will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR–BATS–2011–032 and should be submitted on or before October 3, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–23170 Filed 9–9–11; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65282; File No. SR–MSRB–2011–14]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Proposed Rule G–36, on Fiduciary Duty of Municipal Advisors, and a Proposed Interpretive Notice Concerning the Application of Proposed Rule G–36 to Municipal Advisors

September 7, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 23, 2011, the Municipal Securities Rulemaking Board (''Board'' or ''MSRB'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The MSRB is filing with the SEC a proposed rule change consisting of proposed Rule G–36 (on fiduciary duty of municipal advisors) and a proposed interpretive notice (the ''Notice'') concerning the application of proposed Rule G–36 to municipal advisors. The MSRB requests that the proposed rule change be made effective on the date that rules defining the term ''municipal advisor'' under the Exchange Act are first made effective by the Commission or such later date as the proposed rule change is approved by the Commission.

The text of the proposed rule change is available on the MSRB's Web site at *http://www.msrb.org/Rules-and-Interpretations/SEC-Filings/2011-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 Board 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

With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''),[3] the MSRB was expressly directed by Congress to protect municipal entities. Accordingly, the MSRB is proposing Rule G–36 and an interpretive notice thereunder to address the fiduciary duty of municipal advisors to their municipal entity clients.

A more-detailed description of the provisions of the Notice follows:

Duty of Loyalty. The Notice would provide that the Rule G–36 duty of loyalty would require the municipal advisor to deal honestly and in good faith with the municipal entity and to act in the municipal entity's best interests without regard to financial or other interests of the municipal advisor. It would require a municipal advisor to make clear, written disclosure of all material conflicts of interest, such as those that might impair its ability to satisfy the duty of loyalty, and to receive the written, informed consent of officials of the municipal entity the municipal advisor reasonably believes have the authority to bind the municipal entity by contract with the municipal advisor. Such disclosure would be required to be made before the municipal advisor could provide municipal advisory services to the municipal entity or, in the case of conflicts discovered or arising after the municipal advisory relationship has commenced, before the municipal advisor could continue to provide such services.

The Notice would provide that a municipal advisor may not undertake an engagement if certain unmanageable conflicts exist, including (i) kickbacks and certain fee-splitting arrangements with the providers of investments or services to municipal entities, (ii) payments by municipal advisors made for the purpose of obtaining or retaining municipal advisory business other than reasonable fees paid to a municipal advisor for solicitation activities regulated by the MSRB, and (iii) acting as a principal in matters concerning the municipal advisory engagement (except when providing investments to the municipal entity on a temporary basis to ensure timely delivery for closing; when engaging in activities permitted under Rule G–23; when it is a municipal advisor solely because it recommends investments or municipal financial products provided or offered by it to a municipal entity as a counterparty (other than a swap or security-based swap counterparty); or when acting as a swap or security-based counterparty to a municipal entity represented by an ''independent representative,'' as defined in the Commodity Exchange Act or the Exchange Act, respectively.

The Notice would provide that, in certain cases, the compensation received by a municipal advisor could be so disproportionate to the nature of the municipal advisory services performed that it would be inconsistent with the proposed Rule G–36 duty of loyalty and would represent an unmanageable conflict. The Notice would also provide that a municipal advisor would be required to disclose conflicts associated with various forms of compensation (except where the form of compensation has been required by the municipal entity client), in which case the disclosure need only address that form of compensation. The Notice would also include a form of disclosure of conflicts relating to the forms of compensation to aid advisors in preparing their disclosure. Use of the form would not be required.

Duty of Care. The Notice would provide that the proposed Rule G–36 duty of care would require that a municipal advisor act competently and provide advice to the municipal entity after inquiry into reasonably feasible alternatives to the financings or products proposed (unless the engagement is of a limited nature). The

[16] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] Public Law 111–203, 124 Stat. 1376 (2010).

Notice would also require the advisor to make reasonable inquiries into facts necessary to determine the basis for the municipal entity's chosen course of action, as well facts necessary to prepare certificates and to help ensure appropriate disclosures for official statements. The Notice would also permit the municipal advisor to limit the scope of its engagement.

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2) of the Exchange Act, which provides, in pertinent part, that:

> The Board shall propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.
>
> Section 15B(c)(1) of the Exchange Act also provides, in pertinent part, that:
>
> A municipal advisor and any person associated with such municipal advisor shall be deemed to have a fiduciary duty to any municipal entity for whom such municipal advisor acts as a municipal advisor, and no municipal advisor may engage in any act, practice, or course of business which is not consistent with a municipal advisor's fiduciary duty or that is in contravention of any rule of the Board.
>
> Section 15B(b)(2)(L) of the Exchange Act provides, in pertinent part, that:
>
> [The rules of the Board, at a minimum, shall,] with respect to municipal advisors—(i) prescribe means reasonably designed to prevent acts, practices, and courses of business as are not consistent with a municipal advisor's fiduciary duty to its clients.

