The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Specifying 30% as the Designated Percentage for rights and warrants in Rule 4613(a)(2)(D) would restore the Market Maker quoting obligations that existed prior to the recent inclusion and subsequent exclusion of rights and warrants from the single-stock circuit breaker pilot program. Allowing the change to be operative upon filing should minimize investor confusion on how Rule 4613(a)(2)(D) will operate for rights and warrants in light of the recent exclusion of rights and warrants from Rule 4120(a)(11). For this reason, the Commission designates the proposed rule change as operative upon filing with the Commission.[14]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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 No. SR–NASDAQ–2011–166 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 No. SR–NASDAQ–2011–166. 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 principal office of the Exchange. 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 No. SR–NASDAQ–2011–166 and should be submitted on or before January 4, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32000 Filed 12–13–11; 8:45 am]

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[14] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65899A; File No. SR–FICC–2008–01]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Proposed Rule Change To Allow the Mortgage-Backed Securities Division To Provide Guaranteed Settlement and Central Counterparty Services; Correction

AGENCY: Securities and Exchange Commission.

ACTION: Notice; correction.

SUMMARY: The Securities and Exchange Commission published a document in the **Federal Register** of December 12, 2011, concerning a Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Proposed Rule Change to Allow the Mortgage-Backed Securities Division to Provide Guaranteed Settlement and Central Counterparty Services. The document contained improper timing requirements. Because this filing was received by the Securities and Exchange Commission prior to amendments to Section 19(b) of the Securities Exchange Act (through the Dodd-Frank Wall Street Reform and Consumer Protection Act), the operative timing requirements for the Securities and Exchange Commission's action with respect to the filing are different from the amended timing requirements. However, the release was sent to the **Federal Register** reflecting the amended and consequently improper timing requirements.

FOR FURTHER INFORMATION CONTACT: Joseph Horn, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549, (202) 551–5765.

Correction

In the **Federal Register** of December 12, 2010, in FR Doc. 2011–31762, on page 77296, in the thirty-second line of the third column, correct the paragraph to read ''Within 35 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 shall: (a) By order approve such proposed rule change or (b) institute proceedings to determine whether the proposed rule change should be disapproved.''

Dated: December 12, 2011.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32164 Filed 12–12–11; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65918; File No. SR–MSRB–2011–09]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Instituting Proceedings to Determine Whether to Disapprove Proposed Rule Change, as Modified by Amendment No. 2, Consisting of Interpretive Notice Concerning the Application of MSRB Rule G–17 to Underwriters of Municipal Securities

December 8, 2011.

I. Introduction

On August 22, 2011, the Municipal Securities Rulemaking Board (''MSRB'' or ''Board'') filed with the Securities

and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act'') [1] and Rule 19b–4 thereunder,[2] a proposal consisting of an interpretive notice concerning the application of MSRB Rule G–17 (Conduct of Municipal Securities and Municipal Advisory Activities) to underwriters of municipal securities (''Notice''). The proposed rule change was published for comment in the **Federal Register** on September 9, 2011.[3] The Commission received five comment letters on the proposed rule change.[4] On October 11, 2011, the MSRB extended the time period for Commission action to December 7, 2011. On November 3, 2011, the MSRB filed Amendment No. 1 to the proposed rule change. On November 10, 2011, the MSRB withdrew Amendment No. 1, responded to comments,[5] and filed Amendment No. 2 to the proposed rule change. The proposed rule change, as modified by Amendment No. 2, was published in the **Federal Register** on November 21, 2011.[6] The Commission received eight comment letters on the proposed rule change, as modified by Amendment No. 2, and a response from the MSRB.[7] On December 6, 2011, the MSRB extended the time period for Commission action to December 8, 2011.

This order institutes proceedings under Section 19(b)(2)(B) of the Act to determine whether to disapprove the proposed rule change.

II. Description of the Proposal

MSRB proposes to adopt an interpretive notice with respect to MSRB Rule G–17, which states that ''[i]n the conduct of its municipal securities or municipal advisory activities, each broker, dealer, municipal securities dealer, and municipal advisor shall deal fairly with all persons and shall not engage in any deceptive, dishonest, or unfair practice.''

The scope of the Notice would apply to underwriters and their duty to municipal entity [8] issuers of municipal securities in negotiated underwritings (except as set forth otherwise), but would not apply to selling group members or when a dealer is serving as an advisor to a municipal entity. The Notice includes the following sections: (1) Basic Fair Dealing Principle; (2) Role of the Underwriter/Conflicts of Interest; (3) Representations to Issuers; (4) Required Disclosures to Issuers; (5) Underwriter Duties in Connection with Issuer Disclosure Documents; (5) Underwriter Compensation and New Issue Pricing; (6) Conflicts of Interest; (7) Retail Order Periods; and (8) Dealer Payments to Issuer Personnel.

A. Basic Fair Dealing Principle

The Notice would specify that an underwriter must not misrepresent or omit the facts, risks, potential benefits, or other material information about municipal securities activities undertaken with a municipal entity issuer. The Notice would also state that MSRB Rule G–17 establishes a general duty of a dealer to deal fairly with all persons (including, but not limited to, issuers of municipal securities), even in the absence of fraud.

B. Role of the Underwriter/Conflicts of Interest

Under the Notice, MSRB Rule G–17's duty to deal fairly with all persons would require the underwriter to make certain disclosures to the issuer of municipal securities to clarify the underwriter's role in an issuance of municipal securities and the actual or potential material conflicts of interest with respect to such issuance.

1. Disclosures Concerning the Underwriter's Role

The Notice would require an underwriter to disclose the following information to an issuer: (A) MSRB Rule G–17 requires an underwriter to deal fairly at all times with both municipal issuers and investors; (B) 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; (C) unlike a municipal advisor, the underwriter does not have a fiduciary duty to the issuer under the federal securities laws and is not required by federal law to act in the best interest of the issuer without regard to the underwriter's own financial or other interests; (D) 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 (E) 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. Moreover, the Notice would state that the underwriter must not recommend that the issuer not retain a municipal advisor.

2. Disclosure Concerning the Underwriter's Compensation

The Notice would require an underwriter to disclose to an issuer whether its underwriting compensation will be contingent on the closing of a transaction. The underwriter 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.

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 65263 (September 6, 2011), 76 FR 55989.

[4] *See* Letters from Joy A. Howard, Principal, WM Financial Strategies, dated September 30, 2011 (''WM Letter''); Mike Nicholas, Chief Executive Officer, Bond Dealers of America, dated September 30, 2010 (''BDA Letter''); Colette J. Irwin-Knott, CIPFA, President, National Association of Independent Public Finance Advisors, dated September 30, 2011 (''NAIPFA Letter''); Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated September 30, 2011 (''SIFMA Letter''); and Susan Gaffney, Director, Federal Liaison Center, Government Finance Officers Association, dated October 3, 2011 (''GFOA Letter'').

[5] *See* Letter from Margaret C. Henry, General Counsel, Market Regulation, MSRB, to Elizabeth M. Murphy, Secretary, Commission, dated November 10, 2011 (''Response Letter I'').

[6] *See* Securities Exchange Act Release No. 65749 (November 15, 2011), 76 FR 72013.

[7] *See* Letters from Colette J. Irwin-Knott, CIPFA, President, National Association of Independent Public Finance Advisors, dated November 30, 2011 (''NAIPFA Letter II''); E. John White, Chief Executive Officer, Public Financial Management, Inc., dated November 30, 2011 (''PFM Letter''); Leslie M. Norwood, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated November 30, 2011 (''SIFMA Letter II''); Joy A. Howard, Principal, WM Financial Strategies, dated November 30, 2011 (''WM Letter II''); Michael Nicholas, CEO, Bond Dealers of America, dated December 1, 2011 (''BDA Letter II''); Susan Gaffney, Director, Federal Liaison Center, Government Finance Officers Association, dated December 1, 2011 (''GFOA Letter II''); Robert Doty, AGFS, dated December 1, 2011 (''AGFS Letter''); and Peter C. Orr, CFA, President, Intuitive Analytics LLC, dated December 7, 2011 (''IA Letter''). *See* Letter from Margaret C. Henry, General Counsel, Market Regulation, MSRB, to Elizabeth M. Murphy, Secretary, Commission, dated December 7, 2011 (''Response Letter II'').

[8] The Notice defines the term ''municipal entity'' as that term is defined by Section 15B(e)(8) of the Exchange Act: ''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.'' *See* proposed Notice endnote 1.

