA as an established industry source. *See* MSRB Guidance On Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities (July 14, 2009). The 2009 Notice also extended the Rule G–17 affirmative disclosure obligation to ''material information.''

particularly relevant to dealers operating alternative trading systems, stating that dealers operating such systems may be merely aggregating the buy and sell interest of other dealers or SMMPs. A footnote to the Existing SMMP Notice says that the same interpretation would apply to a broker's broker when executing an agency transaction for another dealer.

Rule G–19. Under Rule G–19, in the case of a recommended transaction, a dealer must have a reasonable basis for recommending a particular security (''reasonable-basis suitability''), as well as reasonable grounds for believing the recommendation is suitable for the customer to whom it is made, based upon information available from the issuer of the security or otherwise and based upon the facts disclosed by the customer or otherwise known about the customer (''customer-specific suitability''). The Existing SMMP Notice provides that, when a dealer has reasonable grounds for concluding that an institutional customer is an SMMP, the dealer's customer-specific suitability obligation is fulfilled.

Rule G–13. Under Rule G–13, no dealer may distribute or publish, or cause to be distributed or published, any quotation relating to municipal securities, unless the quotation is *bona fide* (*i.e.,* the dealer making the quotation is prepared to execute at the quoted price) and the price stated in the quotation is based on the best judgment of the dealer of the fair market value of the securities that are the subject of the quotation at the time the quotation is made. In general, any quotation disseminated by a dealer (including the quotation of an investor) is presumed to be a quotation made by the dealer and the dealer is responsible for ensuring compliance with the *bona fide* and fair market value requirements with respect to the quotation. However, if a dealer disseminates a quotation that is actually made by another dealer and the quotation is labeled as such, then the quotation is presumed to be a quotation made by such other dealer and not by the disseminating dealer. In such a case, the disseminating dealer is only required to have no reason to believe that either: (i) The quotation does not represent a *bona fide* bid for, or offer of, municipal securities by the maker of the quotation or (ii) the price stated in the quotation is not based on the best judgment of the maker of the quotation of the fair market value of the securities.

The Existing SMMP Notice provides that, if a dealer disseminates the quotation of an SMMP and it is labeled as such, the disseminating dealer will be held to the same standard as if it were disseminating a quotation made by another dealer. The notice says that the following factors are relevant to the dealer's assessment of whether dissemination of the SMMP's quotation may be considered to be a violation of Rule G–13 by the dealer: (i) Complaints received from dealers and investors seeking to execute against such quotations, (ii) a pattern of an SMMP failing to update, confirm or withdraw its outstanding quotations so as to raise an inference that such quotations may be stale or invalid, or (iii) a pattern of an SMMP effecting transactions at prices that depart materially from the prices listed in the quotations in a manner that consistently is favorable to the SMMP making the quotation.

Considerations for Change

Increased Availability of Information about Municipal Securities. In 2002, the MSRB decided to adopt a definition of SMMP that differed from certain other regulatory definitions of investors considered sophisticated enough to receive special treatment under the federal securities law. The SMMP definition was closely modeled on an NASD interpretation of its suitability rule,[6] which contained a comparable list of factors found relevant to an investor's independent evaluation of risk and independent investment decisions. A notable difference was that the definition of SMMP also looked to whether the investor had access to material facts. A key factor in the MSRB's decision was the lack of information available about municipal securities at that time. Since the adoption of the existing definition of SMMP, there has been a vast increase in the availability of information about municipal securities reasonably accessible by institutional investors regardless of the amount of their holdings of municipal securities (*e.g.,* on EMMA, from rating agencies, and from other information vendors).