The proposed rule change is consistent with Section 15B(c)(1) of the Exchange Act and Section 15B(b)(2)(L) of the Exchange Act because it incorporates the fiduciary duty, imposed by the Exchange Act, into a proposed rule that would articulate the principal duties that comprise a municipal advisor's fiduciary duty to a municipal entity client (a duty of loyalty and a duty of care), although such duties would not be exclusive. The proposed rule change also would provide guidance on what conduct would be inconsistent with a duty of loyalty (principally failing to deal honestly and in good faith with the municipal entity and failing to act in the municipal entity's best interests without regard to financial or other interests of the municipal advisor) and the conflicts of interest that would be inconsistent with a duty of loyalty (including certain third-party payments and receipts and, in general, acting as a principal in matters concerning the municipal advisory engagement). It would also provide guidance on what conduct would be inconsistent with a duty of care (principally failing to act competently and to provide advice to the municipal entity after making reasonable inquiry into the representations of the municipal entity's counterparties, as well as then reasonably feasible alternatives to the financings or products proposed that might better serve the interests of the municipal entity).

Section 15B(b)(2)(L)(iv) of the Exchange Act requires that rules adopted by the Board:

> not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud.

All municipal advisors, regardless of their size, have a fiduciary duty to their municipal entity clients. Because the protection of their clients is paramount, in this context, the MSRB has concluded that it is appropriate to impose the same rules on small municipal advisors as it imposes on larger municipal advisors. However, the MSRB recognizes that there are costs of compliance. That is the reason the MSRB has included Appendix A to the Notice. By using Appendix A to provide disclosure concerning compensation conflicts, small municipal advisors will satisfy the compensation disclosure requirement of the Notice without having to retain legal counsel to assist them in the preparation of such disclosure.

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

The MSRB does not believe that the proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, since it would apply equally to all municipal advisors with municipal entity clients.

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

On February 14, 2011, the MSRB requested comment on a draft of Rule G–36 (''draft Rule G–36'') and a draft of the Notice (the ''draft Notice'').[4] The MSRB received comment letters from: the American Bankers Association (''ABA''); the American Council of Engineering Companies (''ACEC''); the American Federation of State, County and Municipal Employees (''AFSCME''); American Governmental Financial Services (''AGFS''); B–Payne Group (''B–Payne Group''); the Education Finance Council (''EFC''); Fi360; Lewis Young Robertson & Burningham, Inc. (''Lewis Young''); the Michigan Bankers Association (''Michigan Bankers''); Municipal Regulatory Consulting LLC (''MRC''); the National Association of Independent Public Finance Advisors (''NAIPFA''); Not for Profit Capital Strategies (''Capital Strategies''); Phoenix Advisors, LLC (''Phoenix Advisors''); Public Financial Management (''PFM''); the Securities Industry and Financial Markets Association (''SIFMA''); and the Wisconsin Bankers Association (''Wisconsin Bankers'').

Scope of the Rule

- *Comment: Delay Interpretive Notice until SEC Rule on Municipal Advisors Finalized.* Many commenters[5] requested that the MSRB withdraw or delay some or all of the provisions of the Notice until the SEC has defined ''municipal advisor,'' after which time they asked that the MSRB afford commenters an additional opportunity to comment on the Notice. Other comments were outside the scope of the request for comment on draft Rule G–36 (*e.g.,* suggested modifications to the definition of ''municipal advisor'') and are not summarized here.
- *MSRB Response:* Because the fiduciary duty applicable to municipal advisors was effective as of October 1, 2010, the MSRB feels it is important to provide guidance on basic fiduciary duties applicable to municipal advisors. The MSRB has requested that the proposed rule change be made effective on the date that rules defining the term ''municipal advisor'' under the Exchange Act are first made effective by the SEC or such later date as the proposed rule change is approved by the SEC. At that time, the MSRB may propose additional guidance, if necessary.
- *Comment: References to Duty of Loyalty and Duty of Care Too Limiting.* Lewis Young suggested said that the MSRB should delete the clause ''which shall include a duty of loyalty and a duty of care'' from the text of draft Rule G–36 on the theory that it is too limiting

[4] *See* MSRB Notice 2011–14 (February 14, 2011).

[5] ABA; SIFMA; Wisconsin Bankers; Michigan Bankers; NAIPFA; MRC; AFSCME; EFC; Phoenix Advisors; and ACEC.

and that there is a substantial body of state and Federal law governing fiduciary duty that includes more than these two duties.

• *MSRB Response:* The MSRB has determined not to make this change to these provisions in proposed Rule G–36. Proposed Rule G–36 would provide that a municipal advisor's fiduciary duty to its municipal entity client includes a duty of loyalty and a duty of care. While the duties of loyalty and care are generally recognized as the principal components of a fiduciary duty, the MSRB recognizes that certain state fiduciary duty laws address other duties. The use of the word ''includes'' permits the MSRB to articulate other duties in the future. Therefore the MSRB has determined not to make this change.

• *Comment: Clarification of Relationship to Duty of Fair Dealing.* NAIPFA requested that the MSRB clarify its statement that the duties of fair dealing under Rule G–17 are subsumed within the municipal advisor's fiduciary duty, and that the fair dealing duties under Rule G–17 are applicable to municipal advisors when advising municipal entities.

• *MSRB Response:* The Notice would provide that, ''The Rule G–36 fiduciary duty to municipal entity clients goes beyond and encompasses the obligation under MSRB Rule G–17 for municipal advisors, in the conduct of their municipal advisory activities, to deal fairly with all persons and not engage in any deceptive, dishonest, or unfair practice. A violation of Rule G–17 with respect to a municipal entity client, therefore, would necessarily be a violation of Rule G–36.'' Endnote 3 to the Notice provides examples of conduct by financial advisors with respect to issuers of municipal securities that has been found to violate Rule G–17. The MSRB would consider such conduct to also be a violation of proposed Rule G–36.