3. Other Conflicts Disclosures

The Notice would require an underwriter to disclose other potential or actual material conflicts of interest, including, but not limited to, the following: (A) Any payments described below in Section II (G)(1) ''Conflicts of Interest—Payments to or from Third Parties''; (B) any arrangements described below in Section II (G)(2) ''Conflicts of Interest—Profit-Sharing with Investors''; (C) the credit default swap disclosures described below in Section II (G)(3) ''Conflicts of Interest—Credit Default Swaps''; and (D) any incentives for the underwriter to recommend a complex municipal securities financing and other associated conflicts of interest described below in Section II (D) ''Required Disclosures to Issuers''.

The Notice would permit disclosures concerning the role of the underwriter and the underwriter's compensation to be made by a syndicate manager on behalf of other syndicate members. The Notice would require other conflicts disclosures to be made by the particular underwriters subject to such conflicts.

4. Timing and Manner of Disclosures

The Notice would require that all of the disclosures be made in writing to an official of the issuer that the underwriter reasonably believes has the authority to bind the issuer by contract with the underwriter and that, to the knowledge of the underwriter, is not a party to a disclosed conflict. The Notice would specify that the disclosures must be made in a manner designed to make clear to such official the subject matter of the disclosures and their implications for the issuer.

The Notice would specify when the disclosures must be made. First, disclosure concerning the arm's-length nature of the underwriter-issuer relationship must be made in the earliest stages of the underwriter's relationship with the issuer, for example, in a response to a request for proposals or in promotional materials provided to an issuer. Other disclosures concerning the role of the underwriter and the underwriter's compensation generally must be made when the underwriter is engaged to perform underwriting services, for example, in an engagement letter, not solely in a bond purchase agreement. Moreover, conflicts disclosures must be made at the same time, except with regard to conflicts discovered or arising after the underwriter has been engaged. For example, 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 in Section II (D) ''Required Disclosures to Issuers''.

5. Acknowledgement of Disclosures

The Notice would require an underwriter to attempt to receive written acknowledgement (other than by automatic email receipt) by the official of the issuer of receipt of the foregoing disclosures. 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.

C. Representations to Issuers

The Notice would require all representations made by underwriters to issuers of municipal securities in connection with municipal securities undertakings, whether written or oral, to be truthful and accurate and not misrepresent or omit material facts. Underwriters must have a reasonable basis for the representations and other material information contained in documents they prepare and must refrain from including representations or other information they know or should know is inaccurate or misleading. For example, in connection with a certificate signed by the underwriter that will be relied upon by the issuer or other relevant parties to an underwriting, for example, an issue price certificate, the dealer must have a reasonable basis for the representations and other material information contained therein.

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

D. Required Disclosures to Issuers

The Notice would require that disclosures be tailored to the personnel of the issuer if knowledge or experience is lacking with a particular type of structure. While many municipal securities are issued using financing structures that are routine and well understood by the typical municipal market professional, including most issuer personnel that have the lead responsibilities in connection with the issuance of municipal securities, the underwriter must provide disclosures on the material aspects of structures when the underwriter reasonably believes issuer personnel lacks knowledge or experience with such structures that it recommends.

In cases where the issuer personnel responsible for the issuance of municipal securities would not be well positioned to fully understand or assess the implications of a financing in its totality, because the financing is structured in an unique, atypical, or otherwise complex manner, the underwriter in a negotiated offering that recommends such complex financing has an obligation to make more particularized disclosures than otherwise required in a routine financing.[9] Examples of complex financings include variable rate demand obligations and financings involving derivatives such as swaps. The underwriter must disclose the material financial characteristics of the complex 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.[10] The underwriter must also

[9] The Notice would state that if a complex municipal securities financing consists of an otherwise routine financing structure that incorporates a unique, atypical or complex element and the issuer personnel have knowledge or experience with respect to the routine elements of the financing, the disclosure of material risks and characteristics may be limited to those relating to such specific element and any material impact such element may have on other features that would normally be viewed as routine. *See* proposed Notice endnote 6.

[10] The Notice would provide an example that an underwriter that recommends variable rate demand obligations should inform the issuer of the risk of interest rate fluctuations and material risks of any associated credit or liquidity facilities (for example, the risk that the issuer might not be able to replace the facility upon its expiration and might be required to repay the facility provider over a short period of time). As an additional example, if the underwriter recommends that the issuer swap the floating rate interest payments on the variable rate demand obligations to fixed rate payments under a swap, the underwriter must disclose the material financial risks (including market, credit,

Continued

disclose any incentives to recommend the financing and other associated conflicts of interest.[11] These disclosures must be made in a fair and balanced manner based on principles of fair dealing and good faith.

The Notice would dictate that the level of required disclosure 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.[12] 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 Notice would require that this disclosure be made in writing to an official of the issuer whom the underwriter reasonably believes has the authority to bind the issuer by contract with the underwriter in (A) sufficient time before the execution of a contract with the underwriter to allow the official to evaluate the recommendation and (B) a manner designed to make clear to such official the subject matter of such disclosures and their implications for the issuer. The complex financing disclosures must address the specific elements of the financing and cannot be general in nature. Finally, the Notice would require the underwriter to make additional efforts reasonably designed to inform the official of the issuer if the underwriter does not reasonably believe that the official is capable of independently evaluating the disclosures.

E. Underwriter Duties in Connection With Issuer Disclosure Documents

The Notice would note that underwriters often play an important role in assisting issuers in the preparation of disclosure documents, such as preliminary official statements and official statements.[13] These documents are critical to the municipal securities transaction, in that investors rely on the representations contained in the documents in making their investment decisions. Investment professionals, such as municipal securities analysts and ratings services, rely on the representations in forming an opinion regarding the credit.

The Notice would provide that a dealer's duty to have a reasonable basis for the representations it makes, and other material information it provides, to an issuer and to ensure that such representations and information are accurate and not misleading extends to representations and information provided by the underwriter in connection with the preparation by the issuer of its disclosure documents, for example, cash flows.

F. Underwriter Compensation and New Issue Pricing

1. Excessive Compensation

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

2. Fair Pricing

The Notice states that the duty of fair dealing under MSRB Rule G–17 includes an implied representation that the price an underwriter pays to an issuer is fair and reasonable, taking into consideration all relevant factors, including the best judgment of the underwriter as to the fair market value of the issue at the time it is priced.[14] In general, a dealer purchasing bonds in a competitive underwriting for which the issuer may reject any and all bids will be deemed to have satisfied its duty of fairness to the issuer with respect to the purchase price of the issue as long as the dealer's bid is a bona fide bid as defined in MSRB Rule G–13 [15] that is based on the dealer's best judgment of

operational, and liquidity risks) and material financial characteristics of the recommended swap (for example, the material economic terms of the swap, the material terms relating to the operation of the swap, and the material rights and obligations of the parties during the term of the swap), as well as the material financial risks associated with the variable rate demand obligation.

Such disclosure should be sufficient to allow the issuer to assess the magnitude of its potential exposure as a result of the complex municipal securities financing. The underwriter must also inform the issuer that there may be accounting, legal, and other risks associated with the swap and that the issuer should consult with other professionals concerning such risks. If the underwriter's affiliated swap dealer is proposed to be the executing swap dealer, the underwriter may satisfy its disclosure obligation with respect to the swap if such disclosure has been provided to the issuer by the affiliated swap dealer or the issuer's swap or other financial advisor that is independent of the underwriter and the swap dealer, as long as the underwriter has a reasonable basis for belief in the truthfulness and completeness of such disclosure. If the issuer decides to enter into a swap with another dealer, the underwriter is not required to make disclosures with regard to that swap. Dealers that recommend swaps or security-based swaps to municipal entities may also be subject to rules of the Commodity Futures Trading Commission or those of the Commission. *See* proposed Notice endnote 7.

[11] The Notice would provide an example that a conflict of interest may exist when the underwriter is also the provider of a swap used by an issuer to hedge a municipal securities offering or when the underwriter receives compensation from a swap provider for recommending the swap provider to the issuer. *See* proposed Notice endnote 8.

[12] The Notice would state that even a financing in which the interest rate is benchmarked to an index that is commonly used in the municipal marketplace, such as LIBOR or SIFMA, may be complex to an issuer that does not understand the components of that index or its possible interaction with other indexes. *See* proposed Notice endnote 9.