New FINRA Institutional Suitability Rule. Effective July 9, 2012, the NASD guidance on institutional suitability will no longer be in effect. It will be replaced by FINRA Rule 2111, which adopts a different approach to a FINRA member's customer-specific duty of suitability to an ''institutional account.'' [7] Under FINRA Rule 2111, a dealer's customer-specific suitability obligation to an institutional customer will be considered satisfied if (1) the dealer has a reasonable basis to believe that the institutional customer is capable of evaluating investment risks independently, both in general and with regard to particular transactions and investment strategies involving a security or securities and (2) the institutional customer affirmatively indicates that it is exercising independent judgment in evaluating the dealer's recommendations. There will no longer be a detailed listing of factors, such as that found in the Existing SMMP Notice. The MSRB generally considers it desirable from the standpoint of reducing the cost of dealer compliance to maintain consistency with FINRA rules, absent clear reasons for treating transactions in municipal securities differently.

Proposal to Restate SMMP Notice

Revised Definition of SMMP. Because the quality and availability of information concerning municipal securities has improved substantially since 2002, and to maintain consistency with the revised FINRA suitability rule for institutional customers, the MSRB proposes to retain the concept of an SMMP, but revise its definition so that it is consistent with the new FINRA suitability rule for institutional customers. Specifically, the MSRB proposes that an ''SMMP'' be defined as an ''institutional customer [8] of a dealer that: (1) The dealer has a reasonable basis to believe is capable of evaluating investment risks and market value independently, both in general and with regard to particular transactions in municipal securities, and (2) affirmatively indicates that it is exercising independent judgment in evaluating the recommendations of the dealer.''

The MSRB also proposes to include the following statement in the Restated SMMP Notice's discussion of the definition of SMMP: ''As part of the reasonable basis analysis required by clause (1), the dealer should consider the amount and type of municipal securities owned or under management by the institutional customer.''

The key to the revised definition of SMMP is the requirement that a dealer have a reasonable basis to believe that an investor is capable of evaluating

[6] *See* IM–2310–3. Suitability Obligations to Institutional Customers.

[7] The term ''institutional account'' will be defined in the same manner as under MSRB Rule G–8(a)(xi). MSRB Rule G–8(a)(xi) defines ''institutional account'' as: the account of (i) a bank, savings and loan association, insurance company, or registered investment company; (ii) an investment adviser registered either with the Commission under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or (iii) any other entity (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least $50 million.

[8] ''Institutional customer'' would be defined as a customer with an institutional account (as defined under MSRB Rule G–8(a)(xi).

investment risks and market value independently, both in general and with regard to particular transactions in municipal securities (sometimes referred to in this filing as the ''reasonable basis analysis''). When the MSRB created the existing definition of SMMP, alternative trading systems for municipal securities were new and access to material facts about municipal securities was in large part limited to very large institutional investors. The high threshold for determining whether an investor would be considered an institutional customer under the Existing SMMP Notice ($100 million of municipal securities owned and/or under management) was considered necessary to make sure that only the most sophisticated institutions and dealers were likely to use alternative trading systems. The Restated SMMP Notice would provide that, as part of its reasonable basis analysis, a dealer should consider the amount and type of municipal securities owned or under management by the institutional customer. However, there would no longer be a threshold requirement that a customer own or manage a certain amount of municipal securities in order to be considered an SMMP.

The MSRB also proposes that, in the case of the affirmation described in clause (2) of the revised definition of SMMP (*i.e.,* ''capable of evaluating investment risks and market value independently''), customers be allowed to make the affirmation orally or in writing and to provide the affirmation on a trade-by-trade basis, on a type-of-municipal-security basis (*e.g.,* general obligation, revenue, VRDO, etc.), or for all potential transactions for the customer's account. This would be consistent with the affirmation requirement of FINRA Rule 2111, so receipt by a dealer of the FINRA 2111 affirmation would also satisfy this requirement.