• *Comment: Application of Draft Rule G–36 to Broker-Dealers.* PFM suggested that the MSRB clarify that draft Rule G–36 applies to broker-dealers who engage in municipal advisory activities (except in the course of underwriting under Section 2(a)(11) of the Securities Act).

• *MSRB Response:* The Notice would provide that: ''The term ''municipal advisory activities'' is defined by MSRB Rule D–13 to mean the activities described in Section 15B(e)(4)(A)(i) and (ii) of the Exchange Act, whether conducted by a broker, dealer, or municipal securities dealer (''dealer'') that is a municipal advisor within the meaning of Section 15B(e)(4) of the Exchange Act or by a municipal advisor that is not a dealer.''

• *Comment: Duty When Advising Obligated Person.* Capital Strategies requested that the MSRB clarify the municipal advisor's duty when a financing alternative for a municipal advisor's obligated person client is not in the best interests of a municipal entity.

• *MSRB Response:* The Exchange Act does not impose a fiduciary duty on municipal advisors with obligated person clients. Accordingly, the MSRB has determined not to make this change in the Notice relating to proposed Rule G–36. The obligations of a municipal advisor to an obligated person client would be set forth in a companion MSRB notice relating to Rule G–17. That notice would provide (in endnote 7): ''Although a municipal advisor advising an obligated person does not have a fiduciary duty to the municipal entity that is the conduit issuer for the obligated person, it still has a fair dealing duty to the municipal entity.'' Thus, when a municipal advisor is advising an obligated person, its primary obligation of fair dealing is to its client. The municipal advisor would not required to act in the best interest of the municipal entity acting as a conduit issuer, although the advisor would be prohibited from acting in a deceptive, dishonest or unfair manner.

• *Comment: Limitations on Fiduciary Duty.* SIFMA requested that the MSRB clarify that a municipal advisor's fiduciary duty only applies in connection with a specific transaction or during the course of a specific engagement and does not apply to solicitation activities of a municipal advisor, to activities concerning obligated persons, or when a municipal advisor solicits a municipal entity on its own behalf. SIFMA requested that the MSRB clarify that the municipal advisor's fiduciary duty will not apply to those entities exempt from the definition of municipal advisor (*i.e.,* underwriters, investment advisors providing investment services, *etc.*).

• *MSRB Response:* Proposed Rule G–36 would provide that a municipal advisor's fiduciary duty applies when the advisor has a municipal entity client. A companion MSRB notice relating to Rule G–17 would specifically provide that a municipal advisor does not have a fiduciary duty under proposed Rule G–36 to an obligated person client or a municipal entity it solicits on behalf of a third-party client. The MSRB also determined to clarify when a municipal entity is determined to be a client and has revised the Notice so that it would provide: ''A municipal entity will be considered to be a client of the municipal advisor from the time that the advisor has been engaged to provide municipal advisory services (either pursuant to a written agreement or by informal arrangement) until the time that the agreed upon engagement ends.''

Duty of Loyalty

Conflicts of Interest; Disclosure.

• *Comment: Certain Conflicts Not Waiveable.* Lewis Young suggested removing the examples of the types of conflicts that must be disclosed because this is not necessary and because certain of the conflicts concerning third-party payments should be considered not to be waiveable.

• *MSRB Response:* The MSRB has determined not to revise the Notice to remove the examples of conflicts, because it is important to provide this guidance to municipal advisors. However, the revised Notice would clarify that disclosures of conflicts and consent by the recipient would not suffice to allow a municipal advisor to undertake a municipal advisory engagement if the conflicts are so significant that they are unmanageable.

• *Comment: Substitute Term ''Engagement'' for ''Relationships.''* Lewis Young suggested that, because the term ''relationships'' was vague and overbroad, the term ''engagement'' should be used instead, because such term was clear and measurable. It said that this substitution would also avoid the suggestion that municipal advisors were subject to a higher standard than that applicable to attorneys. It also said that only those relationships that the advisor reasonably feels will cloud its judgment should be required to be disclosed; otherwise, it said, important relationships may get lost in the disclosure of a long list of items.

• *MSRB Response:* The MSRB does not agree with this comment and therefore has determined not to make the changes suggested. The cases cited in the endnotes to the Notice include examples of informal relationships of which issuers should have been made aware. Furthermore, if a relationship is so significant that it would materially impair an advisor's duty to act in the best interests of its client, the municipal advisor would be precluded from entering into the engagement. Disclosure and informed consent would not suffice.

• *Comment: Disclosure of Conflicts of Interest.* SIFMA said that disclosure of conflicts should be based on reasonableness and upon actual knowledge of personnel who are specifically involved in municipal

advisory activities. It said that requiring large organizations to centralize and maintain information would be costly and could also risk compromising confidentiality barriers.

• *MSRB Response:* The MSRB has addressed these concerns and has revised the Notice so that it would provide that the advisor must disclose all material conflicts ''of which it is aware after reasonable inquiry.'' The MSRB has also determined to apply this standard to conflicts ''existing at the time the engagement is entered into, as well those discovered or arising during the course of the engagement.''

