SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-78777; File No. SR-MSRB-2016-12)

September 7, 2016

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change to MSRB Rules G-15 and G-30 to Require Disclosure of Mark-Ups and Mark-Downs to Retail Customers on Certain Principal Transactions and to Provide Guidance on Prevailing Market Price

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Exchange Act" or "Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on September 2, 2016 the Municipal Securities Rulemaking Board (the "MSRB" or "Board") filed with the Securities and Exchange Commission (the "SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The MSRB filed with the Commission a proposed rule change to amend MSRB Rule G-15, on confirmation, clearance, settlement and other uniform practice requirements with respect to customer transactions, and MSRB Rule G-30, on prices and commissions, (the "proposed rule change") to require brokers, dealers and municipal securities dealers (collectively, "dealers") to disclose mark-ups and mark-downs to retail customers on certain principal transactions and to provide dealers guidance on prevailing market price for the purpose of calculating mark-ups and mark-downs and other Rule G-30 determinations.

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

2 17 CFR 240.19b-4.

If the Commission approves the proposed rule change, the MSRB will announce the effective date of the proposed rule change no later than 90 days following Commission approval. The effective date will be no later than 365 days following Commission approval.

The text of the proposed rule change is available on the MSRB's website at www.msrb.org/Rules-and-Interpretations/SEC-Filings/2016-Filings.aspx, at the MSRB's principal office, and at the Commission's Public Reference Room.

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

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

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

1. Purpose

Proposed Amendments to Rule G-15

The MSRB is proposing to amend Rule G-15 to require dealers to provide additional pricing information on customer confirmations in connection with specified municipal securities transactions with retail customers. Specifically, if a dealer trades as principal with a retail (i.e., non-institutional) customer in a municipal security, the dealer must disclose the dealer's mark-up or mark-down (collectively, "mark-up," unless the context requires otherwise) from the prevailing market price for the security on the customer confirmation, if the dealer also executes one or more offsetting principal transaction(s) on the same trading day as the customer, on the

same side of the market as the customer, in an aggregate size that meets or exceeds the size of the customer trade.

Many dealers already are required to disclose additional pricing information to customers for certain types of transactions under certain circumstances. Pursuant to Exchange Act Rule 10b-10, dealers effecting equity transactions in which they act in a riskless principal capacity must disclose on the customer confirmation the difference between the price to the customer and the dealer's contemporaneous purchase or sale price.[3] Pursuant to Rule G-15, dealers effecting municipal securities transactions in which they act in an agent capacity must disclose on the customer confirmation the amount of remuneration received from the customer in connection with the transaction (i.e., the commission).

The MSRB has conducted analyses of various data reported to its Electronic Municipal Market Access (EMMA®) system[4] in order to evaluate the potential need for the proposed mark-up disclosure rule. Over the period from July 1, 2015 through September 30, 2015 (Q3 2015),[5]

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3 See 17 CFR 240.10b-10. Under Rule 10b-10, where a broker or dealer is acting as principal for its own account and is not a market maker in an equity security, and receives a customer order in that equity security that it executes by means of a principal trade to offset the contemporaneous trade with the customer, the rule requires the broker or dealer to disclose the difference between the price to the customer and the dealer's contemporaneous purchase (for customer purchases) or sale price (for customer sales). See Rule 10b-10(a)(2)(ii)(A). Where the broker or dealer acts as principal for any other transaction in a defined National Market System stock, or an equity security that is listed on a national securities exchange and is subject to last sale reporting, the rule requires the broker or dealer to report the reported trade price, the price to the customer in the transaction, and the difference, if any, between the reported trade price and the price to the customer. See Rule 10b-10(a)(2)(ii)(B).

4 EMMA is a registered trademark of the MSRB.

5 Q3 2015 trading activity was substantially similar to trading activity in the preceding two and following one quarter. For example, the total number of trades reported to EMMA in Q3 2015 was 2,319,070 while the average number of trades reported to EMMA per quarter in 2015 was 2,305,705. Similarly, the number of retail-size, customer transactions

the average daily number of retail-size[6] customer transactions in the secondary market for municipal securities in which the dealer acted in a principal capacity was 15,538. The transactions were mainly concentrated among large firms. These trades were reported by approximately 700 dealers, however, the top 20 dealers with the highest volumes accounted for approximately 73 percent of the transactions in municipal securities. Of those retail-size customer transactions in the secondary market in which the dealer acted in a principal capacity, approximately 55 percent would have likely received a disclosure if the proposed rule had been in place.[7]

Of those trades which likely would have received disclosure, 38 percent of the offsetting trade(s) that would have triggered the disclosure occurred simultaneously (the reported times of both the customer trade and the offsetting trade(s) were identical), 50 percent of the offsetting trade(s) occurred within 19 seconds of the customer trade, and 83 percent of the offsetting trades occurred within 30 minutes.

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in the secondary market in which the dealer acted in a principal capacity in Q3 2015 was 994,409 while the average number of trades per quarter with the same characteristics during 2015 was 980,809.

6 The data reported to the MSRB do not indicate whether the customer purchasing or selling a security has an "institutional" account as defined in Rule G-8(a)(xi). Therefore, for the purposes of the analysis included here, the MSRB has defined a "retail-size" transaction as any customer transaction with a reported trade amount of 100 bonds or fewer or a face value of $100,000 or less. The MSRB recognizes that this proxy for retail customers may, in some cases, include transactions with institutional account holders and may also fail to include transactions with some retail customers.

7 That is, the customer's trade with a dealer was preceded or followed, on the same trading day, by one or more trades equal to the customer trade, by the dealer on the other side of the market in the same security. The percentage of customer trades that would have received a disclosure may be overestimated because in some cases, the dealer trade on the other side of the market may have been with an affiliate and the "look through" provision of the proposed rule may not have identified another trade that would have required disclosure.

For those trades that likely would have received disclosure, the median value of the estimated mark-up for customer purchases was approximately 1.20 percent and the median value of the estimated mark-down was approximately 0.50 percent.[8] For both mark-ups on customer purchases and mark-downs on customer sales, many customers paid considerably more than the median value. For example, five percent of customer purchases that would have been eligible for disclosure (representing approximately 14,900 trades) had estimated mark-ups higher than 2.25 percent while five percent of customer sales (representing approximately 6,500 trades) had estimated mark-downs higher than 1.51 percent.

The MSRB believes that retail investors are currently limited in their ability to assess and compare transaction costs associated with the purchase or sale of municipal securities. Joint investor testing conducted by the Financial Industry Regulatory Authority ("FINRA") and the MSRB ("joint investor survey") revealed that investors lack a clear understanding of how dealers are compensated when dealers act in a principal capacity and that investors have a desire for more information on this topic. Retail investors transacting with dealers acting in a principal capacity may, therefore, participate in the municipal securities market with less information than other market participants and be less able to foster price competition.[9] This information asymmetry may be observable, in part, in the large differences between estimated median mark-

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8 The mark-up and mark-down calculations involved matching customer trades to one or more offsetting same-day principal trades by the same dealer in the same CUSIP. This included matching same-size trades as well as trades of different sizes where there was no same-size match (e.g., a dealer purchase of 100 bonds matched to two sales to customers of 50 bonds each). The mark-ups (mark-downs) on customer buys (sells) correspond to the percentage difference in price in customer trades and the offsetting principal trade.

9 The SEC's 2012 Report on the Municipal Securities Market reached similar conclusions based on multiple studies. See U.S. Securities and Exchange Commission, Report on the Municipal Securities Market (July 31, 2012).

ups and the highest mark-ups paid by retail customers. As noted above, the five percent of customer trades with the highest mark-ups have mark-ups that are more than twice as large as the median mark-up.

Some market participants have asserted that the observed dispersion in mark-ups might be explained by bond- or execution-specific characteristics (e.g., that higher mark-ups can be explained by the additional dealer costs associated with transacting in relatively small quantities). The data do not support this conclusion. An analysis of the transactions that took place during Q3 2015 and that likely would have received disclosures if the proposed rule had been in place indicates that not only are the large dispersions in mark-ups not fully explained by bond- or execution-specific characteristics, but also that, in some cases, factors that might be expected to result in lower mark-ups appear to be associated with higher mark-ups. For example, the median quantity of bonds traded in transactions with the highest mark-ups was either the same or similar to the median quantity of bonds traded in transactions with significantly lower mark-ups and bonds with higher trading frequencies in Q3 2015, and presumably higher liquidity, actually had higher estimated mark-ups than bonds that traded less frequently. The MSRB believes that requiring dealers to disclose their mark-ups on retail customer confirmations would provide meaningful and useful pricing information and may lower transaction costs for retail transactions.

As described in greater detail in the section on comments received on the proposed rule change, the MSRB initially solicited comment on a related proposal in MSRB Notice 2014-20 (the "initial confirmation disclosure proposal"),[10] and subsequently on a revised proposal in

[10] See MSRB Notice 2014-20 (November 17, 2014).

MSRB Notice 2015-16 (the "revised confirmation disclosure proposal").[11] The MSRB also has been coordinating with FINRA regarding the development of similar proposals, as appropriate, to foster generally consistent potential disclosures to customers across debt securities and to reduce the operational burdens for firms that trade multiple fixed income securities. The MSRB and FINRA published their initial and revised confirmation disclosure proposals on similar timelines,[12] and FINRA filed with the Commission a substantially similar proposed rule change to the proposed amendments to Rule G-15 on August 12, 2016.[13]

Provided below is a more detailed description of each significant aspect of the proposed amendments to Rule G-15.

Scope of the Disclosure Requirement

The proposed mark-up disclosure requirement would apply where the dealer buys (or sells) a municipal security on a principal basis from (or to) a non-institutional customer and engages in one or more offsetting principal trade(s) on the same trading day in the same security, where the size of the dealer's offsetting principal trade(s), in the aggregate, equals or exceeds the size of the customer trade. A non-institutional customer would be a customer with an account that is not an institutional account, as defined in Rule G-8(a)(xi), (i.e., a retail customer account).[14] The proposed rule change would apply to transactions in municipal securities, other than municipal fund securities.[15]

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11 See MSRB Notice 2015-16 (September 24, 2015).

12 See FINRA Regulatory Notice 14-52 (November 2014) and FINRA Regulatory Notice 15-36 (October 2015).

13 See SR-FINRA-2016-032 (Aug. 12, 2016).

14 Rule G-8(a)(xi) defines an institutional account as

The MSRB believes that the proposed amendments would provide meaningful pricing information to retail investors, which would most benefit from such disclosure, while not imposing unduly burdensome disclosure requirements on dealers. The MSRB believes that requiring disclosure for retail customers, i.e., those with accounts that are not institutional accounts, would be appropriate because retail customers typically have less ready access to market and pricing information than institutional customers. The MSRB believes that using the definition of an institutional account as set forth in Rule G-8(a)(xi) to define the scope of the disclosure requirement would be appropriate because reliance on an existing standard would simplify implementation and thereby reduce costs associated with the requirement.[16]

Same-Day Triggering Timeframe

The MSRB believes that it would be appropriate to require disclosure of the mark-up where the dealer's offsetting principal trade(s) equaled or exceeded the size of the customer trade on the same trading day. To the extent that a dealer will often refer to its contemporaneous cost or proceeds, e.g., the price it paid or received for the bond, in determining the prevailing market

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> the account of (i) a bank, savings and loan association, insurance company, or registered investment company; (ii) an investment adviser registered either with the Commission under Section 203 of the Investment Advisers Act of 1940 or with a state securities commission (or any agency or office performing like functions); or (iii) any other entity (whether a natural person, corporation, partnership, trust, or otherwise) with total assets of at least $50 million.

15 See discussion infra, Exceptions for Functionally Separate Trading Desks, List Offering Price Transactions and Municipal Fund Securities.

16 As discussed in greater detail below, the MSRB initially proposed that the disclosure requirement would apply to customer trades involving 100 bonds or fewer or bonds in a par amount of $100,000 or less. In response to comments that the proposed size-based standard could either exclude retail customer transactions above that amount from the proposed disclosure, or subject institutional transactions below that amount to the proposed disclosure, the MSRB revised the proposal to incorporate the Rule G-8(a)(xi) definition of an institutional account.

price for purposes of calculating the mark-up or mark-down, the MSRB believes that limiting the disclosure requirement to those instances where there is an offsetting trade in the same trading day would generally make determination of the prevailing market price easier.