[13] The Notice would state that underwriters that assist issuers in preparing official statements must remain cognizant of the underwriters' duties under federal securities laws. With respect to primary offerings of municipal securities, the SEC has noted, ''By participating in an offering, an underwriter makes an implied recommendation about the securities.'' *See* Securities Exchange Act Release No. 34–26100 (September 22, 1988), 53 FR 37778 (September 28, 1998) (proposing Exchange Act Rule 15c2–12) at text following note 70. The SEC has stated that ''this recommendation itself implies that the underwriter has a reasonable basis for belief in the truthfulness and completeness of the key representations made in any disclosure documents used in the offerings.'' Furthermore, pursuant to SEC Rule 15c2–12(b)(5), an underwriter may not purchase or sell municipal securities in most primary offerings unless the underwriter has reasonably determined that the issuer or an obligated person has entered into a written undertaking to provide certain types of secondary market disclosure and has a reasonable basis for relying on the accuracy of the issuer's ongoing disclosure representations. Securities Exchange Act Release No. 34–34961 (November 17, 1994), 59 FR 59590 (November 10, 1994) (adopting continuing disclosure provisions of Exchange Act Rule 15c2–12) at text following note 52. *See* proposed Notice endnote 10.

[14] The Notice would state that the MSRB has previously observed that whether an underwriter has dealt fairly with an issuer for purposes of MSRB Rule G–17 is dependent upon all of the facts and circumstances of an underwriting and is not dependent solely on the price of the issue. The Notice refers to MSRB Notice 2009–54 and Rule G–17 Interpretive Letter—Purchase of new issue from issuer, MSRB interpretation of December 1, 1997. *See* proposed Notice endnote 11.

[15] The Notice would refer to MSRB Rule G–13(b)(iii), which provides: ''For purposes of subparagraph (i), a quotation shall be deemed to represent a ''bona fide bid for, or offer of, municipal securities'' if the broker, dealer or municipal securities dealer making the quotation is prepared to purchase or sell the security which is the subject of the quotation at the price stated in the quotation and under such conditions, if any, as are specified at the time the quotation is made.'' *See* proposed Notice endnote 12.

the fair market value of the securities that are the subject of the bid.

In a negotiated underwriting, the underwriter has a duty under MSRB Rule G–17 to negotiate in good faith with the issuer. This duty would include the obligation of the dealer to ensure the accuracy of representations made during the course of such negotiations, including representations regarding the price negotiated and the nature of investor demand for the securities, for example, the status of the order period and the order book. If, for example, the dealer represents to the issuer that it is providing the ''best'' market price available on the new issue, or that it will exert its best efforts to obtain the ''most favorable'' pricing, the dealer may violate MSRB Rule G–17 if its actions are inconsistent with such representations.[16]

G. Conflicts of Interest

1. Payments To or From Third Parties

The Notice would state that in certain cases, compensation received by the underwriter from third parties, such as the providers of derivatives and investments (including affiliates of the underwriters), may color the underwriter's judgment and cause it to recommend products, structures, and pricing levels to an issuer when it would not have done so absent such payments. The MSRB would view the failure of an underwriter to disclose to the issuer the existence of payments, values, or credits received by the underwriter in connection with its underwriting of the new issue from parties other than the issuer, and payments made by the underwriter in connection with such new issue to parties other than the issuer (in either case including payments, values, or credits that relate directly or indirectly to collateral transactions integrally related to the issue being underwritten), to be a violation of the underwriter's obligation to the issuer under MSRB Rule G–17.

For example, the MSRB would consider it to be a violation of MSRB Rule G–17 for an underwriter to compensate an undisclosed third party in order to secure municipal securities business. Similarly, the MSRB would consider it to be a violation of MSRB Rule G–17 for an underwriter to receive undisclosed compensation from a third party in exchange for recommending that third party's services or products to an issuer, including business related to municipal securities derivative transactions. The Notice does not require that the amount of such third party payments be disclosed.

In addition, the underwriter must disclose to the issuer whether the underwriter has entered into any third-party arrangements for the marketing of the issuer's securities.

2. Profit-Sharing With Investors

The Notice would state that arrangements between the underwriter and an investor purchasing new issue securities from the underwriter (including purchases that are contingent upon the delivery by the issuer to the underwriter of the securities) according to which profits realized from the resale by such investor of the securities are directly or indirectly split or otherwise shared with the underwriter 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 MSRB Rule G–17. Such arrangements could also constitute a violation of MSRB Rule G–25(c), which precludes a dealer from sharing, directly or indirectly, in the profits or losses of a transaction in municipal securities with or for a customer.[17]

3. Credit Default Swaps

The issuance or purchase by a dealer of credit default swaps for which the reference is the issuer for which the dealer is serving as underwriter, or an obligation of that issuer, may pose a conflict of interest, because trading in such municipal credit default swaps has the potential to affect the pricing of the underlying reference obligations, as well as the pricing of other obligations brought to market by that issuer. The Notice would require a dealer to disclose the fact that it engages in such activities to the issuers for which the dealer serves as underwriter.

The Notice would not require disclosures for activities with regard to credit default swaps based on baskets or indexes of municipal issuers that include the issuer or its obligations, unless the issuer or its obligations represents more than 2% of the total notional amount of the credit default swap or the underwriter otherwise caused the issuer or its obligations to be included in the basket or index.

H. Retail Order Periods

The Notice would require an underwriter that has agreed to underwrite a transaction with a retail order period to honor such agreement.[18] The Notice would require a dealer that wishes to allocate securities in a manner that is inconsistent with an issuer's requirements to obtain the issuer's consent.

The Notice would require an underwriter that has agreed to underwrite a transaction with a retail order period to take reasonable measures to ensure that retail clients are bona fide. An underwriter that knowingly accepts an order that has been framed as a retail order when it is not, for example, a number of small orders placed by an institutional investor that would otherwise not qualify as a retail customer, would violate MSRB Rule G–17 if its actions are inconsistent with the issuer's expectations regarding retail orders. Moreover, a dealer that places an order that is framed as a qualifying retail order but in fact represents an order that does not meet the qualification requirements to be treated as a retail order, for example, an order by a retail dealer without ''going away'' orders [19] from retail customers when such orders are not within the issuer's definition of ''retail,'' would violate its MSRB Rule G–17 duty of fair dealing.

The Notice specifies that the MSRB will continue to review activities relating to retail order periods to ensure that they are conducted in a fair and orderly manner consistent with the intent of the issuer and the MSRB's investor protection mandate.

I. Dealer Payments to Issuer Personnel

The Notice would state that dealers are reminded of the application of MSRB Rule G–20 on gifts, gratuities, and non-cash compensation, and MSRB Rule G–17, in connection with certain

[16] The Notice would refer to Rule G–17 Interpretive Letter—Purchase of new issue from issuer, MSRB interpretation of December 1, 1997. *See* proposed Notice endnote 13.

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

[18] The Notice refers to MSRB Interpretation on Priority of Orders for Securities in a Primary Offering under Rule G–17, MSRB interpretation of October 12, 2010, reprinted in the MSRB Rule Book. The Notice would remind underwriters of previous MSRB guidance on the pricing of securities sold to retail investors and refer to Guidance on Disclosure and Other Sales Practice Obligations to Individual and Other Retail Investors in Municipal Securities, MSRB Notice 2009–42 (July 14, 2009). *See* proposed Notice endnote 15.

[19] The Notice would state that a ''going away'' order is an order for new issue securities for which a customer is already conditionally committed and cites Securities Exchange Act Release No. 62715 (August 13, 2010), 75 FR 51128 (August 18, 2010) (File No. SR–MSRB–2009–17). *See* proposed Notice endnote 16.

payments made to, and expenses reimbursed for, issuer personnel during the municipal bond issuance process.[20] The Notice would further state that the rules are designed to avoid conflicts of interest and to promote fair practices in the municipal securities market.

The Notice would alert dealers to consider carefully whether payments they make in regard to expenses of issuer personnel in the course of the bond issuance process, including in particular, but not limited to, payments for which dealers seek reimbursement from bond proceeds or issuers, comport with the requirements of MSRB Rule G–20. For example, the Notice provides that a dealer acting as a financial advisor or underwriter may violate MSRB Rule G–20 by paying for excessive or lavish travel, meal, lodging and entertainment expenses in connection with an offering such as may be incurred for rating agency trips, bond closing dinners, and other functions, that inure to the personal benefit of issuer personnel and that exceed the limits or otherwise violate the requirements of the rule.[21]

III. Comment Letters and the MSRB's Responses

As noted earlier, the Commission received five comments [22] on the proposed rule change as originally proposed and eight comments [23] on the proposed rule change, as modified by Amendment No. 2.[24] The MSRB filed two letters responding to the comments.[25] A summary of the comments and the MSRB's responses are set forth below.