The MSRB recognizes the issues concerning compromising confidentiality barriers when making inquiries about other relationships with municipal entities. Nevertheless, the MSRB believes that actual knowledge of only those persons involved in the municipal advisory activity is not sufficient. Section 15B(e)(4) of the Exchange Act does not limit the term ''municipal advisor'' to natural persons. A municipal entity client retains a municipal advisor firm, not an individual that works for the firm. Accordingly, it is the conflicts of the firm that must be disclosed. The revised Notice would clarify that persons preparing the conflicts disclosure must make a reasonable inquiry into the activities of their firm to determine what conflicts may exist. This may include inquiry of persons in addition to those specifically engaged in the municipal advisory activity. In addition, the revised Notice would provide that reasonable inquiry will continue to apply during the course of the engagement to address conflicts discovered or arising after the engagement has been entered into.

• *Comment: Disclose Only General Conflicts of Interest.* SIFMA said that generalized disclosure of conflicts, rather than disclosure tailored to the individual client, should be permitted, allowing the municipal entity to request additional disclosure. SIFMA argued that requiring a municipal advisor to undertake an individualized investigation relating to conflicts applicable to the specific municipal entity, or analyzing the exact implications of the conflict applicable to the municipal entity client, would be time consuming and expensive. It said that the municipal entity could request more information and decide if the expense was worth it.

SIFMA also said that a municipal advisor should be required to disclose the applicable conflicts only once, in a brochure disclosing material conflicts, and not be required to re-disclose or reconfirm on a transaction by transaction basis unless new material conflicts were discovered. SIFMA said that the municipal advisor should not be required to re-disclose conflicts previously disclosed in a request for proposal (''RFP'').

• *MSRB Response:* The MSRB has determined not to make the suggested changes in the Notice. Generalized disclosure, without a discussion of the specific conflicts that may relate to the municipal entity client, is not sufficient to alert a municipal entity client to specific conflicts and is an insufficient basis for informed consent. The Notice would not require disclosures to be made more than once per issue. An RFP response may be an appropriate place to make required disclosures as long as the proposed structure of the financing is adequately developed at that point to permit the specific disclosures required by the Notice.

• *Comment: Conflicts of Interest Should be Addressed in Rule G–23.* MRC suggested that the requirements to disclose conflicts and to obtain informed consent would be more appropriately addressed in MSRB Rule G–23, and that the requirements should be removed from the Notice.

• *MSRB Response:* The MSRB disagrees with this comment and has therefore determined not to make the suggested changes. Rule G–23 only concerns financial advisory activities of dealers. It also does not impose a fiduciary duty.

• *Comment: Rule Recognizes Essential Duties of Loyalty and Due Care.* Fi360 applauded the MSRB for recognizing the duties of loyalty and due care as essential obligations under the fiduciary standard of care. It also said the Notice amply captured key principles that underlie the duties of loyalty and care. AFSCME also applauded the efforts of the MSRB to protect municipal entities from self-dealing and other deceptive practices, and said that strong protections were required for municipal entities.

• *MSRB Response.* The MSRB appreciates these comments.

• *Comment: Due Diligence To Determine Authority of Municipal Official.* SIFMA requested that the MSRB clarify the level of due diligence required to determine if an official has the authority to bind the municipal entity by contract, and suggested that a representation by the official that it had the requisite authority to execute should be sufficient, absent actual knowledge by the municipal advisor that such representation was false.

• *MSRB Response:* The MSRB has revised the Notice so that it would provide that a municipal advisor is only required to have a reasonable belief that it is making required disclosures to officials with the authority to bind the issuer. This change would also be made to the informed consent provisions of the Notice.

Conflicts of Interest; Unmanageable Conflicts

• *Comment: Principal Transactions.* ABA and SIFMA suggested that principal transactions should not be prohibited as unmanageable conflicts because other Federal and state laws permit entities subject to a fiduciary duty to effect principal transactions with clients after disclosure and informed consent. They said that traditional banking activities, including accepting deposits and foreign exchange transactions, should be permitted, arguing that not permitting municipal advisors to engage in these transactions would create an unfair advantage for investment advisors and swap dealers, among others, that have the ability to effect these types of transactions. They said that such a ban would also effectively limit municipal entities' access to critical products and services. SIFMA also proposed that the prohibition on principal transactions not prohibit a municipal advisor or affiliate from serving as a trustee and that the prohibition should not apply to advisory transactions if the principal transactions were effected by ''distant cousin'' affiliates of a municipal advisor. ABA suggested that the MSRB propose exceptions for associated persons, similar to the exception provided in a 1978 interpretation [6] of MSRB Rule D–11, which excludes, solely for purposes of the fair practice rules, persons who are associated ''solely by reason of a control relationship,'' unless the affiliate is otherwise engaged in municipal advisory activities.

• *MSRB Response:* The revised Notice would provide that a municipal advisor will not be considered to have an unmanageable conflict as a result of acting as principal when: (i) Providing investments to the municipal entity on a temporary basis to ensure timely delivery for closing; (ii) engaging in activities permitted under Rule G–23; (iii) it is a municipal advisor solely because it recommends investments or municipal financial products provided or offered by it to a municipal entity as a counterparty, but is not described in (iv); or (iv) acting as a swap or security-

[6] The ABA's citation is actually to the SEC's order approving Rule D–11, a portion of which is reprinted in the MSRB Rule Book.

based counterparty to a municipal entity represented by an ''independent representative,'' as defined in the Commodity Exchange Act or the Exchange Act, respectively. Once the SEC has completed its rulemaking on the definition of ''municipal advisor,'' the MSRB will consider whether additional exceptions are appropriate.