Application of Revised SMMP Definition. The Restated SMMP Notice would not change the application of Rules G–18, G–19, and G–13 to SMMPs. However, it would change the application of Rule G–17 to SMMPs, under the assumption that institutional customers now have substantial access to material information about municipal securities. The Existing SMMP Notice limits the exclusion from the duty to disclose all material facts to SMMPs to non-recommended transactions. The Restated SMMP Notice would apply the exclusion to all transactions with SMMPs, whether recommended or self-directed. The Restated SMMP Notice would also remove the lists of factors that were deemed by the Board in 2002 to be relevant to the components of the original definition of SMMP. It would also update the Existing SMMP Notice to reflect developments in the MSRB's interpretations of Rule G–17 since 2002 and remove endnote 9 to the Existing SMMP Notice, which has been construed by some to lessen the duty of a broker's broker under Rule G–18 in a manner that is inconsistent with the Board's proposed Rule G–43 (on broker's brokers).[9] Furthermore, it would remove the language that suggests that transactions on alternative trading systems are done on an agency basis, because at least one major alternative trading system engages only in principal transactions.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2) of the Securities Exchange Act (''Exchange Act''), 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 Exchange Act, provides that the rules of the MSRB 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 Sections 15B(b)(2) and 15B(b)(2)(C) of the Exchange Act. Its principal purpose is to remove impediments to and perfect the mechanism of a free and open market in municipal securities, particularly in the case of the alternative trading systems that have been an increasingly important venue for the provision of secondary market liquidity for municipal securities. New municipal securities products, such as Build America Bonds, and decreasing spreads between interest rates on Treasury bonds and municipal securities, have attracted investors that were not previously invested in municipal securities to the municipal securities market. At the same time, the amount of available information about municipal securities has vastly increased since the Existing SMMP Notice was approved. While the Restated SMMP Notice would provide that a dealer should consider the amount and type of municipal securities owned or under management by the institutional customer, the MSRB no longer considers it essential that an institutional customer own or manage municipal securities in order to engage in informed decisionmaking about municipal securities investments. The MSRB believes it is appropriate to allow sophisticated investors to trade in municipal securities on alternative trading systems even though they do not meet the $100 million threshold of municipal securities owned and/or managed found in the Existing SMMP Notice. This change would not come at the expense of investor protection. While the application of the proposed rule change would not be limited to transactions on alternative trading systems, the application of certain MSRB rules to such systems has proven difficult in practice, especially with the increasing use of computerized algorithmic trading. The MSRB notes that such systems, if monitored closely and subjected to appropriate rulemaking,[10] have the potential to increase pre-trade transparency in the municipal marketplace, which should eventually improve prices for all investors. The MSRB also generally considers it desirable from the standpoint of reducing the cost of dealer compliance to maintain consistency with FINRA rules, absent clear reasons for treating transactions in municipal securities differently.

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

The MSRB does not believe that the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act, since it would apply equally to all dealers that have SMMP customers, whether alternative trading systems or not.

[9] File No. SR–MSRB–2012–04 (March 5, 2012). The MSRB notes that, under proposed Rule G–43(d)(iii)(A), an alternative trading system that had any customers (as defined in MSRB Rule D–9) that were not SMMPs would not be excepted from the definition of ''broker's broker.''

[10] The MSRB notes that proposed MSRB Rule G–43 would provide for additional regulation of such alternative trading systems.

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

On November 8, 2011, the MSRB requested comment on the original version of the proposed rule change.[11] The MSRB received comment letters from (1) Alternative Regulatory Solutions, LLC (''ARS''); (2) Bond Dealers of America (''BDA''); (3) Securities Industry and Financial Markets Association (''SIFMA''); and (4) TMC Bonds L.L.C. (''TMC''), formerly The MuniCenter.