A. Basic Fair Dealing Principle

Commenters generally supported the principle of fair dealing in MSRB Rule G–17,[26] but some commenters believed that the principle of fair dealing should not be interpreted to impose a fiduciary duty on underwriters to issuers,[27] while other commenters believed that underwriters have such a duty if they engage in certain activities.[28] In Response Letter I, the MSRB responded that the Notice does not impose a fiduciary duty on underwriters and that the duties imposed by the Notice on underwriters are no different in many cases from the duties already imposed on them by MSRB rules with respect to customers. Further, the MSRB stated that an underwriter is not required to act in the best interest of an issuer without regard to the underwriter's own financial and other interests and is not required to consider all reasonably feasible alternatives to the proposed financings. Rather, the MSRB stated that one purpose of the Notice is to eliminate issuer confusion about the role of the underwriter.

B. Role of the Underwriter/Conflicts of Interest

1. Disclosures Concerning the Underwriter's Role

Some commenters suggested additional disclosures with respect to the role of underwriters.[29] For example, commenters suggested that the MSRB require an underwriter to state: (1) That the underwriter does not have a fiduciary duty to the issuer and is a counterparty at arm's length; [30] (2) that the issuer may choose to engage a financial advisor to represent its interests; [31] (3) that the underwriter is not acting as an advisor; [32] (4) that the underwriter has conflicts with issuers because the underwriter represents the interests of investors and other parties; [33] (5) that the underwriter seeks to maximize profitability; [34] and (6) that the underwriter has no continuing obligation to the issuer after the transaction.[35]

In Response Letter I, the MSRB noted that the Notice, as modified by Amendment No. 2, incorporates many of the recommendations suggested by the commenters, such as requiring underwriters to provide issuers with disclosure that underwriters do not have a fiduciary duty to issuers. In addition, the MSRB noted that the Notice, as modified by Amendment No. 2, requires disclosure regarding the underwriter's role compared to a municipal advisor,[36] and prohibits an underwriter from recommending that the issuer not retain a municipal advisor.[37] The MSRB also

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[20] The Notice would cite to MSRB Rule G–20 Interpretation—Dealer Payments in Connection With the Municipal Securities Issuance Process, MSRB interpretation of January 29, 2007, reprinted in the MSRB Rule Book. *See* proposed Notice endnote 17.

[21] The Notice cites to *In the Matter of RBC Capital Markets Corporation,* SEC Rel. No. 34–59439 (Feb. 24, 2009) (settlement in connection with broker-dealer alleged to have violated MSRB Rules G–20 and G–17 for payment of lavish travel and entertainment expenses of city officials and their families associated with rating agency trips, which expenditures were subsequently reimbursed from bond proceeds as costs of issuance); *In the Matter of Merchant Capital,* L.L.C., SEC Rel. No. 34–60043 (June 4, 2009) (settlement in connection with broker-dealer alleged to have violated MSRB rules for payment of travel and entertainment expenses of family and friends of senior officials of issuer and reimbursement of the expenses from issuers and from proceeds of bond offerings). *See* proposed Notice endnote 18.

[22] *See supra* note 4.

[23] *See supra* note 7.

[24] One commenter stated that the amended Notice is a significant improvement over the original Notice. *See* PFM Letter. Another commenter stated that it supports the changes made in the Notice, as modified by Amendment No. 2, such as the limits on negotiated offerings, disclosures based on reasonable beliefs, and nondisclosure of third-party payment amounts. *See* GFOA Letter II.

[25] *See supra* notes 5 and 7.

[26] *See* SIFMA Letter I.

[27] *See* SIFMA Letter I; NAIPFA Letter I; BDA Letter I. Both NAIPFA Letter I and BDA Letter I noted that the imposition of a fiduciary duty would confuse municipal issuers on the role of underwriters. One commenter disagreed with the imposition of a fiduciary duty and noted that municipal issuers often do not understand the disclosures that they are provided and municipal issuers do not benefit from complex disclosures from firms that are not acting in a fiduciary capacity. *See* WM Letter I (stating its belief that the proposal will not improve transparency in the municipal market).

[28] *See, e.g.,* PFM Letter. The commenter stated that advice given by brokers in their promotion of themselves to become underwriters makes them municipal advisors.

[29] One commenter stated that it supports the proposal but believes that additional changes would be required to protect infrequent and/or small and unsophisticated issuers. *See* NAIPFA Letter I.

[30] *See* GFOA Letter I and NAIPFA Letter I. One commenter stated its belief that a simple disclosure from an underwriter to the issuer that the underwriter is not acting as financial advisor and that the issuer should consult with a financial advisor would be sufficient. *See* WM Letter I.

[31] *See* GFOA Letter I and NAIPFA Letter I (requesting a disclosure that an underwriter is no replacement for a municipal advisor and stating that when an issuer engages a municipal advisor, the underwriter disclosures should not overlap with areas covered by the role of municipal advisor). Other commenters stated their belief that in a negotiated sale, when the issuer of municipal securities engages a registered municipal advisor, disclosures should be reduced. *See* NAIPFA Letter II; SIFMA Letter II; and WM Letter II (stating that the exemption from some of the disclosures required by the rule for underwriters engaged in a competitive sale should be extended to all transactions in which a financial advisor has been retained). In Response Letter II, the MSRB noted its disagreement because it believes that more disclosure would empower, rather than confuse, issuers.

[32] *See* NAIPFA Letter I.

[33] *See* NAIPFA Letter I. One commenter objected to the required disclosure that an underwriter must balance a fair and reasonable price for issuers with a fair and reasonable price for investors. *See* BDA Letter II. The commenter stated its belief that there exists a reasonable price for both issuers and investors, and recommended that the disclosure be modified to reflect that statement. In Response Letter II, the MSRB stated its belief that it is appropriate to characterize the underwriter's duties of fair pricing as a balance between the interests of the issuer and investors.

[34] *See* NAIPFA Letter I.

[35] *See* NAIPFA Letter I.

[36] One commenter stated that the requirement for an underwriter to compare its obligations with others, such as a municipal advisor, should be eliminated. *See* BDA Letter II. In Response Letter II, the MSRB noted that it has determined to take the approach suggested by another commenter (GFOA) and, therefore, has not changed this provision of the proposal but will monitor disclosure practices under the proposal and will engage in a dialogue with industry participants and the Commission to determine whether sufficient improvements have occurred in the flow of disclosures to decision-making personnel of issuers or whether additional steps should be taken.

[37] One commenter agreed with the MSRB that an underwriter should not recommend that an issuer not retain a municipal advisor. *See* BDA Letter II.

stated that it does not believe that it is necessary for underwriters to disclose that they seek to maximize profitability and have no continuing obligation to the issuer after the transaction.

One commenter suggested that the MSRB require underwriters to disclose pending litigation that may affect the underwriter's municipal securities business, departure of experts that the issuer relied upon, and transactional risk including a comparison of different forms of financings.[38] In Response Letter I, the MSRB disagreed that underwriters should disclose different types of financings that may be applicable to an issuer's particular situation because that is under the domain of the municipal advisor, and noted that pending litigation and expert departures do not rise to the level of conflicts, but could be required by issuers as the issuers deem appropriate.

One commenter stated its belief that the Notice should require underwriters to educate issuers to better understand underwriting pricing and fees.[39] In Response Letter I, the MSRB noted it is in the process of developing education materials for issuers as suggested by the commenter.

Another commenter stated that underwriters should not be required to provide generalized role and compensation disclosures or written risk disclosures to large and frequent issuers unless requested by such issuers.[40] In Response Letter II, the MSRB noted its disagreement and stated its belief that additional disclosure would empower, rather than confuse, issuers and, therefore, no further modifications to these provisions are warranted.

2. Disclosure Concerning the Underwriter's Compensation

One commenter requested additional conflicts of interest disclosures regarding underwriter compensation, such as how the underwriter is compensated.[41] In Response Letter I, the MSRB stated that it believes that the Notice, as modified by Amendment No. 2, would incorporate the commenter's recommendation, such as disclosure regarding contingent fee compensation as a conflict of interest.