• *Comment: Engineers as Municipal Advisors.* ACEC said that, under certain circumstances, some engineers, if subject to a fiduciary duty by reason of being included in the definition of ''municipal advisor,'' may have direct conflicts with their municipal entity clients because of the engineers' professional and ethical duties. It said that an engineer's ethical duties require it to hold the safety, health, and welfare of the public paramount and that an engineer's duty to render independent judgments might in some cases conflict with its duty of loyalty to its municipal entity client, particularly if the expectations of its client differed from the engineer's independent judgment.

• *MSRB Response:* The MSRB has determined not to make any changes to the Notice with respect to this comment. The MSRB recognizes that members of other professions that also serve as municipal advisors may have concurrent professional duties and standards and the MSRB agrees that an advisor is required to exercise its independent professional skill and judgment in performing its role. The rule does not require that the advisor abandon its professional standards in order to render opinions consistent with the client's expectations.

Fee Splitting; Prohibited Payments

• *Comment: Compensation for Related Services.* SIFMA and ABA requested further clarification about fee-splitting and related compensation arrangements, and suggested that compensation for certain traditional banking services (relating to corporate trust and mutual funds), such as shareholder servicing fees and 12b–1 fees, be permitted with full disclosure and informed consent.

• *MSRB Response.* Endnote 6 to the Notice provides examples of fee-splitting arrangements. The Notice also provides exceptions to the general rule that a municipal advisor that serves as a principal has an unmanageable conflict. Depending upon the SEC's definition of ''municipal advisor,'' the MSRB may propose additional exceptions, but the MSRB is unwilling to do so at this time.

• *Comment: Prohibited Payments to Affiliated Solicitors.* SIFMA also requested further guidance on prohibited payments by municipal advisors to solicitors and argued that payments to affiliated solicitors should not be prohibited because the definition of municipal advisor adopted by the Dodd Frank Act only restricts payments to independent solicitors.

• *MSRB Response:* The MSRB has determined not to make the suggested changes. The cases cited in the endnotes to the Notice demonstrate the inappropriate role that third-party payments have played in many municipal securities financings. The exceptions made by the Notice would only concern issuer-permitted payments and payments to parties that are themselves regulated by the MSRB.

Compensation; Excessive Compensation

• *Comment: Definition of Excessive Compensation.* NAIPFA, SIFMA, and B-Payne Group requested further clarification on the definition of ''excessive compensation.'' NAIPFA suggested certain criteria, including, among other things, the time and labor required, the novelty and difficulty of the issue involved, and the skill requisite to perform the municipal advisory services properly; the fee customarily charged in the locality for similar municipal advisory services; the amount involved and the results obtained; the nature and length of the professional relationship with the client; the experience, reputation, and ability of the municipal advisor or municipal advisors performing the services; and whether the fee is fixed or contingent. B–Payne Group objected to any evaluation of whether its fees were excessive, arguing that no regulator was in a position to evaluate the reasonableness of the municipal advisor's fee. SIFMA suggested that a fully disclosed and negotiated agreement, absent fraud, was sufficient to guard against excessive compensation.

• *MSRB Response:* The MSRB has revised the Notice so that it would incorporate some of the factors noted in the comment letters. The revised Notice would describe excessive compensation as compensation that is so disproportionate to the nature of the municipal advisory services performed as to indicate that the municipal advisor is not acting in the best interests of its municipal advisory client. Further, the revised Notice would provide that ''the MSRB recognizes that what is considered reasonable compensation for a municipal advisor will vary according to the municipal advisor's expertise, the complexity of the financing, and the length of time spent on the engagement, among other factors.'' As this language recognizes, many factors may appropriately affect the amount of the fee, and the specific factors listed in the Notice would not be exclusive. Thus, it may be that the various other factors noted by commenters could have an impact on the compensation paid to a municipal advisor. In all cases, the municipal advisor must be able to support the legitimacy of its fees.

Compensation; Forms of Compensation

• *Comment: Disclosure of Conflicts Confusing and Unnecessary.* Several commenters[7] suggested that the MSRB delete Appendix A to the Notice (Disclosure of Conflicts with Various Forms of Compensation) and the requirement of the Notice that municipal advisors disclose the conflicts with various forms of compensation. Commenters argued that: (i) Such disclosure was unnecessary and that including it would detract from the importance of the rest of the rule; (ii) statements about imbedded conflicts in compensation would be confusing to municipal entities because underwriters (who, they said, have inherent conflicts as both purchasers and distributors of the municipal entity's securities) are not required to disclose this information, whereas municipal advisors, who do not have these inherent conflicts, are nevertheless required to disclose such possible conflicts; and (iii) contingent fees do not affect professional performance. Other commenters argued that the fiduciary duty applicable to municipal advisors was sufficient to guard against excessive compensation. NAIPFA requested that, if this requirement were retained, a similar requirement be applicable to underwriters. B-Payne Group agreed that fees of all participants, including bond lawyers, should be disclosed. MRC suggested that any disclosure requirements were more appropriately addressed in Rule G–23.