As is discussed in greater detail below, a number of commenters stated that the window for triggering disclosure should be limited to two hours. Among other things, commenters argued that a two-hour window would be easier to implement, and would more closely capture riskless principal trades, which would align the proposed disclosure to the riskless principal disclosure requirements for equity securities under Exchange Act Rule 10b-10.[17]

The MSRB believes that there are added benefits to requiring disclosure for trades that occur within the same trading day, rather than only trades that occur within two hours. First, the full-day window would ensure that more investors receive mark-up disclosure. Second, the full-day window may make dealers less likely to alter their trading patterns in response to the proposed requirement, as dealers would need to hold positions overnight to avoid the proposed disclosure.[18]

Some commenters recommended that the proposed disclosure obligation be limited to riskless principal transactions involving retail investors, which, in their view, would more

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17 See 17 CFR 240.10b-10.

18 It is important to note that, under Rule G-18, on best execution, dealers must use reasonable diligence to ascertain the best market for the security and buy or sell in that market so that the resultant price to the customer is as favorable as possible under prevailing market conditions. Rule G-18, Supplementary Material .03 emphasizes that a dealer must make every effort to execute a customer transaction promptly, taking into account prevailing market conditions. Any intentional delay of a customer execution to avoid the proposed disclosure requirement or otherwise would be contrary to these duties to customers. A dealer that purposefully delayed the execution of a customer order to avoid the proposed disclosure also may be in violation of the MSRB's fundamental fair-dealing rule, Rule G-17, on conduct of municipal securities and municipal advisory activities.

accurately reflect dealer compensation and transaction costs and be more consistent with the stated objectives of the SEC in this area. These commenters would apply the requirement to riskless principal transactions as previously defined in the equity context by the Commission, where the dealer has an "order in hand" at the time of execution. However, the MSRB believes that it may be difficult to objectively define, implement and monitor a riskless principal trigger standard for municipal securities. The MSRB also believes that customers would benefit from the disclosure irrespective of whether the dealer's capacity on the transaction was riskless principal and believes, at this juncture, that using the riskless principal standard ultimately would be too narrow.

Non-Arms-Length Affiliate Transactions

With respect to the offsetting principal trade(s), where a dealer buys from, or sells to, certain affiliates, the proposal would require the dealer to "look through" the dealer's transaction with the affiliate to the affiliate's transaction(s) with third parties in determining when the security was acquired and whether the "same trading day" requirement has been triggered. Specifically, the MSRB proposes to require dealers to apply the "look through" where a dealer's transaction with its affiliate was not at arms-length. For purposes of the proposed rule change, an "arms-length transaction" would be considered a transaction that was conducted through a competitive process in which non-affiliate dealers could also participate -- e.g., pricing sought from multiple dealers, or the posting of multiple bids and offers -- and where the affiliate relationship did not influence the price paid or proceeds received by the dealer. As a general matter, the MSRB would expect that the competitive process used in an "arms-length" transaction, e.g., the request for pricing or platform for posting bids and offers, is one in which non-affiliates have frequently participated. The MSRB believes that, for example, sourcing

liquidity through a non-arms-length transaction with an affiliate is functionally equivalent to selling out of a dealer's own inventory for purposes of the proposed disclosure trigger. The MSRB therefore believes it would be appropriate in those circumstances to require a dealer to "look through" its transaction in a security with its affiliate to the affiliate's transactions in the security with third parties to determine whether the proposed mark-up disclosure requirement applies in these circumstances.[19]

Exceptions for Functionally Separate Trading Desks, List Offering Price Transactions and Municipal Fund Securities

Functionally Separate Trading Desks. The proposed amendments contain a number of exceptions from the mark-up disclosure requirement. First, if the offsetting same-day dealer principal trade was executed by a trading desk that is functionally separate from the dealer's trading desk that executed the transaction with the customer, the principal trade by that separate trading desk would not trigger the disclosure requirement. Dealers must have in place policies and procedures reasonably designed to ensure that the functionally separate principal trading desk through which the dealer purchase or dealer sale was executed had no knowledge of the customer transaction. The MSRB believes that this exception is appropriate because it recognizes the operational cost and complexity that may result from using a dealer principal trade executed by a separate, unrelated trading desk as the basis for determining whether a mark-up disclosure is triggered on the customer confirmation. For example, the exception would allow an institutional

[19] Similarly, as explained in greater detail, infra, in the discussion of the proposed prevailing market price guidance, in the case of a non-arms-length transaction with an affiliate, the dealer also would be required to "look through" to the affiliate's transaction(s) with third parties in the security and the time of trade and related cost or proceeds of the affiliate in determining the dealer's calculation of the mark-up pursuant to Rule G-30.

desk within a dealer to service an institutional customer without triggering the disclosure requirement for an unrelated trade performed by a separate retail desk within the dealer. At the same time, in requiring that the dealer have policies and procedures in place that are reasonably designed to ensure that the other trading desk had no knowledge of the customer transaction,[20] the MSRB believes that the safeguards surrounding the exception are sufficiently rigorous to minimize concerns about the potential misuse of the exception. In other words, in the example above, the dealer could not use the functionally separate trading desk exception to avoid the proposed disclosure requirement if trades at the institutional desk were used to source securities for transactions at the retail desk.

The MSRB also believes that this exception is appropriate and consistent with the concept of functional and legal separation that exists in connection with other regulatory requirements, such as SEC Regulation SHO, and notes that some dealers may already have experience maintaining functionally separate trading desks to comply with these requirements, depending upon their particular mix of business.

List Offering Price Transactions. Second, the mark-up would not be required to be disclosed if the customer transaction is a list offering price transaction, as defined in paragraph

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[20] This provision is distinguished from the "look through" provision noted above, whereby the customer transaction is being sourced through a non-arms-length transaction with the affiliate. Under the separate trading desk exception, functionally separate trading desks are required to have policies and procedures in place that are reasonably designed to ensure that trades occurring on the functionally separate trading desks are executed with no knowledge of each other and reflect unrelated trading decisions. Additionally, the MSRB notes that this exception would only apply to determine whether or not the proposed disclosure requirement has been triggered; it does not change the dealer's requirements relating to the calculation of its mark-up or mark-down under Rule G-30.

(d)(vii)(A) of Rule G-14 RTRS Procedures.[21] For such transactions, bonds are sold at the same published list offering price to all investors, and the compensation paid to the dealer, such as the underwriting fee, is paid for by the issuer and typically is described in the official statement.[22] Given the availability of information in connection with such transactions, the MSRB believes that the proposed mark-up disclosure would not be warranted for list offering price transactions.

Municipal Fund Securities. Lastly, disclosure of mark-ups would not be required for transactions in municipal fund securities. Because dealer compensation for municipal fund securities transactions is typically not in the form of a mark-up, the MSRB believes that the proposed mark-up disclosure would not have application for transactions in municipal fund securities. Additionally, the proposed requirement to disclose the time of execution and a reference and hyperlink to the Security Details page for the customer's security on EMMA (both discussed below) also would not be established for transactions in such securities.

Proposed Information to be Disclosed on the Customer Confirmation

If the transaction meets the criteria described above, the dealer would be required to disclose on the customer confirmation the dealer's mark-up from the prevailing market price for

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21 The term "list offering price transaction" is defined as a primary market sale transaction executed on the first day of trading of a new issue "by a sole underwriter, syndicate manager, syndicate member, selling group member, or distribution participant [to a customer] at the published list offering price for the security." Rule G-14 RTRS Procedures (d)(vii)(A).

22 Under Rule G-32, on disclosures in connection with primary offerings, a dealer selling offered municipal securities generally must deliver to its customers a copy of the official statement by no later than the settlement of the transaction. Under Rule G-32(a)(iii), any dealer that satisfies the official statement delivery obligation by making certain submissions to EMMA in compliance with Rule G-32(a)(ii) must also provide to the customer, in connection with offered municipal securities sold by the issuer on a negotiated basis to the extent not included in the official statement, among other things, certain specified information about the underwriting arrangements, including the underwriting spread.

the security. The mark-up would be required to be calculated in compliance with Rule G-30 and the supplementary material thereunder, including proposed Supplementary Material .06 (discussed below), and expressed as a total dollar amount and as a percentage of the prevailing market price of the municipal security.[23] The MSRB believes that it would be appropriate to require dealers to calculate the mark-up in compliance with Rule G-30, as new Supplementary Material .06 would provide extensive guidance on how to calculate the mark-up for transactions in municipal securities, including transactions for which disclosure would be required under the proposed rule change, and incorporates a presumption that prevailing market price is established by reference to contemporaneous cost or proceeds. While some commenters noted the operational cost and complexity of implementing a mark-up disclosure requirement, the MSRB notes that dealers are currently subject to Rule G-30, on prices and commissions, and already are required to evaluate the mark-ups that they charge to ensure that they are fair and reasonable.[24]

The MSRB recognizes that the determination of the prevailing market price of a particular security may not be identical across dealers.[25] Existing Rule G-30, however, requires

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23 Some commenters stated that the mark-up should be expressed as a total dollar amount, while others suggested that disclosure as a total dollar amount should not be required. Others still stated that the mark-up should be required to be disclosed as both a percentage and a total dollar amount. While commenters did not uniformly favor any particular format of disclosure, results of the joint investor survey indicated that investors found that disclosing the mark-up or mark-down both as a dollar amount and as a percentage of the prevailing market price would be more useful than only disclosing it in one of those forms.

24 Rule G-30, Supplementary Material .01(d).

25 For example, because the prevailing market price of a security is presumptively established by reference to the dealer's contemporaneous cost or proceeds, different dealers may arrive at different prevailing market prices for the same security depending on the price at which they contemporaneously acquired or sold such security. However, even where dealers may reasonably arrive at different prevailing market prices for the

dealers to exercise reasonable diligence in establishing the prevailing market price.[26] The MSRB, therefore, would expect that dealers have reasonable policies and procedures in place to establish the prevailing market price and that such policies and procedures are applied consistently across customers.

The MSRB understands that some dealers provide confirmations on an intra-day basis. As explained in detail below in the context of the proposed amendments to Rule G-30, the proposed requirement to disclose a mark-up calculated "in compliance with" Rule G-30 (including the proposed prevailing market price guidance) need not delay the confirmation process. A dealer may determine, as a final matter for disclosure purposes, the prevailing market price based on the information the dealer has, based on the use of reasonable diligence as required by proposed amended Rule G-30, at the time of the dealer's generation of the disclosure.

The proposed rule change also would require the dealer to provide a reference and hyperlink to the Security Details page for a customer's security on EMMA, along with a brief description of the type of information available on that page. This disclosure requirement would be limited to transactions with retail (i.e., non-institutional) customers, but would apply for all such transactions regardless of whether a mark-up disclosure is required for the transaction.[27]

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same security, the MSRB believes that the difference between such prevailing market price determinations would typically be small.

[26] Rule G-30, Supplementary Material .04(b).

[27] Because institutional customers typically have more ready access to the type of information available on EMMA, the MSRB is not proposing to require this disclosure for transactions with institutional customers. Of course, dealers are free to voluntarily provide such a disclosure on all customer confirmations, including those for institutional customers.

The MSRB believes that such a link would provide retail investors with a broad picture of the market for a security on a given day and believes that requiring a link to EMMA would increase investors' awareness of, and ability to access, this information. Additionally, results from the joint investor survey support the value to investors of a security-specific link to EMMA, rather than a link to the EMMA homepage.[28] The MSRB believes that a link to EMMA or such other enhancements would not be sufficient, as customers are not always able to identify with certainty a principal trade in the same security that was made by that customer's dealer. As a result, the customer would not always be able to ascertain the exact amount of the price differential between the dealer and customer trade or to determine whether such a trade accurately reflects the "prevailing market price" for purposes of calculating the dealer's compensation.

The proposed rule change also would require the dealer to disclose on all customer confirmations, other than those for transactions in municipal fund securities, the time of execution. Dealers are already under an obligation to either disclose such information on the customer confirmation or to include a statement that the time of execution will be furnished upon written request.[29] The proposed amendments to Rule G-15 would essentially delete the option to provide this information upon request. The MSRB believes that the provision of a security-

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[28] Some commenters stated that EMMA already contains sufficient pricing information for municipal securities, such as the last trade price for a security, and recommended that the MSRB focus solely on enhancing access to EMMA instead of requiring additional pricing disclosure.