Another commenter stated its belief that the underwriter should be required to disclose to an issuer, and obtain its informed consent in writing, that the form of the underwriter's compensation creates a conflict of interest, because underwriter compensation is based primarily on the size and type of issuance.[42] The commenter later stated that contingent fees should be disclosed.[43] Another commenter objected to the characterization of contingent fee arrangements as resulting in a conflict of interest with issuers.[44] The commenter stated that such arrangements do not necessarily result in a conflict, and recommended that disclosure should state that such disclosure ''may'' present a conflict or ''may have'' the potential for a conflict.[45]

In Response Letter II, the MSRB stated that it believes that it has accurately characterized compensation arrangements contingent on closing or on the size of the transactions as creating a conflict of interest—it may be that other factors on which an underwriter and the issuer have a coincidence of interests may outweigh the conflicting interests resulting from the contingent arrangement, but that does not change the fact that such arrangement itself represents a conflict. Further, given the transaction-based nature of the typical relationship between underwriters and issuers, the MSRB stated that it believes that the proposal's requirements regarding disclosure of compensation conflicts, together with the other conflicts disclosures included in the proposal, adequately address concerns that may arise in cases where potential conflicts may arise under less typical compensation scenarios.

One commenter stated that it would be more beneficial to issuers to require underwriters to disclose the amount of compensation at the outset and conclusion of the transaction.[46] In Response Letter II, the MSRB stated that the provisions relating to these disclosures are appropriate given the transaction-based nature of the typical relationship between underwriters and issuers. The MSRB stated its belief that the proposal's requirements regarding disclosure of compensation conflicts, together with the other conflicts disclosures included in the proposal, adequately address concerns that may arise in cases where potential conflicts may arise under less typical compensation scenarios.

3. Other Conflicts Disclosures

One commenter requested additional conflicts of interest disclosures such as the duty the underwriter has to investors.[47] In Response Letter I, the MSRB stated that it believes that the Notice, as modified by Amendment No. 2, would incorporate the commenter's recommendation, such as by requiring disclosure of an underwriter's other actual or potential material conflicts of interest.

One commenter stated that when there is a syndicate of underwriters, an underwriter whose participation level is below 10% should be exempted from the disclosure requirements.[48] Another commenter stated that, with respect to underwriter syndicates, underwriters who do not have a role in the development or implementation of the financing structure or other aspects of the issue should not be subject to the disclosures.[49] In Response Letter II, the MSRB declined to create any such exemption since not all conflicts or other concerns that arise in the context of an underwriting are necessarily proportionate to the size of participation of an underwriter. The MSRB noted, however, that with respect to disclosures about the material financial characteristics and risks of an underwriting transaction recommended by underwriters, where such recommendation is made by the syndicate manager on behalf of the underwriting syndicate, the Notice does not prohibit syndicate members from delegating to the syndicate manager (through, for example, the agreement among underwriters) the task of delivering such disclosure in a full and timely manner on behalf of the syndicate members, although each syndicate member would remain responsible for providing disclosures with respect to conflicts specific to such member.

4. Timing and Manner of Disclosures

With respect to the disclosure process, one commenter stated its belief that underwriters should be subject to a process similar to the proposed municipal advisors' more rigorous process under the municipal advisor portion of proposed MSRB Rules G–17 and G–36.[50] The commenter stated its

However, the commenter stated that it is concerned that municipal advisors are not subject to professional standards, continuing education, licensing or other requirements, or a prohibition against making political contributions.

[38] *See* GFOA Letter I. *See also* GFOA Letter II.

[39] *See* GFOA Letter I.

[40] *See* SIFMA Letter II.

[41] *See* GFOA Letter I.

[42] *See* NAIPFA Letter I.

[43] *See* NAIPFA Letter II.

[44] *See* BDA Letter II.

[45] *See id.*

[46] *See* NAIPFA Letter II.

[47] *See* GFOA Letter I.

[48] *See* SIFMA Letter II.

[49] *See* BDA Letter II.

[50] *See* NAIPFA Letter I. The Commission notes that these proposals were subsequently withdrawn by the MSRB. *See* Securities Exchange Act Release

Continued

belief that providing disclosures is inadequate; rather, underwriters should be required to obtain informed consent from issuers. Moreover, the commenter stated its belief that disclosures should be made to officials of the municipal entity with the power to bind the issuer.[51] The commenter also stated that the Notice should be amended to prohibit the giving of disclosures based on a reasonable belief standard and instead require underwriters to have actual knowledge whether an official has the power to bind the issuer by contract.

In Response Letter I, the MSRB stated that it believes that it is not necessary for underwriters to obtain consent from the issuer's governing body when the issuer finance officials have been delegated the ability to contract with the underwriter. The MSRB stated that it is not necessary for a contract to have been executed in order for an underwriter to have a reasonable belief that an issuer official has the requisite power to bind the issuer.

Another commenter stated its belief that disclosure should be made to an official that the underwriter reasonably believes ''has or will have'' the requisite authority, instead of the standard that the underwriter believes ''has'' the authority to bind the issuer by contract.[52] The commenter stated that due to the nature of these transactions, at the time of disclosures, there may not be an official with such authority as the authority may not be granted until later. In Response Letter II, the MSRB noted that an official, such as a finance director, who is expected to receive the delegation of authority from the governing body to bind the issuer could reasonably be viewed as an acceptable recipient of disclosures for purposes of the proposal so long as such expectation remains reasonable.

Another commenter stated that the Notice should state that the disclosure must be made in a response to a request for proposals or in promotional materials provided to an issuer, rather than the proposed ''at the earliest stages'' standard, because the commenter believes that the proposed standard is vague and ambiguous.[53] Another commenter requested clarification regarding the meaning of ''execution of a contract'' with respect to the timing of the required risk disclosures.[54] The commenter stated that execution of the purchase agreement should be the appropriate measurement. In Response Letter II, the MSRB clarified that, other than the disclosure with regard to the arm's-length nature of the relationship, the remaining disclosures regarding the underwriter's role, underwriter's compensation and other conflicts of interest all must be provided when the underwriter is engaged to perform underwriting services (such as in an engagement letter), not solely in the bond purchase agreement.

One commenter suggested that the underwriter make its disclosures to the issuer, in plain English, to ensure that the issuer understands such disclosures.[55] In Response Letter II, the MSRB stated that it agrees that reasonable efforts must be made to make the disclosures understandable, that disclosures must be made in a fair and balanced manner and, if the underwriter does not reasonably believe that the official to whom the disclosures are addressed is capable of independently evaluating the disclosures, the underwriter must make additional efforts reasonably designed to inform the issuer or its employees or agent.

One commenter stated that it remains concerned that to provide disclosure to an official of the issuer that the underwriter reasonably believes has authority to bind the issuer would not provide the issuer with sufficient knowledge of any existing conflicts.[56] The commenter recommended that underwriters make disclosure to the issuer's governing body and require underwriters to have actual knowledge, instead of a reasonable belief knowledge standard, as to whether the official being presented with disclosures has the power to bind the issuer by contract. In Response Letter II, the MSRB responded that underwriters must document the failure to receive acknowledgement, as well as what actions were taken to attempt to obtain the acknowledgement, in order for the underwriter to fulfill its obligation to document why it was unable to obtain the acknowledgement.

5. Acknowledgement of Disclosures

One commenter stated its belief that the provision of the Notice requiring issuer written acknowledgement of disclosures would be helpful, but in situations where written acknowledgement is not received from the issuer, the commenter urged the MSRB to require underwriters to put forth some level of effort to obtain the written acknowledgement of the issuer.[57] Another commenter stated that it believes that an underwriter should not be required to document why an official of the issuer does not acknowledge in writing that disclosures were received.[58] Instead, the commenter recommended that the Notice require the underwriter to document that disclosures were made and whether acknowledgement was received.

In Response Letter II, the MSRB clarified that if an issuer does not provide the underwriter with a written acknowledgement of receipt of disclosures, the failure to receive such acknowledgement must be documented, as well as what actions were taken to attempt to obtain the acknowledgement, in order for the underwriter to fulfill its obligation to document why it was unable to obtain the acknowledgement.

C. Representations to Issuers

Under the Notice, an underwriter would be required to have a reasonable basis for providing representations and material information in a certificate that will be relied upon by the municipal entity issuer or other relevant parties to an underwriting. One commenter stated that one example of such a certificate used by the MSRB in the Notice is already regulated by tax laws and does not need additional regulation by the MSRB.[59] In Response Letter I, the MSRB stated that it does not believe the disclosure requirement imposes an additional regulatory burden on underwriters.