AGFS said that, among other things, the proposal to require that firms clarify for clients the advantages and disadvantages of various forms of advisor compensation was excellent. It said that too many municipal issuers are gullible regarding the use of contingent compensation payable only after transactions are completed and that they do not think through the long-term costs and other relevant implications of contingent compensation that can place advisors, upon whom the issuers rely heavily, in the unfortunate position of sacrificing months of work without compensation when it becomes

[7] B-Payne Group, Lewis Young, MRC, NAIPFA, PFM, and SIFMA.

apparent (or should be apparent to a market financial professional) that a transaction is not in the issuers' best interests. AGS said that, unfortunately, there are advisors who would plow ahead in order to avoid substantial financial loss, rather than informing the issuer clients either (1) not to proceed or (2) to alter the structure or approach.

• *MSRB Response:* The MSRB has determined not to eliminate Appendix A from the Notice. Because municipal advisors are fiduciaries with respect to their municipal entity clients, the MSRB considers it essential that they disclose all material conflicts to their clients. Appendix A was included in the Notice for the benefit of small municipal advisors to help them avoid the need to hire an attorney to prepare such compensation conflicts disclosure. Use of Appendix A would not be mandatory and municipal advisors would be free to draft their own disclosure addressing these conflicts.

Pursuant to Section 15B(e)(4)(C) of the Exchange Act, dealers are not municipal advisors when they are serving as underwriters. Even so, MSRB Rule G–17 (on fair dealing) would apply to them when they engage in municipal securities activities with issuers of municipal securities. The MSRB recognizes that underwriters would not be subject to the same requirement to disclose conflicts associated with various forms of compensation under Rule G–17. It is appropriate to interpret Rule G–17 differently for arm's-length counterparty relationships on the one hand (such as underwriters appropriately maintain with issuers) and advisory relationships on the other.

The MSRB notes that it does not have jurisdiction over bond lawyers, unless they are functioning as municipal advisors, and, therefore, in most cases, may not require them to disclose compensation conflicts.

• *Comment: Limit Disclosure of Conflicts to Form of Compensation Mandated by Issuer.* NAIPFA suggested that disclosure of conflicts be limited to the conflicts applicable to the form of compensation methodology at the time the compensation methodology was proposed. NAIPFA also suggested that ''pitches'' or other discussions of ideas with municipal entities prior to engagement should not require delivery of the disclosure. NAIPFA suggested that the disclosures should not be required when the municipal entity dictated the form of compensation, arguing that discussion of conflicts in this instance would not advance the duty of loyalty to the municipal entity client.

• *MSRB Response:* The MSRB has determined to revise the Notice so that it would require that conflicts disclosures, including those regarding compensation, need only be delivered before the engagement of the municipal advisor, unless a conflict is discovered or arises later. Furthermore, the revised Notice would provide that ''if the municipal entity client has required that a particular form of compensation be used, the compensation conflicts disclosure provided by the municipal advisor need only address that particular form of compensation.'' If the form of compensation is not required by the municipal entity, however, the municipal advisor would be required to disclose and discuss the conflicts associated with various forms of compensation.

• *Comment: Authority of Municipal Entity Officials to Consent to Disclosures.* Several commenters suggested that, in determining the authority of a municipal entity official to enter into a contract, to receive various disclosures, and to deliver informed consent, a municipal advisor should be permitted to rely on the apparent authority of an official to acknowledge the conflicts disclosure. NAIPFA suggested that the municipal advisor be able to rely on the designation by the municipal entity of the primary contact for the engagement as evidence of its authority unless the municipal advisor has reason to believe that the official does not have the requisite authority. SIFMA suggested that the municipal advisor be able to rely on a representation of the official as to its apparent authority.

• *MSRB Response:* As noted above under ''Conflicts of Interest; Disclosure,'' the MSRB determined to revise the Notice so that it would provide that a municipal advisor is only required to have a reasonable belief that it is making required disclosures to, and receiving informed consent from, officials with the authority to bind the issuer.

• *Comment: Consent Presumed With Receipt of Written Agreement.* NAIPFA suggested that a municipal advisor be permitted to presume consent to compensation conflicts disclosure if it receives an executed contract, or verbal agreement that a written engagement letter (or similar document) has been accepted, or written or verbal acknowledgement that the advisor has been selected following an RFP process in which the form of compensation was appropriately disclosed.

• *MSRB Response:* The MSRB had determined not to make changes to the Notice in response to this comment because the following provisions of the Notice would address this comment: ''The disclosures described in this paragraph must be provided as described above under ''Duty of Loyalty/Conflicts of Interest/Disclosure Obligations.'' That section of the Notice would provide: ''For purposes of proposed Rule G–36, a municipal entity will be deemed to have consented to conflicts that are clearly described in its engagement letter or other written contract with the municipal advisor, if the municipal entity expressly acknowledges the existence of such conflicts. If the officials of the municipal entity agree to proceed with the municipal advisory engagement after receipt of the conflicts disclosure but will not provide written acknowledgement of such conflicts, the municipal advisor may proceed with the engagement after documenting with specificity why it was unable to obtain their written acknowledgement.''

Duty of Care

Necessary Qualifications.

• *Comment: Restrictions on Undertaking Engagements Are Unnecessary.* Lewis Young suggested that the requirement that the ''municipal advisor should not undertake a municipal advisory engagement for which the advisor does not possess the degree of knowledge and expertise needed to provide the municipal entity with informed advice'' be removed, arguing that it was unnecessary and it left out many other aspects of the general fiduciary duty of care and ''unbalanced'' the implications of the general duty.