[29] Dealers have an existing obligation to report "time of trade" to the Real-Time Transaction Reporting System pursuant to Rule G-14, on reports of sales or purchases. In addition, dealers have an existing obligation to make and keep records of the time of execution of principal transactions under Rule G-8(a)(vii). The time of execution for proposed confirmation disclosure purposes is the same as the time of trade for Rule G-14 reporting purposes and the time of execution for purposes of Rule G-8(a)(vii), except that dealers should omit all seconds from the disclosure because the trade data displayed on EMMA does not include seconds (e.g., dealers should disclose a time of trade of 10:00:59 as 10:00).

specific link to EMMA on retail customer confirmations, together with the time of execution would provide retail customers a comprehensive view of the market for their security, including the market as of the time of their trade. This combined disclosure also would reduce the risk that a customer may overly focus on dealer compensation and not appropriately consider other factors relevant to the investment decision. Even in instances in which the mark-up would not be required to be disclosed to customers, the MSRB believes that the inclusion of the time of execution on all customer confirmations (retail and institutional) would increase market transparency at relatively low cost. Results from the joint investor survey support the MSRB's view that time of execution disclosure is valued by investors.

As noted above, if the Commission approves the proposed rule change, the MSRB will announce the effective date of the proposed rule change no later than 90 days following Commission approval. The effective date will be no later than 365 days following Commission approval.

Proposed Amendments to Rule G-30

The MSRB is proposing to add new supplementary material (paragraph .06 entitled "Mark-Up Policy") and amend existing supplementary material under MSRB Rule G-30, on prices and commissions, to provide guidance on establishing the prevailing market price and calculating mark-ups and mark-downs for principal transactions in municipal securities (the "proposed guidance" or "proposed prevailing market price guidance"). The MSRB believes additional guidance on these subjects would promote consistent compliance by dealers with their existing fair-pricing obligations under MSRB rules, in a manner that would be generally harmonized with the approach taken in other fixed income markets. The MSRB also believes that such guidance would support effective compliance with the proposed amendments to Rule

G-15, discussed above. In addition, commenters indicated that compliance with the proposed amendments to MSRB Rule G-15 would be less burdensome if the MSRB were to provide guidance on establishing the prevailing market price. Significantly, municipal securities dealers that also transact in corporate or agency debt securities must comply with FINRA Rule 2121, including Supplementary Material .02 ("FINRA guidance") for transactions in those securities.[30]

The proposed rule change also includes amendments to the Supplementary Material to Rule G-30. For example, the MSRB proposes to clarify in Supplementary Material .01(a) that a dealer must exercise "reasonable" diligence in establishing the market value of a security and the reasonableness of the compensation received. This requirement is consistent with existing Supplementary Material .04(b) ("[D]ealers must establish market value as accurately as possible using reasonable diligence under the facts and circumstances") and clarifies that the same standard applies under the Supplementary Material .01(a). Similarly, the proposed amendments to Supplementary Material .01(d) to Rule G-30 will clarify the relationship between that provision and the new proposed Supplementary Material .06 containing the proposed prevailing market price guidance. In addition, this provision will assist in understanding of the overall rule.

When a dealer acts in a principal capacity and sells a municipal security to a customer, the dealer generally "marks up" the security, increasing the total price the customer pays. Conversely, when buying a security from a customer, a dealer that is acting as a principal generally "marks down" the security, reducing the total proceeds the customer receives. Rule G-30(a) prohibits a dealer from engaging in a principal transaction with customers except at an aggregate price (including any mark-up or mark-down) that is fair and reasonable. The

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30 See FINRA Rule 2121, Fair Prices and Commissions, Supplementary Material .02, Additional Mark-Up Policy For Transactions in Debt Securities, Except Municipal Securities.

Supplementary Material to Rule G-30, among other things, provides that as part of the aggregate price to the customer, the mark-up or mark-down also must be a fair and reasonable amount, taking into account all relevant factors.[31]

A critical step in determining whether the mark-up or mark-down on a principal transaction with a customer and the aggregate price to such customer is fair and reasonable is correctly identifying the prevailing market price of the security. Currently, under Rule G-30, the total transaction price to the customer must bear a reasonable relationship to the prevailing market price of the security, and, in a principal transaction, the dealer's compensation must be computed from the inter-dealer market price prevailing at the time of the customer transaction.[32] Moreover, existing Rule G-30 requires dealers to exercise diligence in establishing the market value of the security and the reasonableness of their compensation.[33]

Under the proposed guidance, the prevailing market price of a municipal security generally would be presumptively established by referring to the dealer's contemporaneous cost as incurred, or contemporaneous proceeds as obtained. This presumption could be overcome in limited circumstances. If the presumption is overcome, or if it is not applicable because the dealer's cost is (or proceeds are) not contemporaneous, various factors discussed below would be either required or permitted to be considered, in successive order, to determine the prevailing market price. Generally, a subsequent factor or series of factors could be considered only if previous factors in the hierarchy, or "waterfall," are inapplicable.

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31 Rule G-30, Supplementary Material .01(d).

32 Rule G-30, Supplementary Material .01(c), (d).

33 Rule G-30, Supplementary Material .01(a).

As described in greater detail below, the MSRB solicited comment on draft prevailing market price guidance in MSRB Notice 2016-07 (the "draft guidance"). The draft guidance was substantially similar to and generally harmonized with the FINRA guidance for non-municipal fixed income securities. As discussed below, the proposed guidance is substantially in the form of the draft guidance on which public comment was sought, with some minor changes. In addition, the MSRB provides additional explanation of the proposed guidance herein in response to commenters and to clearly express the MSRB's intended meaning of the proposed guidance. Moreover, the MSRB will continue to engage with FINRA with the goal of promoting generally harmonized interpretations of the proposed guidance, if approved, and the FINRA guidance, as applicable and to the extent appropriate in light of the differences between the markets.

Provided below is a more detailed description of each significant aspect of the proposed amendments to Rule G-30.

Rebuttable Presumption Based on Contemporaneous Costs or Proceeds

The proposed guidance builds on the standard in existing Supplementary Material to Rule G-30 that the prevailing market price of a security is generally the price at which dealers trade with one another (i.e., the inter-dealer price).[34] The proposed guidance provides that the best measure of prevailing market price is presumptively established by referring to the dealer's contemporaneous cost (proceeds), as consistent with other MSRB pricing rules, such as the best-execution rule (Rule G-18). Under the proposed guidance, a dealer's cost is (or proceeds are) considered contemporaneous if the transaction occurs close enough in time to the subject transaction that it would reasonably be expected to reflect the current market price for the

[34] See Rule G-30, Supplementary Material .01(d) ("Dealer compensation on a principal transaction is considered to be a mark-up or mark-down that is computed from the inter-dealer market price prevailing at the time of the customer transaction.").

municipal security. The reference to dealer contemporaneous cost or proceeds in determining the prevailing market price reflects a recognition of the principle that the prices paid or received for a security by a dealer in actual transactions closely related in time are normally a highly reliable indication of the prevailing market price and that the burden is appropriately on the dealer to establish the contrary.

A dealer may look to other evidence of the prevailing market price (other than contemporaneous cost) only where the dealer, when selling the security, made no contemporaneous purchases in the municipal security or can show that in the particular circumstances the dealer's contemporaneous cost is not indicative of the prevailing market price. When buying a municipal security from a customer, the dealer may look to other evidence of the prevailing market price (other than contemporaneous proceeds) only where the dealer made no contemporaneous sales in the municipal security or can show that in the particular circumstances the dealer's contemporaneous proceeds are not indicative of the prevailing market price.

A dealer may be able to show that its contemporaneous cost (when it is making a sale to a customer) or proceeds (when it is making a purchase from a customer) are not indicative of the prevailing market price, and thus overcome the presumption, in instances where: (i) interest rates changed to a degree that such change would reasonably cause a change in municipal securities pricing; (ii) the credit quality of the municipal security changed significantly;[35] or (iii) news was

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[35] Consistent with FINRA statements with respect to other fixed income securities, although an announcement by a nationally recognized statistical rating organization ("NRSRO") that it has reviewed the issuer's credit and has changed the issuer's credit rating is an easily identifiable incidence of a change of credit quality, the category is not limited to such announcements. It may be possible for a dealer to establish that the issuer's credit quality changed in the absence of such an announcement; conversely, a relevant regulator may determine that the issuer's credit quality had changed and such change was known to the market and factored into the price of the municipal security before the dealer's transaction (the transaction used to measure the dealer's contemporaneous cost) occurred. See Exchange

issued or otherwise distributed and known to the marketplace that had an effect on the perceived value of the municipal security.[36]

Hierarchy of Pricing Factors. Under the proposed guidance, if the dealer has established that the dealer's cost is (or proceeds are) not contemporaneous or if the dealer has overcome the presumption that its contemporaneous cost or amount of proceeds provides the best measure of the prevailing market price, the dealer must consider, in the order listed (subject to Supplementary Material .06(a)(viii), on isolated transactions and quotations), a hierarchy of three additional types of pricing information, referred to here as the hierarchy of pricing factors: (i) prices of any contemporaneous inter-dealer transactions in the municipal security; (ii) prices of contemporaneous dealer purchases (or sales) in the municipal security from (or to) institutional accounts with which any dealer regularly effects transactions in the same municipal security; or (iii) if an actively traded security, contemporaneous bid (or offer) quotations for the municipal security made through an inter-dealer mechanism, through which transactions generally occur at the displayed quotations. Pricing information of a succeeding type may only be considered where the prior type does not generate relevant pricing information. In reviewing the available pricing information of each type, the relative weight of the information depends on the facts and circumstances of the comparison transaction or quotation. The proposed guidance also makes

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Act Release No. 54799 (Nov. 21, 2006); 71 FR 68856 (Nov. 28, 2006) (FINRA Notice of Filing of Amendments Related to Mark-Up Policy).

36 Consistent with FINRA statements with respect to other fixed income securities, certain news affecting an issuer, such as news of legislation, may affect either a particular issuer or a group or sector of issuers and may not clearly fit within the two previously identified categories – interest rate changes and credit quality changes. Such news may cause price shifts in a municipal security, and could, depending on the facts and circumstances, invalidate the use of the dealer's own contemporaneous cost as a reliable and accurate measure of prevailing market price. See id.

clear the expectation that, because of the lack of active trading in many municipal securities, these factors may frequently not be available in the municipal market. Accordingly, dealers may often need to consult factors further down the waterfall, such as "similar" securities and economic models, to identify sufficient relevant and probative pricing information to establish the prevailing market price of a municipal security.

Similar Securities. If the above factors are not available, the proposed guidance provides that the dealer may take into consideration a non-exclusive list of factors that are generally analogous to those set forth under the hierarchy of pricing factors, but applied here to prices and yields of specifically defined "similar" securities. However, unlike the factors set forth in the hierarchy of pricing factors, which must be considered in the specified order, the factors related to similar securities are not required to be considered in a particular order or particular combination. The non-exclusive factors specifically listed are:

- Prices, or yields calculated from prices, of contemporaneous inter-dealer transactions in a specifically defined "similar" municipal security;
- Prices, or yields calculated from prices, of contemporaneous dealer purchase (sale) transactions in a "similar" municipal security with institutional accounts with which any dealer regularly effects transactions in the "similar" municipal security with respect to customer mark-ups (mark-downs); and
- Yields calculated from validated contemporaneous inter-dealer bid (offer) quotations in "similar" municipal securities for customer mark-ups (mark-downs").

When applying one or more of the factors, a dealer would be required to consider that the ultimate evidentiary issue is whether the prevailing market price of the municipal security will be correctly identified. As stated in the proposed guidance, the relative weight of the pricing

information obtained from the factors depends on the facts and circumstances surrounding the comparison transaction, such as whether the dealer in the comparison transaction was on the same side of the market as the dealer in the subject transaction, the timeliness of the information and, with respect to the final bulleted factor above, the relative spread of the quotations in the "similar" municipal security to the quotations in the subject security. As noted below, regarding isolated transactions generally, in considering yields of "similar" securities, except in extraordinary circumstances, dealers may not rely exclusively on isolated transactions or a limited number of transactions that are not fairly representative of the yields of transactions in "similar" municipal securities taken as a whole.