D. Required Disclosures to Issuers

One commenter stated that the disclosure requirements, especially for routine transactions, should only be imposed when the underwriter has reason to believe that the issuer does not have the knowledge or experience available to understand the transaction.[60] Moreover, the commenter

Nos. 65397 (September 26, 2011), 76 FR 60955 (September 30, 2011) (withdrawing proposed MSRB Rule G–36 and interpretive guidance concerning MSRB Rule G–36); and 65398 (September 26, 2011), 76 FR 60958 (September 30, 2011) (withdrawing proposed interpretive notice concerning MSRB Rule G–17).

[51] *See* NAIPFA Letter I and NAIPFA Letter II.

[52] *See* BDA Letter II.

[53] *See id.*

[54] *See* SIFMA Letter II. The same commenter also requested clarification in situations where the financing terms are determined in a short period of time, such as within a 24-hour window, and how underwriters would satisfy the disclosure requirements. In Response Letter II, the MSRB stated that the timeframe set out in the proposal, which matches the timeframe for this same disclosure under guidance provided in connection with recent amendments to MSRB Rule G–23, on activities of financial advisors, is appropriate and should not be changed.

[55] *See* GFOA Letter II.

[56] *See* NAIPFA Letter II.

[57] *See* NAIPFA Letter I.

[58] *See* BDA Letter II.

[59] *See* SIFMA Letter I.

[60] *See* BDA Letter I. One commenter suggested factors to determine routine financings when disclosures would not be necessary. *See* NAIPFA

stated that the proposal should be clarified as to when the underwriter is required to provide disclosures on the material aspects of the financing structures. The commenter also noted that ''issuer personnel responsible for the issuance of municipal securities'' and ''an official of the issuer whom the underwriter reasonably believes has the authority to bind the issuer by contract with the underwriter'' are not the same.[61] Thus, the commenter stated its belief that clarification should be provided that these regulatory requirements are imposed on the underwriter only if the underwriter has reason to believe that issuer personnel do not have the requisite knowledge or experience, regardless of whether the particular official that the underwriter reasonably believes to have the legal authority to contractually bind the issuer can be reasonably thought to have the requisite knowledge and experience. Another commenter stated that the Notice should be amended to take into consideration the needs of unsophisticated municipal issuers, and underwriters should be required to assess the knowledge and understanding of municipal issuers on a case-by-case basis.[62] In Response Letter I, the MSRB stated that it does not consider it unreasonable to require that an underwriter evaluate the level of knowledge and sophistication of the issuer, particularly considering that under the Notice, as amended by Amendment No. 2, the underwriter need only have a reasonable basis for its evaluation.

One commenter stated its belief that the written risk disclosures imposed on underwriters related to the financings (including complex financings) are too broad and vague and do not take into account the role of the issuer's municipal advisor, if any.[63] Other commenters stated that the underwriter should not have disclosure requirements when the issuer has engaged a financial advisor.[64] Another commenter stated that the underwriter should not be required to evaluate issuer personnel when the issuer has retained a municipal advisor.[65] In Response Letter I, the MSRB stated that underwriters are in the best position to understand the material terms and risks associated with recommended financings, and the burden should not be solely on municipal advisors to ascertain such terms and risks.

One commenter noted that if written risk disclosures are to be required, then additional guidance and clarity is needed on the following: (1) References to ''atypical or complex'' financings;[66] (2) references to ''all material risks and characteristics of the complex municipal securities financing'';[67] (3) which issuer personnel must have the requisite level of knowledge and sophistication;[68] (4) if the issuer does not have a financial advisor or internal personnel acting in a similar role, then the issuer's finance staff's knowledge and experience should be assessed by underwriters; and (5) only material risks that are known to the underwriter and reasonably foreseeable at the time of the disclosure should be required.[69]

In Response Letter I, the MSRB stated that it does not consider it appropriate to provide a more precise definition of ''complex municipal securities financing'' since the Notice already provides examples of complex financings, such as those involving variable rate demand obligations and swaps. The MSRB stated that it does not consider it appropriate to require an issuer to inform the underwriter that the issuer lacks knowledge or experience with a financing. The MSRB stated its belief that it is reasonable to require the underwriter to evaluate the level of knowledge and sophistication of the issuer. The Notice, as modified by Amendment No. 2, would only require the underwriter to have a reasonable basis for its evaluation. Further, the MSRB stated that it agrees with the commenter that disclosure on complex financings should be limited to material financial risks that are known to the underwriter and reasonably foreseeable. The MSRB stated that the Notice, as modified by Amendment No. 2, shows such change. The Notice, as modified by Amendment No. 2, would also require disclosures of the characteristics of a financing that are limited to the material financial characteristics and would provide examples in the case of swaps.

One commenter disagreed with the MSRB that the level of disclosure should vary based on the issuer's financial ability to bear the risks of the recommended financing.[70] The commenter stated its belief that a municipal entity with taxing power, who would be able to bear more risks of a financing, should not be ineligible for advice that is competent and unimpaired by the broker's own interests simply because the government can tax the citizens to restore any loss. In Response Letter II, the MSRB conceded that the financial ability to bear the risks of a recommended financing would not normally be a sufficient basis, by itself, for determining the level of disclosure to provide. The MSRB noted, however, the proposal states three distinct factors that should be considered together in coming to this determination.

Other commenters noted that disclosure regarding derivatives is premature since there are pending rulemakings with the Commodity Futures Trading Commission (''CFTC'') and the Commission that will apply to dealers recommending swaps or security-based swaps to municipal entities.[71] One commenter urged the MSRB to work together with SEC and CFTC to ensure that one set of

Letter I. In Response Letter I, the MSRB stated that while the factors are helpful, they do not address the particular issuer personnel's experience and knowledge, which are more relevant to the Notice. The MSRB stated that it would take the comment under advisement. Another commenter stated that in a routine financing, the Notice should require an underwriter to disclose, in writing, information regarding the transaction, should the issuer make such a request. *See* GFOA Letter II. The commenter stated that additional information on routine financings would be helpful. In Response Letter II, the MSRB stated its belief that the provisions relating to this disclosure are appropriate for the reasons described in Response Letter I and, therefore, no further modification is warranted.

[61] Another commenter noted that to require an underwriter to determine who should be considered ''issuer personnel'' is an issue worth more consideration and discussion. *See* GFOA Letter II. In Response Letter II, the MSRB noted that it would monitor disclosure practices and would engage in a dialogue with industry participants and the Commission to determine whether sufficient improvements have occurred in the flow of disclosures to decision-making personnel of issuers or whether additional steps should be taken.

[62] *See* NAIPFA Letter I and NAIPFA Letter II. The commenter reiterated that the proposal requires additional changes in order to protect over 50,000 infrequent and/or small, unsophisticated issuers of municipal bonds. *See* NAIPFA Letter II. Another commenter stated that there are many unsophisticated issuers who will benefit from the disclosures. *See* AGFS Letter. The commenter stated that issuers should rely upon advice from advisors who owe the issuers a fiduciary duty, instead of underwriters who may be in an adversarial position.

[63] *See* SIFMA Letter I.

[64] *See* BDA Letter I and WM Letter I.

[65] *See* SIFMA Letter I.

[66] The commenter stated that these additional written disclosures may require detailed review by counsel, which would be costly. The commenter urged the Commission to carefully consider the costs relative to the potential benefits.

[67] The commenter stated that this reference should be limited to financial risks and characteristics since the underwriter should not have to provide disclosures on legal issues.

[68] The commenter stated that if the issuer has a financial advisor or internal personnel serving the same role then no underwriter written disclosures should be required. The commenter further stated that underwriters may satisfy their disclosure requirements by communicating the disclosures to the financial advisor or issuer internal personnel.

[69] *See* SIFMA Letter I.

[70] *See* PFM Letter.

[71] *See* SIFMA Letter I; BDA Letter I; GFOA, Letter I.

definitions and rules apply to the municipal securities market.[72]

In Response Letter I, the MSRB noted that it is aware of the ongoing rulemaking by the Commission and CFTC and has taken care to ensure that any requirements of the Notice are consistent with such rulemaking. In Response Letter II, the MSRB disagreed with the commenter that the proposal is premature for the reasons described in Response Letter I.

E. Underwriter Duties in Connection With Issuer Disclosure Documents

Under the Notice, the underwriter must have a reasonable basis for its representations and information provided to issuers in connection with the preparation by the issuer of its disclosure documents. One commenter stated its belief that the reasonable basis requirement is unreasonably broad.[73] The commenter stated that the Notice should be revised to clarify that an underwriter may limit its responsibility for information provided by disclosing to the issuer any limitations on the scope of the underwriter's analysis and factual verification it performed. The commenter further stated that such duty should extend only to material information. In Response Letter I, the MSRB stated that it disagrees with the commenter and believes that an underwriter should have a reasonable basis for its own representations set forth in the official statement, as well as a reasonable basis for the material information it provides to the issuer in connection with the preparation of the official statement.