• *MSRB Response:* The MSRB has determined not to make any changes to the Notice in response to this comment. The MSRB disagrees with this comment because it considers the requisite knowledge and expertise to be an essential element of the duty of care. The cases cited in endnote 20 to the Notice provide examples of instances in which financial advisors violated this duty.

Consideration of Alternatives

• *Comment: Requirement Unnecessary.* Lewis Young suggested that this requirement should be removed as it was unnecessary.

• *MSRB Response:* The MSRB disagrees with this comment and considers this requirement to be a fundamental distinction between a fiduciary and an arm's length counterparty, such as an underwriter.

• *Comment: Limit Obligations to Terms of Contract.* SIFMA argued that a municipal advisor should be required to

do only what the municipal entity contracts for and that imposing other duties will impose additional costs and will cause extensive negotiation on the limitations clauses in contracts. Further, SIFMA argued that an implied duty to review alternatives should not apply where the form of engagement letter is non-negotiable because the inability to negotiate a limited engagement clause will reduce the number of municipal advisors who offer services.

• *MSRB Response:* The MSRB has determined not to make any changes to the Notice in response to this comment. The MSRB expects that municipal advisors that wish to limit their engagements with municipal entities will do so in writings (whether as part of engagement letters or separately) that limit the scope of their engagements to particularly enumerated items or which state that any services not specified in the writing will not be provided by the advisor. This should impose no measurable additional cost on the advisor or the municipal entity.

Duty of Inquiry

• *Comment: Scope of Inquiry.* Lewis Young said that the requirement to conduct reasonable inquiry regarding representations set forth in a certificate should be governed by the terms of the certificate, which should show the scope of inquiry. SIFMA requested more guidance on the required scope of a factual investigation and on the nature and scope of any permitted qualifications, and whether a municipal advisor could disclaim the duty altogether in its engagement letter or later, noting that it would be impossible to anticipate all limitations on this duty at outset of engagement. NAIPFA suggested that the MSRB clarify its statements about a municipal advisor's duty of inquiry under G–36 and G–17 to form a reasonable basis for its recommendations.

• *MSRB Response:* The MSRB has determined not to make the suggested changes. The Notice would not permit the waiver of duties imposed by proposed Rule G–36, as interpreted by the Notice, if they are within the scope of the municipal advisor's engagement. If it is within the scope of the municipal advisor's engagement to prepare a certificate that will be relied upon by the issuer, the municipal advisor would be required to conduct a reasonable inquiry into the facts that underlie the certificate. For example, review of the official books of the issuer and other factual information within the municipal advisor's control might assist the municipal advisor in forming a reasonable basis for its certificate. However, if the certificate relies on the representations of others or facts not within the municipal advisor's control, additional inquiry on the part of the municipal advisor might be required.

The MSRB notes that some certificates that municipal advisors provide already have the potential to subject the advisor to penalties under Section 6700 of the Internal Revenue Code. An Internal Revenue Service publication on Section 6700 [8] provides: ''Participants [in a bond financing] can rely on matters of fact or material provided by other participants necessary to make their own statements or draw their own conclusions, unless they have actual knowledge or a reason to know of its inaccuracy or the statement is not credible or reasonable on its face.'' The Internal Revenue Service summarized the legislative history of Section 6700. *See* H. Conf. Rep. No. 101–247, 101st Cong., 1st Sess. 1397.

With respect to clarifying the statements in the Notice concerning the municipal advisor's duty to form a reasonable basis for any recommendation, the MSRB has determined not to make any changes to the Notice other than those directed to specific circumstances in the Notice (*e.g.* Duty of Inquiry, Consideration of Alternatives, *etc.*). The MSRB notes that each recommendation, and the basis for such recommendation, will be dependent on facts and circumstances and that the statements in the Notice are intended as general guidelines.

• *Comment: Due Diligence.* Lewis Young and SIFMA said that the requirement for a municipal advisor to use due diligence when preparing an official statement suggested that the municipal advisor (whose duties are to an issuer) had the duties of an underwriter (whose duties are to investors). Lewis Young said that this requirement is inconsistent with an advisor's obligation, which is to advise ''in a secondary role to the issuer as principal as to disclosure duties, as well as duplicating the duties of an underwriter.'' Lewis Young also noted that a municipal advisor owes a duty to the municipal entity, not to investors, and the municipal advisor's obligations in respect of the disclosure process are to explain the process to the issuer, to make recommendations on the structure and content of the disclosure document, and to recommend competent counsel to prepare.

[8] *See* Office of Chief Counsel, Internal Revenue Service, Memorandum No. 200610018, Application of Section 6700 Penalty with Respect to Various Participants in Tax-Exempt Bond Issuance (Feb. 3, 2006).

• *MSRB Response:* The MSRB has determined to revise the Notice so that it would address these concerns. The language in the Notice upon which this comment is based covers the situation in which the municipal advisor prepares all, or substantially all, of the official statement, exercising discretion as to the content of disclosures. This is often true in the case of competitive underwritings. Under these circumstances, the advisor owes a duty to the municipal entity to make reasonable inquiries in order to help ensure the appropriate disclosures are made in the official statement. The revised Notice would no longer require that the advisor exercise due diligence, and would further provide that the municipal advisor ''owes a duty to the municipal entity to make reasonable inquiries in order to help ensure the appropriate disclosures are made in the official statement.''