The proposed guidance provides that a "similar" municipal security should be sufficiently similar to the subject security that it would serve as a reasonable alternative investment to the investor. At a minimum, the municipal security or securities should be sufficiently similar that a market yield for the subject security can be fairly estimated from the yields of the "similar" security or securities. Where a municipal security has several components, appropriate consideration may also be given to the prices or yields of the various components of the security. The proposed guidance also sets forth a number of non-exclusive factors that may be used in determining the degree to which a security is "similar." These include: (i) credit quality considerations;[37] (ii) the extent to which the spread at which the "similar" municipal security trades is comparable to the spread at which the subject security trades; (iii) general

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[37] Credit quality considerations include, but are not limited to, whether the municipal security is issued by the same or similar entity, bears the same or similar credit rating, or is supported by a similarly strong guarantee or collateral as the subject security (to the extent securities of other issuers are designated as "similar" securities, significant recent information concerning either the "similar" security's issuer or subject security's issuer that is not yet incorporated in credit ratings should be considered (e.g., changes to ratings outlooks)).

structural characteristics and provisions of the issue;[38] (iv) technical factors such as the size of the issue, the float and recent turnover of the issue, and legal restrictions on transferability as compared with the subject security; and (v) the extent to which the federal and/or state tax treatment of the "similar" municipal security is comparable to such tax treatment of the subject security.

Because of the unique characteristics of the municipal securities market, including the large number of vastly different issuers and the highly diverse nature of most outstanding securities, the MSRB expects that, in order for a security to qualify as sufficiently "similar" to the subject security, such security will be at least highly similar to the subject security with respect to nearly all of the listed "similar" security factors that are relevant to the subject security at issue. The MSRB believes that this recognition of a practical aspect of the municipal securities market supports a more rational comparison of a municipal security to only those that are likely to produce relevant and probative pricing information in determining the prevailing market price of the subject security. Pricing information, for example, for a taxable security will not be useful in evaluating a tax-exempt security without making some price adjustment for that difference, which would constitute a form of economic modeling that is not permitted except at the next level of the waterfall analysis. The same is true, just as additional examples, of a bond versus another with a different credit rating, a general obligation bond versus a revenue bond, a bond with bond insurance versus one without, a bond with a sinking fund versus one without, and a bond with a call provision versus one without. As a result of these practical aspects, and due also in part to the lack of active trading in many municipal securities, dealers in the municipal

[38] General structural characteristics and provisions of the issue include, but are not limited to, coupon, maturity, duration, complexity or uniqueness of the structure, callability, the likelihood that the municipal security will be called, tendered or exchanged, and other embedded options, as compared with the characteristics of the subject security.

securities market likely may not often find pricing information from sufficiently similar securities and may frequently need to then consider economic models at the next level of the waterfall analysis.

When a security's value and pricing is based substantially on, and is highly dependent on, the particular circumstances of the issuer, including creditworthiness and the ability and willingness of the issuer to meet the specific obligations of the security (often referred to as "story bonds"), in most cases other securities would not be sufficiently similar, and therefore, other securities may not be used to establish the prevailing market price.

Economic Models. If information concerning the prevailing market price of a security cannot be obtained by applying any of the factors at the higher levels of the waterfall, dealers may consider as a factor in assessing the prevailing market price of a security the prices or yields derived from economic models. Such economic models may take into account measures such as reported trade prices, credit quality, interest rates, industry sector, time to maturity, call provisions and any other embedded options, coupon rate, and face value, and may consider all applicable pricing terms and conventions used.[39]

Isolated Transactions and Quotations. The ultimate issue the proposed guidance is intended to address is the prevailing market price of the security; therefore, isolated transactions

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[39] Consistent with FINRA's commentary with respect to other fixed income securities, when a dealer seeks to identify prevailing market price using other than the dealer's contemporaneous cost or contemporaneous proceeds, the dealer must be prepared to provide evidence that would establish the dealer's basis for not using contemporaneous cost (proceeds), and information about the other values reviewed (e.g., the specific prices and/or yields of securities that were identified as similar securities) in order to determine the prevailing market price of the subject security. If a dealer relies upon pricing information from a model the dealer uses or has developed, the dealer must be able to provide information that was used on the day of the transaction to develop the pricing information (i.e., the data that was input and the data that the model generated and the dealer used to arrive at prevailing market price). See supra n. 35, FINRA Notice of Filing of Amendments Related to Mark-Up Policy.

or isolated quotations generally would have little or no weight or relevance in establishing the prevailing market price. Due to the unique nature of the municipal securities market, including the large number of issuers and outstanding securities and the infrequent trading of many securities in the secondary market, the proposed guidance recognizes that isolated transactions and quotations may be more prevalent in the municipal securities market than other fixed income markets and explicitly recognizes that an off-market transaction may qualify as an "isolated transaction" under the proposed guidance.

The proposed guidance also addresses the application of the "isolated" transactions and quotations provision. The proposed guidance explains that, for example, in considering the factors in the hierarchy of pricing factors, a dealer may give little or no weight to pricing information derived from an isolated transaction or quotation. The proposed guidance also provides that, in considering yields of "similar" securities, except in extraordinary circumstances, dealers may not rely exclusively on isolated transactions or a limited number of transactions that are not fairly representative of the yields of transactions in "similar" municipal securities taken as a whole.

Contemporaneous Customer Transactions

Because the proposed guidance ultimately seeks to identify the prevailing inter-dealer market price, a dealer's contemporaneous cost (for customer sales) or proceeds (for customer purchases) in an inter-dealer transaction is presumptively the prevailing market price of the security. Where the dealer has no contemporaneous cost or proceeds, as applicable, from an inter-dealer transaction, the dealer must then consider whether it has contemporaneous cost or proceeds, as applicable, from a customer transaction. In establishing the presumptive prevailing market price, in such instances, the dealer should refer to such contemporaneous cost or proceeds

and make an adjustment for any mark-up or mark-down charged in that customer transaction. This methodology for establishing the presumptive prevailing market price is appropriate because, as explained in the relevant case law, it reflects the fact that the price at which a dealer, for example, purchases securities from customers generally is less than the amount that the dealer would have paid for the security in the inter-dealer market. To identify the prevailing market price for the purpose of calculating the mark-up or mark-down in the contemporaneous customer transaction, the dealer should proceed down the waterfall, according to its terms, identifying the most relevant and probative evidence of the prevailing inter-dealer market price.

This approach is supported by the relevant case law, in which the prevailing market price has been established by reference to a customer price by adjusting the customer price based on an "imputed" mark-up or mark-down.[40] This approach is also consistent with the text of the proposed guidance because the presumptive prevailing market price is, through this methodology, established "by referring to" the dealer's contemporaneous cost or proceeds, as required by proposed Supplementary Material .06(a)(i).[41] Moreover, this approach is consistent

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[40] In a number of instances, where a dealer lacked contemporaneous inter-dealer transactions, the prevailing market price in connection with a sale to a customer was calculated by identifying contemporaneous cost from a transaction with another customer and then making an upward adjustment. The adjustment, referred to in the cases as an "imputed markdown," was then added to the dealer's purchase price from the customer to establish pricing at the level at which an inter-dealer trade might have occurred. Similarly, in determining the prevailing market price of a municipal security in connection with a purchase from a customer, the prevailing market price was determined by identifying the dealer's contemporaneous proceeds in a transaction with another customer, and then making a downward adjustment by deducting an "imputed mark-up" from such contemporaneous proceeds.

[41] For example, assume that Dealer A sells municipal security X to Dealer B at a price of 98.5. Then, assume that Dealer C purchases municipal security X from a customer at a price of 98 and contemporaneously sells the security to a customer at a price of 100. Because Dealer C itself has no other contemporaneous transactions in the security, it would proceed down the waterfall to the hierarchy of pricing factors, discussed supra. A

with the fundamental principle underlying the proposed guidance, because it results in a reasonable proxy for what the dealer's contemporaneous cost or proceeds would have been in an inter-dealer transaction. Indeed, because this adjustment methodology occurs at the first step of the waterfall analysis (proposed Supplementary Material .06(a)(i)), the resulting price from this methodology is presumed to be the prevailing market price for any contemporaneous transactions with the same strength of the presumption that applies to prices from inter-dealer transactions.

This interpretation of the proposed prevailing market price guidance takes on special significance in the context of a mark-up disclosure requirement, such as contained in the proposed amendments to Rule G-15. Where, for example, a dealer purchases a security from one retail customer and contemporaneously sells it to another retail customer, with no relevant market changes in the interim, the total difference between the two prices may be attributed to dealer compensation, but each customer pays only a portion of this difference (as either a mark-up or a mark-down). Without adjustments to the contemporaneous cost and proceeds based on the mark-down and mark-up, respectively, the confirmation disclosures to both customers would reflect "double counting." By contrast, under the adjustment approach, where there are no

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dealer at that level of the waterfall analysis must first consider prices of any contemporaneous inter-dealer transaction in establishing the prevailing market price. Accordingly, Dealer C would consider the contemporaneous inter-dealer transaction between Dealer A and Dealer B at 98.5 in determining the amount of the mark-down, and deduct its contemporaneous cost of 98 from 98.5 to arrive at a mark-down of 0.5. Then, Dealer C would add the amount of the mark-down to the dealer's contemporaneous cost for a presumptive prevailing market price (or adjusted contemporaneous cost) of 98.5. In the absence of evidence to rebut the presumption, when disclosing the mark-up to the customer to whom Dealer C sold municipal security X, Dealer C would then disclose the difference between Dealer C's adjusted contemporaneous cost (98.5) and the price paid by the customer to whom Dealer C sold municipal security X (100) for a mark-up of 1.5 (1.02% of the prevailing market price).

relevant market changes in the interim that would rebut the presumption, there is a complete apportionment of the total difference in price (i.e., no double counting and no part of the total difference in price left undisclosed to either customer).

Non-Arms-Length Affiliate Transactions. The ultimate issue the proposed guidance is intended to address is the prevailing market price of the security, using the most relevant and probative evidence of the market price in the inter-dealer market. Therefore, as noted in the discussion above of the mark-up disclosure requirement, a non-arms-length transaction in a security (as defined in that context) with an affiliate should not be used to identify a dealer's contemporaneous cost or proceeds and presumptively the prevailing market price of the security. The MSRB believes that, for example, sourcing liquidity through a non-arms-length transaction with an affiliate is functionally equivalent to selling out of a dealer's own inventory for purposes of the calculation of the mark-up. The MSRB therefore believes it would be appropriate in those circumstances to require a dealer to "look through" its transaction in a security with its affiliate to the affiliate's transaction(s) in the security with third parties and the related time of trade and cost or proceeds of the affiliate in determining the dealer's calculation of the mark-up pursuant to Rule G-30. This is the case not only for transactions for which mark-up disclosure would be required under the proposed amendments to Rule G-15, but for the application of proposed amended Rule G-30 generally, including the proposed prevailing market price guidance, for purposes of evaluating the fairness and reasonableness of mark-ups and mark-downs.[42]

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[42] For example, assume Dealer A1, a market-facing dealer, and Dealer A2, a retail customer-facing dealer, are affiliates both owned by Company A. On the same trading day, Dealer A1 purchases municipal security X from an unaffiliated dealer at $90 ("Transaction 1"). Dealer A1 displays municipal security X for sale at $93 on Dealer A2's customer-facing platform, on which other dealers have not frequently participated. A retail customer places an order to purchase municipal security X from Dealer A2 at the displayed price of $93. Dealer A2 purchases municipal security X from Dealer A1 at $93

Compliance at the Time of Generation of Disclosure. As noted, the MSRB understands that some dealers provide confirmations on an intra-day basis. The requirement under the proposed amendments to Rule G-15 to disclose a mark-up or mark-down calculated "in compliance with" Rule G-30 (including the proposed prevailing market price guidance) need not delay the confirmation process. A dealer may determine, as a final matter for disclosure purposes, the prevailing market price based on the information the dealer has, based on the use of reasonable diligence as required by proposed amended Rule G-30, at the time the dealer inputs the information into its systems to generate the mark-up disclosure.[43] Such timing of the determination of prevailing market price would avoid potentially open-ended delays that could otherwise result if dealers were required to wait to generate a disclosure until they could

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in a non-arms-length transaction within the meaning of proposed amended Rule G-15 ("Transaction 2"). Dealer A2 then sells municipal security X to the retail customer at $93, plus $1 trading fee ("Transaction 3"). During the day, there are no other transactions in municipal security X and no other dealers display any price for municipal security X. In this example, Transaction 2 should not be used to indicate Dealer A2's contemporaneous cost. Instead, Dealer A2 would be required to "look through" Transaction 2, a non-arm's length transaction with affiliated Dealer A1, and use Transaction 1 and the time of that trade and the related cost to Dealer A1 in determining the prevailing market price.