One commenter also stated its belief that when an underwriter intends to assist in the preparation of an official statement, that a disclosure should be made to the issuer stating that the underwriter can only be held liable where it can be shown that it did not act with a reasonable belief that the information presented was truthful and complete.[74] In Response Letter I, the MSRB noted that the Notice would provide that an underwriter must have ''a reasonable basis for the representations it makes, and other material information it provides, to an issuer and to ensure that such representations and information are accurate and not misleading.''

F. Underwriter Compensation and New Issue Pricing

1. Excessive Compensation

One commenter requested that, in the absence of disclosure and informed consent, underwriters be prohibited from seeking reimbursements from bond proceeds for expenditures made on behalf of the issuer for any expenses incurred by the underwriter.[75] In Response Letter I, the MSRB noted that it disagrees with the commenter and that MSRB Rule G–20 already precludes underwriters from seeking reimbursement for lavish expenditures, especially from bond proceeds. Further, in Response Letter I, the MSRB noted that state law would govern whether such reimbursements are permissible.

2. Fair Pricing

With respect to the representation that the price an underwriter pays in a negotiated sale be fair and reasonable, one commenter stated its belief that such representation should be altered so that the price the underwriter pays is ''not unreasonable.'' [76] In Response Letter I, the MSRB stated that the fair and reasonable pricing standard is no different in many cases than the duties already imposed on underwriters by MSRB rules with respect to underwriters' customers and that it believes the approach in the Notice would require more robust disclosures by underwriters to issuers. In the alternative, the commenter recommended that the disclosure should be changed to state that the pricing is not necessarily the best pricing.[77] In Response Letter II, the MSRB stated that it believes that the provisions relating to these disclosures are appropriate for the reasons described in Response Letter I and, therefore, no further modifications to these provisions are warranted.

One commenter urged the Commission to require underwriters to expressly represent in writing to the issuer that the price paid for the issuer's debt is fair, and specify the facts that support the representation.[78] In Response Letter II, the MSRB stated that its view is that, even if an underwriter provides a fair price to an issuer for its new issue offering, its fair practice duties under Rule G–17 are not thereby discharged because, among other things, the many principles laid out in the proposal also must be addressed. Conversely, an underwriter cannot justify under Rule G–17 an unfair price to an issuer by balancing that unfair price with the fact that it may otherwise have been fair to the issuer under the other fairness principles enunciated in the proposal.

G. Conflicts of Interest

1. Payments To or From Third Parties

One commenter stated that disclosures with respect to third-party arrangements for the marketing of the issuer's securities should be clarified as to the level of details.[79] Further, the commenter stated its belief that payments to and from affiliates of the underwriters are not third-party payments since those payments would not cloud a party's judgment when the parties are related to each other, unlike third parties. In Response Letter I, the MSRB noted that the Notice, as modified by Amendment No. 2, would require only the disclosure of third-party marketing arrangements, not the particular terms. Moreover, while the MSRB disagreed with the commenter that payments from affiliates do not raise risks, the MSRB noted that the Notice, as modified by Amendment No. 2, would not require the disclosure of the amounts of such payments.

Another commenter stated that the payment amount is an important variable for the issuer to consider and would encourage its members to further question the underwriter about any relevant third-party relationships and payments, which provides better transparency for the transaction.[80] In Response Letter II, the MSRB stated its agreement that such further inquiries can be made. In addition, the MSRB clarified that the third-party payments to which the disclosure requirement under the 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.

2. Profit-Sharing With Investors

One commenter sought clarification that legitimate trading, such as when an

[72] *See* GFOA Letter I.

[73] *See id.*

[74] *See* NAIPFA Letter I.

[75] *See id.*

[76] *See* NAIPFA Letter I and NAIPFA Letter II.

[77] *See* NAIPFA Letter II.

[78] *See* PFM Letter.

[79] *See* SIFMA Letter I. *See also* IA Letter. The commenter cited examples where an underwriter would outsource certain routine tasks related to the financing transactions, and sought clarification whether the Notice would encompass such payments for services rendered. The Commission received the IA Letter after the MSRB filed Response Letter II, and thus, the MSRB has not specifically responded to the commenter.

[80] *See* GFOA Letter II.

underwriter sells a bond and later repurchases the bond from a purchaser, is not included in the disclosure for profit sharing arrangements.[81] In Response Letter II, the MSRB stated its belief that the language of the proposal appropriately reflects that the disclosure applies in cases where there exists an arrangement to split or share profits realized by an investor upon resale.

3. Credit Default Swaps

One commenter stated that it believes that underwriters should not be required to disclose hedging and risk management strategies and activities when the underwriter, in its role as a dealer, issues or purchases credit default swaps that reference the obligations of the municipal issuer.[82] The commenter noted that should these disclosures be required, a general disclosure to the issuers that the underwriters may engage in such activities should be sufficient. The commenter objected to any provisions that would require underwriters to provide specific disclosures that may reveal identities of counterparties and the underwriters' hedging and risk management strategies. In Response Letter I, the MSRB stated that it does not believe that the disclosure requirement would compromise counterparty relationships or deter the use of credit default swaps for legitimate risk management purposes. In addition, the MSRB noted that the Notice would only require that a dealer that engages in the issuance or purchase of a credit default swap for which the underlying reference is an issuer for which the dealer is serving as underwriter, or an obligation of that issuer, must disclose the fact that it does so to the issuer, not the terms of the particular trades.[83]

H. Retail Order Periods

One commenter recommended that the Notice use a single standard of requiring that the underwriter not knowingly accept orders that do not meet the requirements of the retail order period.[84] In Response Letter II, the MSRB stated that it believes that the commenter has misunderstood these provisions. The MSRB stated that the Notice provides that an underwriter that knowingly accepts an order that has been framed as a retail order when it is not, would violate MSRB Rule G–17 if its actions are inconsistent with the issuer's expectations regarding retail orders, but also provides that a dealer that places an order that is framed as a qualifying retail order but in fact represents an order that does not meet the qualification requirements to be treated as a retail order, violates its duty of fair dealing. The MSRB stated that these two provisions are entirely consistent and appropriate, since in the first provision an underwriter is receiving an order framed by a third party, whereas in the second provision, a dealer (not limited to an underwriter) is itself placing and framing the order. Therefore, the MSRB noted that it has not modified these provisions.

I. Timing and Consistency

One commenter noted that underwriters that may also be municipal advisors will not be able to properly evaluate the Notice until rules with respect to municipal advisors have been approved and adopted by the Commission and MSRB.[85] The commenter noted that many underwriters may be classified as municipal advisors under these yet-to-be-adopted rules and questioned how the underwriters' obligations under the Notice may relate to these rules. The commenter stated that many interested parties are abstaining from commenting on the proposal due to this uncertainty. The commenter stated its belief that, at a minimum, the portion of the proposal addressing an underwriter's obligation to provide written risk disclosures should be withdrawn and refiled at a later time.

One commenter stated that a 90-day implementation period is too short and requested a period no less than six months.[86] In Response Letter I, the MSRB stated that it believes that 90 days is an adequate time period for underwriters to develop the required disclosures.

J. Miscellaneous Comments

Some commenters raised issues that are outside the scope of the proposal. For example, commenters asked the MSRB to provide clarity on the definition of ''flipping'' [87] and the application of the suitability standard to transactions proposed by an underwriter to an issuer.[88]

With respect to ''flipping,'' the MSRB stated in Response Letter II that it would reach out to other regulators and the Commission in an attempt to develop a shared understanding of what such ''flipping'' activities entail and potential concerns regarding the implications of these activities. The MSRB noted that, to the extent these activities could be characterized as arrangements 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, these activities may already be subject to the proposal's disclosure obligation with respect to profit-sharing with investors.

In Response Letter II, the MSRB noted that although the suitability comment is outside the scope of the proposal, the MSRB will keep this suggestion under advisement.