Safe Harbor. The original version of the Restated SMMP Notice on which comment was requested proposed a safe harbor for satisfaction of the dealer's reasonable basis analysis. Most of the comments concerned that safe harbor. The reasonable basis analysis portion of the definition of SMMP is referred to in this discussion of comments as the ''general rule.'' SIFMA said that the safe harbor was too restrictive. It requested that: (1) The types of assets owned or under management required by the safe harbor not be limited to municipal securities, and (2) the attestation requirement of the safe harbor[12] either be eliminated entirely or eliminated for certain types of institutional customers (*i.e.,* banks, savings and loan associations, insurance companies, registered investment companies, and federally- or state-registered investment advisers). SIFMA said that, if the assets required for the safe harbor were required to be municipal securities, the dollar threshold should be reduced from $50 million to $25 million of municipal securities owned or under management. TMC said that the safe harbor should require ownership and/or management of at least $50 million of direct fixed income securities. BDA advocated that an institutional investor with at least $25 million of fixed income securities should qualify for the safe harbor without the need for an attestation. ARS recommended that the attestations of the general rule and the safe harbor be combined and that all attestations be required to be in writing. ARS also recommended that the safe harbor requirement of $50 million of municipal securities be determined on an average annual basis and asked how often a dealer would be required to verify this asset concentration.

The MSRB has determined to eliminate the safe harbor from the proposed rule due to a concern that the amount of municipal securities owned or managed by a customer does not necessarily equate to sophistication. Nevertheless, the Restated SMMP Notice would provide that, as part of its reasonable basis analysis, a dealer should consider the amount and type of municipal securities owned or under management by an institutional customer.

As to ARS's comment concerning the frequency with which the $50 million threshold of the safe harbor would need to be measured, while the safe harbor has been eliminated, the question is still relevant to the frequency with which dealers would need to take steps to reassess their reasonable basis determinations with respect to their institutional customers. Dealers should monitor their reasonable basis determinations as frequently as they consider prudent, just as they would need to do so if they planned to treat natural persons with total assets of at least $50 million as institutional customers under either FINRA Rule 2111 or the Restated SMMP Notice.[13]

As to ARS's suggestion that the affirmation be required to be in writing, although it appears that many dealers plan to rely on written affirmations, the MSRB is not requiring that the affirmations be in writing in view of the goal to be consistent with FINRA Rule 2111 unless a different rule is justified.

General Rule. SIFMA noted that the original version of the Restated SMMP Notice would have required an attestation from each institutional customer, while FINRA Rule 2111 requires an affirmation. It asked that the MSRB language track the FINRA rule precisely and requested clarification that the FINRA Rule 2111 affirmation would suffice for the SMMP affirmation. BDA questioned how a dealer could satisfy the reasonable basis requirement of the general rule absent use of the safe harbor and suggested that the list of factors set forth in the Existing SMMP Notice be retained. It said that, at a minimum, the MSRB should make it clear that there is no negative implication to the deletion of the list and that the deletion of the list is not an indication that the considerations are no longer considered relevant by the MSRB. BDA objected to the need for attestations from investors even under the general rule and suggested that a dealer should be able to inform its customer that the dealer considers the customer to be an SMMP, capable of exercising independent judgment and evaluating market risks and market value. As to customers that qualify as SMMPs under the current notice, BDA requested that the MSRB provide a transition rule that would permit dealers six months within which to obtain the required attestations from customers that meet the current definition of SMMP. TMC questioned whether attestations from customers that meet the current definition of SMMP would be required.

The MSRB has changed the words ''affirmatively attest'' in the definition of SMMP to ''affirmatively indicate'' to track precisely the affirmation language of FINRA Rule 2111 and wishes to clarify that the FINRA Rule 2111 customer affirmation would satisfy the SMMP affirmation requirement. The MSRB has also determined to recommend that the proposed effective date of the restated SMMP notice be the same as that of FINRA Rule 2111, which is July 9, 2012. No exception from the affirmation requirement would be provided, because under FINRA Rule 2111 affirmations must be received from all institutional customers as to which dealers plan to avail themselves of the institutional customer-specific suitability exception. Companies that already provide qualified institutional buyer (QIB) lists for dealers are already in the process of obtaining the required FINRA Rule 2111 affirmations from institutional customers.