[43] For example, assume Dealer A systematically inputs the mark-up-related information into its systems intra-day for the generation of confirmations. At 9:00 AM, Dealer A purchases municipal security X from a customer at a price of 98. At 1:00 PM, Dealer A sells such security to another dealer at a price of 100. Dealer A does not sell municipal security X at any other time before 1:00 PM. At the time of the 9:00 AM transaction, Dealer A does not have any contemporaneous proceeds for municipal security X. Therefore, to determine the prevailing market price for municipal security X, Dealer A would proceed down the waterfall to the next category of factors—in this case, the hierarchy of pricing factors, as discussed supra. Dealer A would not be required to consider the price of 100, which the dealer would only know at 1:00 PM. In contrast, assuming instead that Dealer A systematically inputs the mark-up-related information into its systems for confirmation generation at the end of the day, under the same facts as above, it would be required to consider, to the extent required by the prevailing market price guidance, the 1:00 PM inter-dealer trade price in determining the prevailing market price and the related mark-down to be disclosed for the 9:00 AM purchase.

determine, for example, that they do not have any "contemporaneous" proceeds for a particular transaction. Such timing would also permit dealers who, on a voluntary basis, choose to disclose mark-ups and mark-downs on all principal transactions to generate customer confirmations at the time of trade, should they choose to do so. To clarify, a dealer would not be expected to cancel and resend a confirmation to revise the mark-up or mark-down disclosure solely based on the occurrence of a subsequent transaction or event that would otherwise be relevant to the calculation of the mark-up or mark-down under the proposed guidance. Where, however, a dealer has contemporaneous proceeds by the time of generation of the disclosure, the dealer presumptively must establish the prevailing market price of the municipal security by reference to such contemporaneous proceeds.[44]

Consideration of Benefits and Costs

The MSRB believes that requiring dealers to disclose their mark-ups on retail customer confirmations based on the proposed amendments to Rule G-30 would provide meaningful and useful pricing information to a significant number of retail investors and may lower transaction costs for retail transactions. The MSRB also believes that the proposed amendments would provide retail customers engaged in municipal securities transactions covered by the rule with information more comparable to that currently received by retail customers in equity securities

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[44] For example, a dealer that operates an alternative trading system or ATS may often, if not always, be in a position to identify its contemporaneous proceeds in connection with a purchase from a customer. Also, as discussed in supra n. 18, under Rule G-18, Supplementary Material .03, a dealer must make every effort to execute a customer transaction promptly, taking into account prevailing market conditions. Any intentional delay of a transaction to avoid recognizing proceeds as contemporaneous at the time of a transaction or otherwise would be contrary to these duties to customers. A dealer found to purposefully delay the execution of a customer order for such purposes also may be in violation of Rule G-17, on conduct of municipal securities and municipal advisory activities.

transactions and municipal securities transactions in which the dealer acts in an agent capacity. In addition, the disclosure may improve investor confidence, better enable customers to evaluate the costs and quality of the execution service that dealers provide, promote transparency into dealers' pricing practices, improve communication between dealers and their customers, and make the enforcement of Rule G-30 more efficient.

The MSRB believes that the proposed amendments to Rule G-30 reflect an appropriate balance between consistency with existing FINRA guidance for determining prevailing market price in other fixed income securities markets and modifications to address circumstances under which use of the FINRA guidance in the municipal securities market might be inappropriate (e.g., treatment of similar securities).[45] The MSRB also believes that the guidance would promote consistent compliance by dealers with their existing fair-pricing obligations under MSRB rules and would support effective compliance with the proposed amendments to Rule G-15.

The MSRB recognizes, however, that the proposed rule change, comprised of amendments to both Rule G-15 and Rule G-30, would impose burdens and costs on dealers.[46] In MSRB Notices 2014-20, 2015-16 and 2016-07, the MSRB specifically solicited comment on the

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45 For example, the municipal securities market includes a larger number of issuers and larger number of outstanding securities than the corporate bond market, and most municipal securities trade less frequently in the secondary market. In addition, many municipal securities are subject to different tax rules and treatment, and have different credit structures, enhancements and redemption features that may not be applicable to or prevalent for other fixed income securities.

46 The MSRB's evaluation of the potential costs does not consider all of the costs associated with the proposal, but instead focuses on the incremental costs attributable to it that exceed the baseline state. The costs associated with the baseline state are, in effect, subtracted from the costs associated with the proposed rule change to isolate the costs attributable to the incremental requirements of the proposal.

potential costs of the draft amendments contained in those notices. While commenters stated that the initial and the revised confirmation disclosure proposals would impose significant implementation costs, no commenters provided specific cost estimates, data to support cost estimates, or a framework to assess anticipated costs.

Among other things, the proposed rule change would require dealers to develop and deploy a methodology to satisfy the disclosure requirement, identify trades subject to the disclosure, convey the mark-up on the customer confirmation, determine the prevailing market price and the mark-up, and adopt policies and procedures to track and ensure compliance with the requirement. To apply the "look through" to non-arms-length transactions with affiliates, dealers also would need to obtain the price paid or proceeds received and the time of the affiliate's trade with the third party. The MSRB sought data in the above-referenced notices that would facilitate quantification of these costs, but did not receive any data from commenters.

Any such costs, however, may be mitigated under certain circumstances. Dealers choosing to provide disclosure on all customer transactions would not incur the cost associated with identifying trades subject to the disclosure requirement; dealers already disclosing mark-ups to retail customers likely would incur lower costs associated with modifying customer confirmations, and dealers with processes in place to evaluate prevailing market price in compliance with FINRA Rule 2121 and MSRB Rule G-30 may be able to leverage those processes to comply with the proposed amendments to Rule G-30.

Based on comments received in response to the Notices, the MSRB made a number of changes to the draft amendments in an effort to make implementation less burdensome. These changes include utilizing existing processes for identifying retail customers, providing detailed prevailing market price guidance alongside the mark-up disclosure proposal, and ensuring that

prevailing market price could be determined in the least burdensome way among the reasonable alternatives.

The MSRB believes that the proposed rule change reflects the overall lowest cost approach to achieving the regulatory objective. To reach that conclusion, the MSRB evaluated several reasonable regulatory alternatives including relying solely on modifications to EMMA, requiring the disclosure of a "reference price" rather than mark-up, and providing only a mark-up disclosure rule without accompanying prevailing market price guidance. These alternatives were deemed to either not sufficiently address the identified need (in the case of the EMMA alternative) or to represent approaches that offered lesser benefits and greater costs.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with the provisions of Section 15B(b)(2)(C) of the Act,[47] which provides that the MSRB's rules shall:

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

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act[48] because it would provide retail customers with meaningful and useful additional pricing information that retail customers typically cannot readily obtain through existing data sources such as EMMA. This belief is supported by the joint investor testing, which indicated that investors would find aspects of the proposed requirements useful, including

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47 15 U.S.C. 78o-4(b)(2)(C).

48 Id.

disclosure of the time of execution and mark-up or mark-down in a municipal securities transaction both as a dollar amount and as a percentage of the prevailing market price. The MSRB believes that a reference and hyperlink to the Security Details page of EMMA, along with a brief description of the type of information available on that page, will provide retail investors with a more comprehensive picture of the market for a security on a given day and believes that requiring a link to EMMA would increase investors' awareness of, and ability to access, this information. Additionally, results from the joint investor survey support the value to investors of a security-specific link to EMMA, rather than a link to the EMMA homepage. The MSRB believes that the proposed rule change will better enable customers to evaluate the cost of the services that dealers provide by helping customers understand mark-ups or mark-downs from the prevailing market prices in specific transactions. The MSRB also believes that this type of information will promote transparency into dealers' pricing practices and encourage communications between dealers and their customers about the execution of their municipal securities transactions. The MSRB further believes the proposed rule change will provide customers with additional information that may assist them in detecting practices that are possibly improper, which would supplement existing municipal securities enforcement programs.

The proposed amendment to Supplementary Material .01(a) to Rule G-30 will clarify the applicable "reasonable diligence" standard in that provision and conform to existing supplementary material referencing that standard. The proposed amendments to Supplementary Material .01(d) to Rule G-30 will clarify the relationship between that provision and the new proposed Supplementary Material .06 containing the proposed prevailing market price guidance and aid in understanding of the overall rule.

The proposed guidance on prevailing market price will provide dealers with additional guidance for determining prevailing market price in order to aid in compliance with their fair-pricing and mark-up disclosure obligations. The MSRB believes that clarifying the standard for correctly identifying the prevailing market price of a municipal security for purposes of calculating a mark-up, clarifying the additional obligations of a dealer when it seeks to use a measure other than the dealer's own contemporaneous cost (proceeds) as the prevailing market price and confirming that similar securities and economic models may be used in certain instances to determine the prevailing market price are measures designed to remove impediments to and perfect the mechanism of a free and open market in municipal securities, prevent fraudulent practices, promote just and equitable principles of trade and protect investors and the public interest.

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

Section 15B(b)(2)(C)[49] of the Act requires that MSRB rules not be designed to impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The MSRB believes that the proposed rule change will improve price transparency and foster greater price competition among dealers. The MSRB recognizes that some dealers may exit the market or consolidate with other dealers as a result of the costs associated with the proposed rule change relative to the baseline. However, the MSRB does not believe—and is not aware of any data that suggest—that the number of dealers exiting the market or consolidating would materially impact competition.

Some commenters noted that the requirement to make a disclosure to retail customers if the dealer engaged in both the retail customer's transaction and one or more offsetting

[49] Id.

transactions on the same day could disproportionately impact smaller dealers as larger dealers might be more able to hold positions overnight and not trigger the proposed disclosure requirement. The MSRB has noted that any intentional delay of a customer execution to avoid a disclosure requirement would be contrary to a dealer's obligations under Rules G-30, G-18, on best execution, and G-17, on conduct of municipal securities and municipal advisory activities. If the proposed amendments are approved, the MSRB expects that FINRA would monitor trading patterns to ensure dealers are not purposely delaying a customer execution to avoid the disclosure.

Although commenters did not provide any data to support a quantification of the costs associated with these proposals, commenters did indicate that the costs associated with modifying systems to comply with these proposals would be significant. It is possible that larger dealers may be better able to absorb these costs than smaller dealers and that smaller dealers could be forced to exit the market or pass a larger share of the implementation costs on to customers. The MSRB believes that these concerns may be mitigated by several factors. As noted above, dealers choosing to disclose to all customers may not incur the costs associated with identifying transactions that require disclosure and dealers engaging in relatively fewer transactions may be able to develop processes for determining prevailing market price that are relatively less costly than larger, more active dealers. In addition, the MSRB believes that smaller dealers are more likely to have their customer confirmations generated by clearing firms. To the extent that clearing firms would not pass along the full implementation cost to each introducing firm, small firms may incur lower costs in certain areas than large firms.

The proposed rule change may disproportionately impact less active dealers that, as indicated by data, currently charge relatively higher mark-ups than more active dealers.

However, overall, the MSRB believes that the burdens on competition will be limited and the proposed rule change will not impose any additional burdens on competition that are not necessary or appropriate in furtherance of the purposes of the Act. In addition, the MSRB believes that the proposed rule change may foster additional price competition.