Another commenter urged further consideration of the costs of disclosures and weighing the costs against the potential benefits.[89] In Response Letter II, the MSRB noted its disagreement that it did not weigh the costs and benefits, and that the proposal in fact recognizes that many of the disclosures required under the proposal can be tailored, and in some cases are not required at all, based on a number of relevant factors set out in the proposal and described in greater detail in Response Letter I. Most across-the-board disclosure provisions in the proposal either require transaction-specific or underwriter-specific disclosures of relevant conflicts of interest or consist of standardized educational disclosures with respect to which, underwriters most likely would realize greater cost-effectiveness and reduced regulatory risk by making such disclosures globally rather than on a case-by-case basis. The MSRB stated that providing more information to issuers would empower and provide considerable benefits to issuers. Further, the MSRB stated that it concedes that some underwriters may bear up-front costs in creating basic frameworks for the required disclosures for the various types of products they may offer their issuer clients, but the on-going burden should thereafter be considerably

[81] *See* BDA Letter II.

[82] *See* SIFMA Letter I.

[83] One commenter noted that the Notice provides that if a dealer issues or purchases credit default swaps for which the reference obligor is the issuer to which the dealer is serving as an underwriter, the underwriter must disclose that fact to the issuer. *See* SIFMA Letter II. The commenter requested clarification that, in the case of a conduit issuer that issues bonds for multiple obligors or on a specific project, whether disclosures need to be made to the obligor(s) to satisfy the disclosure requirements. *See* SIFMA Letter II. In Response Letter II, the MSRB stated that the proposal only requires that credit default swap disclosures be made to the issuers of the municipal securities and not to any conduit borrowers or other obligors. However, the MSRB stated that it would take under advisement the question of whether such disclosure should be extended to any applicable obligors other than the issuer.

[84] *See* BDA Letter II.

[85] *See* SIFMA Letter I and SIFMA Letter II.

[86] *See* SIFMA Letter I.

[87] *See* GFOA Letter I; GFOA Letter II and NAIPFA Letter II.

[88] *See* GFOA Letter I and GFOA Letter II.

[89] *See* SIFMA Letter II.

reduced and the preparation of written disclosures would become an inter-related component of the necessary documentation of the transaction.

One commenter sought clarification that the proposal would not apply to private placement agents.[90] In Response Letter II, the MSRB responded that while the Notice would not apply to private placement agents, parties relying on this exception should be cautious in its application because the term ''private placement'' is often used to describe transactions that are not recognized as private placements for purposes of MSRB rules and other applicable law.

IV. Proceedings To Determine Whether To Disapprove SR–MSRB–2011–09 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[91] to determine whether the proposed rule change should be disapproved. Institution of such proceedings appears appropriate at this time in view of the legal and policy issues raised by the proposal, as discussed below. Institution of disapproval proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to comment on the proposed rule change to inform the Commission's analysis whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act, the Commission is providing notice of the grounds for disapproval under consideration. In particular, Section 15B(b)(2)(C) of the Act[92] requires, among other things, 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 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 MSRB's proposal would interpret the application of MSRB Rule G–17 applicable to dealers acting in the capacity of underwriters in negotiated underwritings of municipal securities transactions (except as specified in the Notice). The Notice would impose disclosures on underwriters regarding, among other things, their role, compensation arrangements, conflicts of interest, and representations made to issuers of municipal securities. Commenters that represent issuers and financial advisors generally support the proposal and urge additional disclosures, while commenters that represent dealers and underwriters believe the proposal should be disapproved or required disclosures be modified to ease the requirements for dealers. Based on the comments, the Commission believes that the proposal raises concerns, among other things, as to whether the disclosures are appropriate and, if so, whether the disclosures are sufficiently balanced to protect investors and municipal entities by assisting issuers and their advisors in evaluating underwriters and the transactions proposed by the underwriters without being overly burdensome for underwriters.

The Commission believes these concerns raise questions as to whether the MSRB's proposal is consistent with the requirements of Section 15B(b)(2)(C) of the Act, including whether the disclosures outlined in the notice would prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons facilitating transactions in municipal securities and municipal financial products, remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, protect investors, municipal entities, obligated persons, and the public interest. The Commission believes the issues raised by the proposed rule change can benefit from additional consideration and evaluation in light of the requirements of Section 15B(c)(2)(C) of the Act.

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the concerns identified above, as well as any others they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is inconsistent with Section 15B(b)(2)(C) or any other provision of the Act, or the rules and regulation thereunder. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.[93]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be disapproved by January 30, 2012. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by February 13, 2012. 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–2011–09 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–2011–09. 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

[90] *See* SIFMA Letter II.

[91] 15 U.S.C. 78s(b)(2)(B).

[92] 15 U.S.C. 78o–4(b)(2)(C).

[93] Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94–29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

also will be available for inspection and copying at the principal office of the Exchange. 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–2011–09 and should be submitted on or before January 30, 2012. Rebuttal comments should be submitted by February 13, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[94]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32087 Filed 12–13–11; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65917; File No. SR–Phlx–2011–143]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Withdrawal of Proposed Rule Change To Modify Commentary .01 to Rule 1009 Regarding Criteria for Listing an Option on an Underlying Covered Security

December 8, 2011.

On October 24, 2011, NASDAQ OMX PHLX LLC (''Phlx'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 [1] and Rule 19b–4 thereunder [2] to amend Commentary .01 to Rule 1009 to modify the criteria for listing options on an underlying covered security. Notice of the proposed rule change was published in the **Federal Register** on November 14, 2011.[3] The Commission received two comment letters on the proposed rule change.[4] On December 2, 2011, Phlx withdrew the proposed rule change (SR–Phlx–2011–143).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[5]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2011–32067 Filed 12–13–11; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65911; File No. SR–EDGA–2011–40]

Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing of Proposed Rule Change To Amend EDGA Rule 11.9

December 8, 2011.

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 December 2, 2011, the EDGA Exchange, Inc. (''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. 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 Exchange proposes to amend certain existing routing options contained in Rule 11.9 to provide Users [3] with more flexible routing options. The text of the proposed rule change is available on the Exchange's Web site at *http://www.directedge.com,* at the Exchange's principal office and at the Public Reference Room of the Commission.

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 Exchange 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 self-regulatory organization 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

The Exchange's current list of routing options are codified in Rule 11.9(b)(3). In this filing, the Exchange proposes to amend several routing options contained in Rule 11.9(b)(3) to allow Users more discretion if shares remain unexecuted after routing. In particular, Rule 11.9(b)(3) is proposed to be amended to provide that Users may elect that any remainder of an order be posted to the EDGX Exchange, Inc. (''EDGX'') for any of the routing options listed in the rule, except those in paragraphs (a) and (n)–(q) [4].

Currently, Rule 11.9(b)(3)(d) provides that the INET routing strategy checks the System for available shares and then is sent to Nasdaq. If shares remain unexecuted after routing, they are posted on the Nasdaq book. The Exchange proposes to modify this language to subject this posting to Nasdaq to a User instruction as proposed in the introductory paragraph of Rule 11.9(b)(3). This User instruction would thus enable the remainder to post to EDGX instead of Nasdaq.

Currently, Rule 11.9(b)(3)(j) provides that the ROLF routing strategy checks the System for available shares and then is sent to LavaFlow ECN. The Exchange proposes to modify this strategy to state that any remainder will be posted to LavaFlow ECN, unless otherwise instructed by the User. This User instruction would thus enable the User to direct the remainder to post to EDGX instead of LavaFlow ECN.

Rule 11.9(b)(3)(m) provides that the IOCT routing option checks the System for available shares and then is sent sequentially to destinations on the System routing table. If shares remain unexecuted after routing, they are sent as an immediate or cancel (IOC) [5] order to EDGX. If shares further remain unexecuted, they are posted on the EDGA Book, unless otherwise instructed by the User. The Exchange proposes to modify this strategy to delete the phrase ''sent as an IOC order'' since a Day Order [6] or an IOC order could be sent to EDGX. This change would thus enable

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[94] 17 CFR 200.30–3(a)(57).

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 65706 (November 8, 2011), 76 FR 70520.

[4] *See* letters to Elizabeth M. Murphy, Secretary, Commission, from Jenny L. Klebes, Senior Attorney, Legal Division, Chicago Board Options Exchange, dated November 25, 2011; and Janet McGinness, Senior Vice President—Legal & Corporate Secretary, Legal & Government Affairs, NYSE Euronext, dated December 1, 2011.

[5] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] As defined in Rule 1.5(cc).

[4] Routing options listed in Rules 11.9(b)(3)(a) and (n)–(q) are not altered as a result of this amendment. The routing option in Rule 11.9(b)(3)(a) already posts to EDGX and no amendment to the rule is needed as no discretion is provided to the User. The routing options in Rules 11.9(b)(3)(n)–(q) do not have the option to post the remainder of an order to EDGX.

[5] As defined in Rule 11.5(b)(1).

[6] As defined in Rule 11.5(b)(2).