As to BDA's comment on the list of factors that the restated notice would eliminate, the factors in the existing SMMP notice may actually have the practical effect of serving as a constraint on a dealer's ability to conclude that a customer is an SMMP. The text of the existing SMMP notice that precedes the list of factors follows:

> The MSRB has identified certain factors for evaluating an institutional investor's sophistication concerning a municipal securities transaction and these factors are discussed in detail below. Moreover, dealers

[11] *See* MSRB Notice 2011–63 (November 8, 2011).

[12] Both the general rule and the safe harbor contained ''attestation'' requirements, unlike the version of the SMMP definition in the proposed rule change.

[13] The following statement from FINRA Regulatory Notice 11–02 (January 2011) is useful: a broker-dealer must know its customers not only at account opening but also throughout the life of its relationship with customers in order to, among other things, effectively service and supervise the customers' accounts. Since a broker-dealer's relationship with its customers is dynamic, FINRA does not believe that it can prescribe a period within which broker-dealers must attempt to update this information. As with a customer's investment profile under the suitability rule, a firm should verify the ''essential facts'' about a customer under the know-your-customer rule at intervals reasonably calculated to prevent and detect any mishandling of a customer's account that might result from the customer's change in circumstances. The reasonableness of a broker-dealer's efforts in this regard will depend on the facts and circumstances of the particular case. Firms should note, however, that SEA Rule 17a–3 requires broker-dealers to, among other things, attempt to update certain account information every 36 months regarding accounts for which the broker-dealers were required to make suitability determinations.

are advised that they have the option of having investors attest to SMMP status as a means of streamlining the dealers' process for determining that the customer is an SMMP. However, a dealer would not be able to rely upon a customer's SMMP attestation if the dealer knows or has reason to know that an investor lacks sophistication concerning a municipal securities transaction, as discussed in detail below.

Because the list of factors may actually serve as a constraint on the dealer's reasonable basis determination, when FINRA Rule 2111 eliminated a very similar list of factors, the MSRB decided to eliminate the list from the restated SMMP notice as well. This provides more flexibility to a dealer as to how it will satisfy the reasonable basis requirement of the general rule. The MSRB wishes to clarify that dealers might find those factors useful but would not be required to consider them.

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 (i) as the Commission may designate up to 90 days of such date 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 Exchange 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–2012–05 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–MSRB–2012–05. 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 Web site (*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 Web site 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the MSRB's offices. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MSRB–2012–05 and should be submitted on or before May 4, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66773; File No. SR–CME–2012–09]

Self-Regulatory Organizations; Chicago Mercantile Exchange Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Comply With Revisions to CFTC Regulations Governing Derivatives Clearing Organizations

April 9, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 29, 2012, the Chicago Mercantile Exchange Inc. (''CME'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I and II below, which items have been prepared primarily by CME. The Commission is publishing this Notice and Order to solicit comments on the proposed rule change from interested persons and to approve the proposed rule change on an accelerated basis.

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

CME proposes to amend certain of its rules to comply with pending revisions to Commodity Futures Trading Commission (''CFTC'') Regulations governing derivatives clearing organizations (''DCOs''). The text of the proposed rule change is available at the CME's Web site at *http://www.cmegroup.com/market-regulation/rule-filings.html.*

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

In its filing with the Commission, CME included statements concerning the purpose 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 III below. CME 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 Purpose of, and Statutory Basis for, the Proposed Rule Change

CME is registered as a DCO with the CFTC and operates a substantial business clearing futures and swaps contracts subject to the jurisdiction of the CFTC. CME proposes to amend certain of its rules to comply with pending changes to CFTC Regulations that require DCOs to make corresponding rule changes. The changes that are the subject of this filing will become effective on May 7, 2012.

1. Amendments To Comply With CFTC Regulations 39.12(a)(5)(B)

The CFTC adopted a number of new regulations designed to implement the core principles for DCOs in the Commodity Exchange Act (''CEA''), as amended by the Dodd-Frank Act. Certain of these new DCO regulations become effective on May 7, 2012, including CFTC Regulation 39.12(a)(5)(B), which provides that: ''(B) A derivatives clearing organization shall require clearing members that are not

[14] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.