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

Proposed Amendments to Rule G-15

The revised confirmation disclosure proposal was published for comment in MSRB Notice 2015-16 (September 24, 2015), and was preceded by the initial confirmation disclosure proposal in MSRB Notice 2014-20 (November 17, 2014). The MSRB received 30 comments in response to MSRB Notice 2014-20,[50] and 25 comments in response to MSRB Notice 2015-16.[51]

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50 See Letter from Eric Bederman, Chief Operating and Compliance Officer, Bernardi Securities, dated December 26, 2014 ("Bernardi Letter I"); Letter from Michael Nicholas, Chief Executive Officer, Bond Dealers of America, dated January 20, 2015 ("BDA Letter I"); Letter from Chris Melton, Executive Vice President, Coastal Securities, dated January 16, 2015 ("Coastal Securities Letter I"); Letter from Micah Hauptman, Financial Services Counsel, Consumer Federation of America, dated January 20, 2015 ("CFA Letter I"); Letter from Larry E. Fondren, President and Chief Executive Officer, DelphX LLC, dated January 7, 2015 ("DelphX Letter I"); Letter from Herbert Diamant, President, Diamant Investments Corp., dated January 9, 2015 ("Diamant Letter I"); Letter from Norman L. Ashkenas, Chief Compliance Officer, Fidelity Brokerage Services LLC and Richard J. O'Brien, Chief Compliance Officer, National Financial Services, LLC, Fidelity Investments, dated January 20, 2015 ("Fidelity Letter I"); Letter from Darren Wasney, Program Manager, Financial Information Forum, dated January 20, 2015 ("FIF Letter I"); Letter from David T. Bellaire, Executive Vice President and General Counsel, Financial Services Institute, dated January 20, 2015 ("FSI Institute Letter I"); Letter from Rich Foster, Vice President and Senior Counsel for Regulatory and Legal Affairs, Financial Services Roundtable, dated January 20, 2015 ("Financial Services Roundtable Letter I"); Emails from Gerald Heilpern, dated December 9, 2014, December 18, 2014 and January 8, 2015 (collectively "Heilpern Letter I"); Letter from Alexander I. Rorke, Senior Managing Director, Municipal Securities Group, Hilliard Lyons, dated January 20, 2015 ("Hilliard Letter I"); Letter from Thomas E. Dannenberg, President and Chief Executive Officer, Hutchinson Shockey Erley and Co., dated January 20, 2015 ("Hutchinson Shockey Letter I"); Letter from Andrew Hausman, President, Pricing & Reference Data, Interactive Data, dated January 20, 2015 ("Interactive Data Letter I");

Email from John Smith, dated December 10, 2014 ("Smith Letter I"); Email from Jorge Rosso, dated November 24, 2014 ("Rosso Letter I"); Letter from Karin Tex, dated January 12, 2015 ("Tex Letter I"); Email from George J. McLiney, Jr., McLiney and Company, dated December 22, 2014 ("McLiney Letter I"); Letter from Vincent Lumia, Managing Director, Morgan Stanley Smith Barney LLC, dated January 20, 2015 ("Morgan Stanley Letter I"); Letter from Peter G. Brandel, Senior Vice President, Municipal Bond Trading, and Kenneth T. Kerr, Senior Vice President, Municipal Bond Trading, Nathan Hale Capital, LLC, dated January 20, 2015 ("Nathan Hale Letter I"); Letter from Rick A. Fleming, Investor Advocate, Office of the Investor Advocate, U.S. Securities and Exchange Commission, dated January 20, 2015 ("SEC Investor Advocate Letter I"); Email from Private Citizen, dated November 23, 2014 ("Private Citizen Letter I"); Letter from Richard Seelaus, R. Seelaus & Co., Inc., dated January 8, 2015 ("R. Seelaus Letter I"); Email from Paige Pierce, RW Smith & Associates, LLC, dated January 21, 2015 ("RW Smith Letter I"); Letter from Sean Davy, Managing Director, Capital Markets Division, and David L. Cohen, Managing Director and Associate General Counsel, Municipal Securities Division, Securities Industry and Financial Markets Association, dated January 20, 2015 ("SIFMA Letter I"); Letter from Gregory Carlin, Vice President, Standard & Poor's Securities Evaluations, Inc., dated January 20, 2015 (S&P Letter I"); Letter from Kyle C. Wootten, Deputy Director – Compliance and Regulatory, Thomson Reuters, dated January 16, 2015 ("Thomson Reuters Letter I"); Letter from Robert J. McCarthy, Director of Regulatory Policy, Wells Fargo Advisors, LLC, dated January 20, 2015 ("Wells Fargo Letter I").

51 See Email from Aaron Botbyl, dated October 9, 2015 ("Botbyl Letter II"); Letter from Eric Bederman, Senior Vice President, Chief Operating and Compliance Officer, Bernardi Securities, Inc., dated December 4, 2015 ("Bernardi Letter II"); Letter from Michael Nicholas, Chief Executive Officer, Bond Dealers of America, dated December 11, 2015 ("BDA Letter II"); Letter from Kurt N. Schacht, Managing Director, Standards and Financial Market Integrity, and Linda L. Rittenhouse, Director, Capital Markets Policy, CFA Institute, dated December 11, 2015 ("CFA Institute Letter II"); Letter from Jason Clague, Senior Vice President, Trading & Middle Office Services, Charles Schwab & Co. Inc., dated December 11, 2015 ("Schwab Letter II"); Email from Chris Melton, Coastal Securities, dated October 30, 2015 ("Coastal Securities Letter II"); Email from Christopher [Last Name Withheld], dated September 25, 2015 ("Christopher Letter II"); Letter from Micah Hauptman, Financial Services Counsel, Consumer Federation of America, dated December 11, 2015 ("CFA Letter II"); Letter from Herbert Diamant, President, Diamant Investment Corporation, dated November 30, 2015 ("Diamant Letter II"); Letter from Norman L. Ashkenas, Chief Compliance Officer, Fidelity Brokerage Services, LLC, and Richard J. O'Brien, Chief Compliance Officer, National Financial Services, LLC, Fidelity Investments, dated December 11, 2015 ("Fidelity Letter II"); Letter from Darren Wasney, Program Manager, Financial Information Forum, dated December 11, 2015 ("FIF Letter II"); Letter from David T. Bellaire, Executive Vice President & General Counsel, Financial Services Institute, dated December 11, 2015, ("FSI Institute Letter II"); Letter from Gerald Heilpern, undated ("Heilpern Letter II"); Email from Jonathan Bricker, dated October 20, 2015; Letter from David P. Bergers,

A copy of MSRB Notice 2014-20 is attached as Exhibit 2a; a list of comment letters received in response is attached as Exhibit 2b; and copies of the comment letters are attached as Exhibit 2c. A copy of MSRB Notice 2015-16 is attached as Exhibit 2d; a list of comment letters received in response is attached as Exhibit 2e; and copies of the comment letters are attached as Exhibit 2f.

Summary of Initial Confirmation Disclosure Proposal and Comments Received

As proposed in MSRB Notice 2014-20, for same-day principal transactions in municipal securities, dealers would have been required to disclose on the customer confirmation the price to the dealer in a "reference transaction" and the differential between the price to the customer and the price to the dealer. The initial proposal would have applied where the transaction with the customer involved 100 bonds or fewer or bonds in a par amount of $100,000 or less, which was designed to capture those trades that are retail in nature.

Of the 30 comments the MSRB received on the proposal, six supported the proposal, while 24 commenters generally opposed the proposal or made recommendations on ways to

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General Counsel, LPL Financial LLC, dated December 10, 2015 ("LPL Letter II"); Letter from Elizabeth Dennis, Managing Director, Morgan Stanley Smith Barney LLC, dated December 11, 2015 ("Morgan Stanley Letter II"); Letter from Rick A. Fleming, Investor Advocate, Office of the Investor Advocate, U.S. Securities and Exchange Commission, dated December 11, 2015 ("SEC Investor Advocate Letter II"); Letter from Patrick Luby, dated December 11, 2015 ("Luby Letter II"); Letter from Hugh D. Berkson, President, Public Investors Arbitration Bar Association, dated December 8, 2015 ("PIABA Letter II"); Letter from David L. Cohen, Senior Counsel and Director, RBC Capital Markets, LLC, dated December 15, 2015 ("RBC Letter II"); Letter from Paige W. Pierce, President & Chief Executive Officer, RW Smith and Associates, LLC, dated December 11, 2015 ("RW Smith Letter II"); Letter from Sean Davy, Managing Director, Capital Markets Division, and Leslie M. Norwood, Managing Director & Associate General Counsel, Municipal Securities Division, Securities Industry and Financial Markets Association, dated December 11, 2015 ("SIFMA Letter II"); Letter from Manisha Kimmel, Chief Regulatory Officer, Wealth Management, Thomson Reuters, dated December 11, 2015 ("Thomson Reuters Letter II"); Letter from Thomas S. Vales, Chief Executive Officer, TMC Bonds LLC, dated December 11, 2015 ("TMC Bonds Letter II"); Letter from Robert J. McCarthy, Director of Regulatory Policy, Wells Fargo Advisors LLC, dated December 11, 2015 ("Wells Fargo Letter II").

narrow substantially the scope of the proposal. Generally, commenters that supported the proposal stated that the proposed confirmation disclosure would provide additional post-trade information to investors that would be otherwise difficult to ascertain.[52] Three commenters, including the Consumer Federation of America and the SEC Investor Advocate, stated that this additional information would put investors in a better position to assess whether they are paying fair prices and the quality of the services provided by their dealer, and also could assist investors in detecting improper practices.[53] The Consumer Federation of America indicated that the proposal would foster increased price competition in fixed income markets, which would ultimately lower investors' transaction costs.[54] Two commenters recommended that the proposal not be limited to retail trades under the proposed size threshold, but that disclosure should be made on all trades involving retail customers, regardless of size.[55]

Other commenters opposed the proposal on several grounds. Commenters questioned whether the proposed disclosure would provide investors with useful information,[56] or whether the disclosure would simply create confusion among investors.[57] Commenters asserted that the proposed methodology for determining the reference transaction would be overly complex[58] and

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52 See, e.g., SEC Investor Advocate Letter I at 1-2.

53 See CFA Letter I at 1; DelphX Letter I at 2; SEC Investor Advocate Letter I at 2.

54 See CFA Letter I at 1.

55 See Hutchinson Shockey Letter I at 2; Thomson Reuters Letter I at 7.

56 See Diamant Letter I at 5.

57 See BDA Letter I at 4-5; FSI Institute Letter I at 3; Morgan Stanley Letter I at 2; SIFMA Letter I at 17; Wells Fargo Letter I at 5.

58 See Fidelity Letter I at 4; FIF Letter I at 2; SIFMA Letter I at 24-26; Thomson Reuters Letter I at 2; Wells Fargo Letter I at 8.

costly for dealers to implement.[59] Commenters also indicated the proposal could impair liquidity in the municipal market.[60]

Several commenters suggested ways to narrow the scope of the proposal. Some commenters recommended that the MSRB limit the disclosure obligation to riskless principal transactions involving retail investors, as this would more accurately reflect dealer compensation and transaction costs,[61] and would be more consistent with the stated objectives of the SEC in this area and of the proposal itself.[62] Some commenters suggested that the proposed rule should apply to riskless principal transactions as previously defined by the Commission for equity trades, wherein the dealer has an "order in hand" at the time of execution.[63] One commenter, however, did not think that such a limitation would appreciably reduce the complexity or cost of the proposal.[64] Commenters also suggested that the MSRB eliminate institutional trades from the scope of the proposal: for example, by not covering institutional accounts as defined in Rule G-8(a)(xi) or sophisticated municipal market professionals ("SMMP") as defined in MSRB Rule D-

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59 See BDA Letter I at 2-3; Diamant Letter I at 7-8; Fidelity Letter I at 4-5; FIF Letter I at 2; FSI Institute Letter I at 5; Financial Services Roundtable Letter I at 5; Morgan Stanley Letter I at 3; Wells Fargo Letter I at 7-9.

60 See Diamant Letter I at 8-9; FSI Institute Letter I at 3.

61 See Hilliard Letter I at 2; Morgan Stanley Letter I at 2; SIFMA Letter I at 29; Wells Fargo Letter I at 11.

62 See SIFMA Letter I at 31.

63 See Hilliard Letter I at 2; SIFMA Letter I at 30; Wells Fargo Letter I at 11.

64 See Thomson Reuters Letter I at 7.

15.[65] Both Fidelity and SIFMA stated that the proposal should permit trading desks that are separately operated within a firm to match only their own trades for purposes of pricing disclosure.[66] Morgan Stanley and SIFMA also stated that transactions between affiliates should not constitute a firm principal trade that, if accompanied by a same-day customer trade, would trigger the disclosure requirement.[67] Commenters also suggested that the proposal exempt the disclosure of mark-ups on new issues.[68] One commenter suggested specifically that this exemption should cover transactions in new issues executed at the public offering price on the date of the issue's sale.[69]

Rather than proposing pricing reference disclosure, several commenters suggested that the MSRB instead enhance EMMA, in part by providing greater investor education about EMMA,[70] and requiring dealers to make EMMA more accessible[71] by, for example, providing

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65 See BDA Letter I at 6; FIF Letter I at 3; Morgan Stanley Letter I at 3; SIFMA Letter I at 35.

66 See Fidelity Letter I at 8; SIFMA Letter I at 36.

67 See Morgan Stanley Letter I at 3; SIFMA Letter I at 21.

68 See BDA Letter I at 6; Coastal Securities Letter I at 1; SIFMA Letter I at 22.

69 See Coastal Securities Letter I at 1.

70 See Fidelity Letter I at 7; FSI Institute Letter I at 6-7; Financial Services Roundtable Letter I at 6; Hilliard Letter I at 2-3; Morgan Stanley Letter I at 2; SIFMA Letter I at 15-16.

71 See Thomson Reuters Letter I at 6.

more near-real-time EMMA information to investors[72] or providing a link to EMMA on customer confirmations,[73] or by aggregating all TRACE and EMMA data on a single website.[74]

Summary of Revised Confirmation Disclosure Proposal and Comments Received

In response to the comments received on MSRB Notice 2014-20, the MSRB proposed a different disclosure standard that was built upon the framework of the initial confirmation disclosure proposal, but modified a number of its key aspects and added several exceptions to the proposed disclosure requirement.[75]

First, in response to concerns that the disclosures may be misconstrued by investors who may equate them with mark-ups or believe that they are always reflective of contemporaneous market conditions, the MSRB proposed requiring dealers to disclose the amount of mark-up or mark-down, as calculated from the prevailing market price for the security, rather than disclose the difference between the customer's price and the dealer's price in a reference transaction. The MSRB also proposed that the mark-up or mark-down disclosure be expressed as a total dollar amount and as a percentage.

Second, the MSRB proposed to narrow the disclosure time window from a same-day disclosure standard to a two-hour disclosure standard. Thus, mark-up disclosure would be required only where the dealer's same-side of the market transaction occurs within the two hours preceding or following the customer transaction. The MSRB explained that it believed that such a time frame would be sufficient to cover transactions that could be considered "riskless

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72 See Wells Fargo Letter I at 7.

73 See Fidelity Letter I at 7; FSI Institute Letter I at 6; Hilliard Letter I at 3; Morgan Stanley Letter I at 2; SIFMA Letter I at 15-16.

74 See FIF Letter I at 4.

75 See MSRB Notice 2015-16 (September 24, 2015).

principal" transactions under any current market understanding of the term, but that it was not proposing a broader same-day trigger out of concern about the potential for additional costs and complexities associated with a broader disclosure time trigger. However, the MSRB specifically sought public comment as to whether a broader disclosure time trigger, such as a same-day standard, might be warranted.

Third, the MSRB proposed to replace the transaction size retail-customer proxy (i.e., 100 bonds or fewer or bonds in a par amount of $100,000 or less) proposed in the initial confirmation disclosure proposal with a status-based exclusion for transactions that involve an institutional account, as defined in Rule G-8(a)(xi). This would ensure that all eligible transactions involving retail customers, regardless of size or par amount, would be subject to the proposed disclosure and was responsive to dealer concerns about using disparate definitions of a retail customer.

Fourth, the MSRB proposed to require the disclosure of two additional data points, even if mark-up disclosure would not be required under the MSRB's proposal. The MSRB proposed to require that: (i) dealers add a CUSIP-specific link to EMMA on all customer confirmations and (ii) dealers disclose the time of execution of a customer's trade on all customer confirmations. These disclosures were intended to provide context for the mark-up disclosures received by providing retail customers with a comprehensive view of the market for their security, including the market as of the time of trade. They were also responsive to commenter suggestions that the MSRB leverage EMMA and direct investors to the more comprehensive information there.

Finally, the MSRB proposed three exceptions to the mark-up disclosure requirement. Under the first exception, in response to concerns from commenters that compensation disclosure is not warranted for primary market transactions, the MSRB proposed to provide an

exclusion from a confirmation disclosure requirement for a customer transaction that is a "list offering price transaction," as defined in paragraph (d)(vii)(A) of Rule G-14 RTRS Procedures. A "list offering price transaction" is a primary market sale transaction executed on the first day of trading of a new issue by a sole underwriter, syndicate manager, syndicate member, selling group member, or distribution participant to a customer at the published list offering price for the security.

Under the second exception, in response to concerns from commenters that having the disclosure requirements triggered by trades made by separate trading departments or desks would undermine the legal and operational separation of those desks, the MSRB proposed to except from the mark-up disclosure requirement transactions between functionally separate trading desks. Under this exception, confirmation disclosure would not be required where, for example, the customer transaction was executed by a principal trading desk that is functionally separate from the retail-side desk if the functionally separate principal trading desk had no knowledge of the customer transaction.

Under the third exception, in response to concerns from commenters about having the disclosure requirements triggered by certain trades between affiliates, the MSRB proposed to require dealers to "look through" a transaction with an affiliated dealer and substitute the affiliate's trade with the third party from whom the dealer purchased or to whom the dealer sold the security to determine whether disclosure of the mark-up would be required. This "look through" would apply only for dealers that, on an exclusive basis, acquire municipal securities from, or sell municipal securities to, an affiliate that holds inventory in such securities and transacts with other market participants. Some commenters stated that acquiring a security through an affiliate was functionally similar to an inventory trade, and that this trade would be of

limited value,[76] particularly where the inter-affiliate trades are tantamount to a booking move across affiliates.[77]

As an ongoing alternative to the revised confirmation disclosure proposal, the MSRB also sought comment on a revised pricing reference proposal that was largely consistent with a revised confirmation disclosure proposal then under consideration by FINRA[78] and, more broadly, sought comment on the revised FINRA confirmation disclosure proposal itself. Under the revised FINRA confirmation disclosure proposal, if a firm sells to a customer as principal and on the same day buys the same security as principal from another party in one or more transaction(s) that equal or exceed the size of the customer transaction, the firm would have to disclose on the customer confirmation the price to the customer; the price to the firm of the same-day trade (the "reference price"); and the difference between those two prices. The revised FINRA confirmation disclosure proposal would permit firms to use alternative methodologies for calculating the reference price for more complex trade scenarios and would also permit firms to omit the reference price in the event of a material change in the price of the security between the time of the firm principal trade and the customer trade. Lastly, the revised FINRA confirmation disclosure proposal would require firms to provide a link to TRACE data on confirmations that are subject to the disclosure requirement.

The revised FINRA confirmation disclosure proposal also contained a number of exclusions that were generally consistent with those in the MSRB revised confirmation disclosure proposal. These included exclusions for: transactions that involve an institutional

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76 See SIFMA Letter I at 21.

77 See Morgan Stanley Letter I at 3.

78 See FINRA Regulatory Notice 15-36 (October 2015).

account; transactions that are part of a fixed price new issue and are sold at the fixed price offering price; firm principal trades that are executed on a trading desk functionally separate from the retail trading desk for purposes of calculating a reference price; and firm principal trades with affiliates for positions that were acquired by the affiliate on a previous trading day.

In response to the MSRB's revised confirmation disclosure proposal, some commenters reiterated that retail investors would benefit from some form of enhanced price disclosure. For example, the Consumer Federation of America stated that increased price disclosure would provide investors with the opportunity to make more informed investment decisions, and would foster increased price competition in the fixed income markets.[79] The SEC Investor Advocate stated that some kind of regulatory solution was necessary, as retail investors in fixed income securities "remain disadvantaged by the lack of information they receive in confirmation statements."[80] The PIABA stated that "abuse of undisclosed mark-ups and mark-downs is not a hypothetical problem," and that making additional pricing information available could result in customers being charged more favorable prices.[81]

A number of commenters supported the MSRB's proposal of disclosing the mark-up based on the prevailing market price instead of the reference price.[82] Both BDA and Schwab stated that the reference price proposal would be costly, difficult for dealers to implement and for retail customers to understand, and may not provide customers with meaningful information

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79 See CFA Letter II at 6.

80 See SEC Investor Advocate Letter II at 2.

81 See PIABA Letter II at 3.

82 See BDA Letter II at 6; Fidelity Letter II at 5; FSI Letter II at 5; LPL Letter II at 1; Schwab Letter II at 3; SEC Investor Advocate Letter II at 5.

about the costs associated with particular transactions.[83] Schwab noted that, under the reference price proposal, a customer may receive disclosure for the execution of one lot of a particular order, but not for another lot of the same order.[84] Schwab stated that the reference price proposal would also reflect market fluctuations, so that a customer may infer that the dealer lost money on a transaction with a customer, even if a mark-up was charged.[85] FSI noted that using prevailing market price would ensure that customers "receive the most reasonably accurate understanding of the cost of their trade."[86] In addition, FSI indicated that "structuring pricing disclosure around prevailing market price will align any new disclosure requirements with existing fair pricing policies enforced by both FINRA and the MSRB."[87] Fidelity stated that the proposed disclosure requirement should focus on the difference between the price the customer was charged for a fixed income security and the prevailing market price of the fixed income security.[88] Fidelity noted that a dealer's actual contemporaneous costs or proceeds are a reasonable proxy for the prevailing market price in some situations, but stated that there are many situations in which a dealer's costs or proceeds are not a reasonable proxy for the prevailing market price.[89] Fidelity proposed that the prevailing market price be defined as the dealer's best available price for the

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83 See BDA Letter II at 4-5; Schwab Letter II at 2.

84 See Schwab Letter II at 2.

85 See Schwab Letter II at 2.

86 See FSI Letter II at 5.

87 Id.

88 See Fidelity Letter II at 5, 7-8.

89 Id. at 7.

subject security under the best available market at the time of trade execution.[90] Fidelity proposed different methodologies that dealers could apply when determining the prevailing market price, including (1) looking at a trader's mark-to-market at the end of the day; (2) contemporaneous cost; (3) top of book; and (4) vendor solutions that offer real time valuations for certain securities.[91]

In supporting the MSRB's mark-up disclosure approach, the SEC Investor Advocate noted that although mark-up disclosure may lead to disclosure to an investor of information indicating a smaller cost under some circumstances than under the reference price proposal, it nonetheless provides relevant information about the actual compensation the investor is paying the dealer for the transaction, reflects market conditions and has the potential to provide a more accurate benchmark for calculating transaction costs.[92] LPL Financial noted that mark-up disclosure based on prevailing market price would be relevant to retail transactions in all kinds of fixed income securities that might be the subject of future disclosure requirements.[93]

Some commenters opposed limiting the disclosure requirement to circumstances where the dealer principal and customer trades occur closer in time to each other, such as two hours, as the MSRB previously had proposed. Coastal Securities, the Consumer Federation of America and the SEC Investor Advocate noted that a shorter timeframe would increase the possibility that

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90 Id.

91 Id. at 8.

92 See SEC Investor Advocate Letter II at 5.

93 See LPL Letter II at 4.

dealers would attempt to evade the disclosure requirement by holding onto positions.[94] Other commenters, including Morgan Stanley and SIFMA, supported the two-hour timeframe for disclosure.[95] These commenters stated that the two-hour window would capture the majority of the trades at issue, and would also be easier to implement.[96] Commenters stated that the concern that a shorter timeframe would facilitate gaming of the disclosure requirement was misplaced, as it was unlikely that dealers would change trading patterns and increase risk exposure merely to avoid disclosure.[97] One commenter also said that regulators have sufficient access to data that would show whether dealers were attempting to game a two-hour disclosure window.[98]

Commenters generally supported the change of the scope of the proposal from the "qualifying size" standard (transactions involving 100 bonds or fewer or $100,000 face amount or less) to all transactions with non-institutional accounts.[99] The Consumer Federation of America noted that the revised standard would help ensure that all retail transactions would receive disclosure, regardless of size.[100]

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94 See Coastal Securities Letter II at 1; CFA Letter II at 2; SEC Investor Advocate Letter II at 5.

95 See Bernardi Letter II at 1; CFA Institute Letter II at 1; Coastal Securities Letter II; Morgan Stanley Letter II at 3; RBC Letter II at 2; SIFMA Letter II at 7.

96 See CFA Institute Letter II at 5; Morgan Stanley Letter II at 3; SIFMA Letter II at 7.

97 See Morgan Stanley Letter II at 3; RW Smith Letter II at 2; SIFMA Letter II at 10.

98 See RW Smith Letter II at 2.

99 See CFA Letter II at 4; PIABA Letter II at 2; Schwab Letter II at 5; SIFMA Letter II at 15.

100 See CFA Letter II at 4.

Three commenters opposed the proposal to require dealers to disclose the time of the execution of the customer transaction.[101] FIF stated that this proposal would create additional expense for dealers, and information related to time of execution could not be adjusted in connection with any trade modifications, cancellations or corrections.[102] FIF also indicated that the execution time is not necessary because "the number of trades in each CUSIP listed on EMMA are so limited that investors will not have difficulty in ascertaining the prevailing market price at or around the time of their trade."[103] Schwab indicated that this would not be a necessary data point for investors if mark-ups are disclosed from the prevailing market price.[104]

Other commenters, however, supported including the time of execution of the customer trade.[105] Thomson Reuters stated that including the time of execution would allow retail investors to more easily identify relevant trade data on EMMA[106] and FSI stated that this would allow investors to understand the market for their security at the time of their trade.[107]

Several commenters supported adding a security-specific link to EMMA,[108] while other commenters, including FSI, SIFMA and Thomson Reuters, supported adding a general link to the EMMA website, noting that, in their view, a CUSIP-specific link could be inaccurate or

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101 See FIF Letter II at 5; Schwab Letter II at 6; SIFMA Letter II at 16.

102 See FIF Letter II at 5.

103 See FIF Letter II at 6.

104 See Schwab Letter II at 6.

105 See CFA Institute Letter II at 4; FSI Letter II at 7; Thomson Reuters Letter II at 2.

106 See Thomson Reuters Letter II at 2.

107 See FSI Letter II at 7.

108 See Bernardi Letter at 1; CFA Institute Letter II at 3-4; Schwab Letter II at 6; Fidelity Letter II at 8; RBC Letter II at 2.

misleading, and could be difficult for dealers to implement.[109] BDA stated that a general link to the main EMMA page would be operationally easier to achieve.[110]

Commenters supported the proposed exception for transactions involving separate trading desks,[111] although Schwab indicated that this exception should be subject to information barriers and rigorous oversight.[112] The Consumer Federation of America suggested the MSRB specifically require, in the rule text, that dealers have policies and procedures in place to ensure functional separation between trading desks,[113] and the SEC Investor Advocate suggested that the MSRB provide more "robust" guidance as to what constitutes a functional separation and applicable requirements.[114]

Some commenters supported the proposed requirement, in cases of transactions between affiliates, to "look through" to the affiliate's principal transaction for purposes of determining whether disclosure is required.[115] FIF and Thomson Reuters stated, however, that not all dealers are able to "look through" principal trades, given information barriers and the fact that dealers often conduct inter-dealer business on a completely separate platform than the retail business.[116]

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109 See FSI Institute Letter II at 6; SIFMA Letter II at 19; Thomson Reuters Letter II at 2.

110 See BDA Letter II at 3.

111 See CFA Letter II at 5; CFA Institute Letter II at 3; Schwab Letter II at 6; SIFMA Letter II at 14-15.

112 See Schwab Letter II at 6.

113 See CFA Letter II at 5.

114 See SEC Investor Advocate Letter II at 6.

115 See CFA Institute Letter II at 3; Fidelity Letter II at 11-12; PIABA Letter II at 2; Schwab Letter at 6; SIFMA Letter II at 18.

116 See FIF Letter II at 5; Thomson Reuters Letter II at 3.

Summary of Proposed Amendments to Rule G-30

The proposed amendments to Rule G-30 to provide prevailing market price guidance was published for comment in MSRB Notice 2016-07 (February 18, 2016). The MSRB received nine comment letters in response to the request for comment on the draft guidance.[117] A copy of MSRB Notice 2016-07 is attached as Exhibit 2g. A list of comment letters received in response to MSRB Notice 2016-07 is attached as Exhibit 2h, and copies of the comment letters received are attached as Exhibit 2i.

Summary of the Proposed Guidance and Comments Received

As proposed in MSRB Notice 2016-07, generally, the prevailing market price of a municipal security would be presumptively established by referring to the dealer's contemporaneous cost as incurred, or contemporaneous proceeds as obtained. If this presumption is either inapplicable or successfully rebutted, the prevailing market price would be determined by referring in sequence to: (1) a hierarchy of pricing factors, including contemporaneous inter-dealer transaction prices, institutional transaction prices, and if an actively traded security, contemporaneous quotations; (2) prices or yields from contemporaneous inter-dealer or

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117 Letter from Michael Nicholas, Chief Executive Officer, Bond Dealers of America, dated March 31, 2016 ("BDA Letter III"); E-mails from G. Lettieri, Breena LLC, dated February 23, 2016 and March 10, 2016 ("Breena Letter III"); Letter from Brian Shaw, dated March 28, 2016 ("Shaw Letter III"); E-mail from Herbert Murez, dated March 28, 2016 ("Murez Letter III"); Letter from Marcus Schuler, Head of Regulatory Affairs, Markit, dated March 31, 2016 ("Markit Letter III"); Letter from Rick A. Fleming, Investor Advocate, Office of the Investor Advocate, U.S. Securities and Exchange Commission, dated March 31, 2016 ("SEC Investor Advocate Letter III"); Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, Municipal Securities Division, and Sean Davy, Managing Director, Capital Markets Division, Securities Industry and Financial Markets Association, dated March 31, 2016 ("SIFMA Letter III"); Letter from J. Ben Watkins III, Director, State of Florida, Division of Bond Finance, dated March 31, 2016 ("State of Florida Letter III"); Letter from Manisha Kimmel, Chief Regulatory Officer, Wealth Management, Thomson Reuters, dated March 31, 2016 ("Thomson Reuters Letter III").

institutional transactions in similar securities and yields from validated contemporaneous quotations in similar securities; and (3) economic models.

Of the nine comments the MSRB received on the proposal, the majority suggested alternatives or made recommendations to modify substantially more than one key aspect of the proposal.[118] The SEC Investor Advocate described the draft guidance as generally useful, clear, and consistent with the FINRA guidance, but urged the MSRB to tighten a perceived "loophole" with respect to transactions between affiliates.[119]

Other commenters opposed the draft guidance on several grounds. Commenters questioned the appropriateness of a hierarchical approach in the municipal market.[120] These commenters generally expressed a belief that while a prescriptive hierarchical approach may be appropriate for more liquid non-municipal debt securities, it is not appropriate for the more unique and heterogeneous municipal market.

A number of commenters stated that additional factors not permitted to be considered under the draft guidance should be expressly permitted to be considered when determining the prevailing market price of a municipal security. These include: trade size;[121] spread to an index;[122] and side of the market.[123] Others still suggested modifying or providing additional

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118 See Shaw Letter III at 2; Markit Letter III at 1-5; SEC Investor Advocate III at 5-8; SIFMA Letter III at 3-14; Thomson Reuters Letter III at 2.

119 See SEC Investor Advocate Letter III at 8.

120 See BDA Letter III at 2; Markit Letter III at 2.

121 See SIFMA Letter III at 7; Thomson Reuters Letter III at 2; Markit Letter III at 4.

122 See Thomson Reuters Letter III at 2.

123 See SIFMA Letter III at 7.

guidance for certain factors that are required or permitted to be considered under the draft guidance such as isolated transactions;[124] economic models;[125] and similar securities.[126] One commenter requested additional guidance on the meaning of the term, "contemporaneous."[127]

One commenter suggested that SMMPs should be exempted from the fair pricing requirement under Rule G-30, reasoning that, if SMMPs are sophisticated enough to opt out of Rule G-18 best-execution protections, they should similarly be able to opt out of fair pricing protections.[128] Another commenter suggested that the draft guidance should be limited to apply only to non-institutional accounts, consistent with the scope of the mark-up disclosure proposal.[129]

Based on a concern that a disclosed mark-up could appear misleadingly small when calculated from a non-arms-length transaction with an affiliated dealer, the SEC Investor Advocate urged the MSRB to require dealers acquiring securities from, or selling securities to, an affiliated dealer to always "look through" a non-arms-length transaction with an affiliate in establishing prevailing market price.[130] The SEC Investor Advocate further suggested that the underlying concern could be addressed in a number of ways (or combination thereof), including potentially modifying the draft guidance, modifying the proposed mark-up disclosure

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124 See Thomson Reuters Letter III at 2; SIFMA Letter III at 9.

125 See Thomson Reuters Letter III at 2.

126 See Thomson Reuters Letter III at 2; SIFMA Letter III at 8.

127 See SIFMA Letter III at 6.

128 See BDA Letter III at 4.

129 See SIFMA Letter III at 9-10.

130 See SEC Investor Advocate Letter III at 5-8.

requirement or providing further explanation regarding non-arms-length inter-affiliate transactions in any filing of a proposed rule change.[131]

Commenters suggested that the MSRB should provide the market sufficient implementation time before any prevailing market price guidance is effective.[132] Two commenters specifically suggested that any final prevailing market price guidance and any final mark-up disclosure requirements should be adopted at the same time.[133] One commenter suggested a minimum three-year implementation period.[134]

A number of commenters suggested that the MSRB take an alternative approach to adopting prevailing market price guidance. One commenter suggested that the MSRB should permit dealers to rely on the use of third-party pricing vendors under certain conditions,[135] while another suggested the MSRB should calculate and disseminate a net weighted average price which should be used in place of the prevailing market price.[136]

One commenter stated that dealers may calculate different prevailing market prices from the same set of facts and that dealers should be permitted to rely on reasonably designed policies and procedures to determine, in an automated fashion, the prevailing market price of a security.[137] Others expressed concern about the burden on dealers in complying with the draft

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131 Id.

132 See SIFMA Letter III at 13; Thomson Reuters Letter III at 2-3.

133 See BDA Letter III at 2-3; SIFMA Letter III at 13.

134 See SIFMA Letter III at 13.

135 See Markit Letter III at 4.

136 See Shaw Letter III at 2.

137 See SIFMA Letter III at 3.

guidance, and questioned whether such burden would be outweighed by any benefits to the market.[138]

More generally, three commenters suggested that the MSRB should coordinate with FINRA to develop consistent guidance and standards with respect to determining the prevailing market price of a security, including, potentially, the making by FINRA of corresponding changes to the FINRA guidance.[139]

In response to the comments received on the draft guidance, the MSRB clarified in the text of the proposed guidance that the list of factors specifically set forth in the proposed guidance to be used in determining whether a municipal security is sufficiently similar to the subject security as to be a "similar" security under the proposed guidance is a non-exclusive list. The text of the proposed guidance also makes clear that the determination of whether such security is "similar" may be determined by all relevant factors.

With respect to isolated transactions, the proposed guidance now clarifies that the determination of whether a transaction is an "isolated transaction" as that term is used in the proposed guidance is not limited to a strictly temporal consideration, and that "off-market transactions" may be deemed isolated transactions under the proposed guidance.

The MSRB agrees with the SEC Investor Advocate's concern regarding the potential for misleading mark-up or mark-down calculations and disclosures when the mark-up or mark-down is determined by reference to a non-arms-length transaction with an affiliated dealer. The MSRB has addressed this concern, as discussed above, through a combination of provisions in the

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138 See BDA Letter III at 1; State of Florida Letter III at 1; SIFMA Letter III at 14.

139 See SIFMA Letter III at 5; Markit Letter III at 5; SEC Investor Advocate Letter III at 6.

proposed mark-up disclosure requirement and explanation in this filing of the MSRB's intended meaning of the proposed prevailing market price guidance.[140]

The MSRB is not, at this time, providing any additional guidance regarding the defined term, "contemporaneous," as that term is used in the proposed guidance. This term is used in the FINRA guidance and adoption of the same term and definition within the proposed guidance promotes consistency and harmonization across fixed income markets. However, as discussed above, the determination of prevailing market price, as a final matter for purposes of confirmation disclosure, may be made at the time of a dealer's generation of the disclosure.

As noted above, the MSRB recognizes that the determination of the prevailing market price of a particular security may not be identical across dealers, although the MSRB expects that even where dealers may reasonably arrive at different prevailing market prices for the same security, the difference between such prevailing market price determinations would typically be small. The MSRB would expect that dealers have reasonable policies and procedures in place to calculate the prevailing market price and that such policies and procedures are applied consistently across customers.

Also as noted above, the MSRB has been in close coordination with FINRA on the development of the MSRB's mark-up disclosure proposal and the proposed guidance. The MSRB believes that the MSRB proposals are generally harmonized with the FINRA confirmation disclosure proposal and the interpretation of FINRA guidance, as applicable and to the extent appropriate in light of the differences between the markets.

The MSRB believes that the cumulative effect of the MSRB's modifications and clarifications contained in the proposed guidance is to make the waterfall generally less

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[140] See discussion supra, Non-Arms-Length Affiliate Transactions.

subjective and more easily susceptible to programming (e.g., specific guidance with respect to determining contemporaneous cost or proceeds, the ability to determine the prevailing market price at the time of the making of a disclosure and the ability to consider economic models earlier in the process to the extent there are no "similar" securities to be considered). At the same time, these modifications and clarifications provide dealers with a greater degree of flexibility with respect to certain elements of the waterfall (e.g., more flexibility in determining the similarity of securities). The MSRB believes that these changes make the hierarchical approach more appropriate for the municipal market.

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

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

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

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

IV. Solicitation of Comments

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

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-MSRB-

2016-12 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-MSRB-2016-12. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00 pm. Copies of the filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change; 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-2016-12 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, pursuant to delegated authority.[141]

Brent J. Fields
Secretary

[141] 17 CFR 200.30-3(a)(12).