Permissible Limitations On Scope of Engagement

Limitations.

• *Comment: Outline Scope of Duties in Engagement.* Both SIFMA and NAIPFA suggested that municipal advisors should be permitted to outline the scope of their duties in an engagement, rather than outlining the exclusions and limitations. NAIPFA noted that it would be unreasonable to subject a municipal advisor to a fiduciary duty with respect to services that were beyond the scope of the parties' agreement. Further, it said that an issuer had no reason to assume that services not specified in writing would be performed. The municipal advisor should be held to the duties it had agreed to undertake, and be able to include a blanket statement relating to the matters excluded from the engagement.

• *MSRB Response:* The MSRB has determined not to make any changes to the Notice in response to this comment. The MSRB expects that municipal advisors that wish to limit their engagements with municipal entities will do so in writings (whether as part of engagement letters or separately) that limit the scope of their engagements to particularly enumerated items or which state that any services not specified in the writing will not be provided by the advisor. This should impose no measurable additional cost on the advisor or the municipal entity.

Disclosure of Pre-Formed Judgment on Appropriateness of Transaction or Product

• *Comment: Remove Requirement to Disclose Advisor's Pre-Formed Opinion.*

SIFMA suggested that the MSRB reconsider its position on permitting the municipal advisor to limit the scope of its engagement while requiring it to disclose any pre-formed opinion it has on matters not within the scope of the engagement. SIFMA said that this was burdensome, detracted from the scope of the limitations, and would effectively require the municipal advisor to consider the appropriateness of the financing or product (which it had excluded from its engagement) to counter any hindsight judgment.

• *MSRB Response:* The MSRB has determined to revise the Notice so that it would no longer include this requirement. While the Notice would not require the municipal advisor to conduct reasonable inquiry to form such an opinion, the MSRB realizes that some municipal advisors might feel obliged to do so to avoid being questioned in hindsight about whether they had, in fact, formed an opinion on appropriateness before being retained.

Scope of Engagement

• *Comment: Define Term of Engagement.* SIFMA suggested that the Notice include a definition of ''engagement,'' and define when the municipal advisor's obligation will commence and terminate pursuant to a written engagement letter. Absent a written engagement letter, SIFMA suggested that an engagement should terminate on the reasonable expectations of the parties, or when the related transaction has been concluded.

• *MSRB Response:* By the use of the word ''engagement,'' the MSRB means the municipal advisory assignment or other scope of work for which the municipal entity has retained the municipal advisor. When a municipal advisor is engaged or retained by the municipal entity, the municipal entity would become the client of the municipal advisor and the fiduciary duty under proposed Rule G–36 would begin to apply. It would continue to apply until the engagement is complete.

• *Comment: Incorporate Requirements of Advisory Contracts in Rule G–23.* MRC suggested that any requirements relating to the content of advisory contracts be incorporated into existing rules such as Rule G–23, rather than by interpretation. MRC also suggested clarification of the various statements relating to appropriateness and incorporation of such statements in MSRB Rule G–19 (on suitability).

• *MSRB Response:* The MSRB disagrees with this comment and has therefore determined not to make the suggested changes. As noted above, Rule G–23 only concerns financial advisory activities of broker-dealers. It also does not impose a fiduciary duty. Rule G–19 only imposes a duty of suitability upon dealers and, even then, only in connection with transactions in municipal securities recommended to customers.[9] The MSRB has determined not to amend that rule at this time.

Other Comments

• *Comment: Other Rules May Impose Conflicting Standards.* Various commenters [10] noted that several regulatory agencies either have in place or are currently promulgating rules that concern parties that might be subject to draft Rule G–36 and that lack of coordination with these agencies could lead to conflicting standards applicable to such parties. They said that the MSRB and other regulatory agencies need to coordinate their respective guidance and AFSCME suggested that these agencies offer informal guidance such as webinars to aid market participants.

• *MSRB Response:* The MSRB has been coordinating with other regulators in areas of overlap. For example, the provisions of the Notice concerning the provision of swap advice use the same language as found in Title VII of Dodd-Frank and the proposed Commodity Trading Futures Commission (''CFTC'') business conduct rule for swap dealers and major swap participants.[11] Further, the MSRB has conducted and will continue to conduct webinars and various outreach events to explain its rulemaking efforts.

• *Comment: Manner of Regulation and Cost of Compliance.* B–Payne Group expressed the view that the MSRB should regulate municipal advisors by getting ''experienced personnel on the ground in regional markets and charge them with staying on top of situations,'' rather than regulating municipal advisors as the MSRB regulates dealers. It argued for exemptions from MSRB rules for small municipal advisors and said the cost of compliance for such advisors would outweigh the regulatory benefit. Other parts of the comment letter addressed matters that were outside the scope of the request for comment on draft Rule G–36 (*e.g.,* professional qualifications testing, training for local finance officials) and are not summarized here.

• *MSRB Response:* For regulation of municipal advisors to be fair, all municipal advisors must know what rules apply to them. The Exchange Act itself imposes a fiduciary duty on municipal advisors and the proposed rule change provides guidance to municipal advisors on what it means to have a fiduciary duty so they can tailor their conduct accordingly. Without such guidance, ''experienced personnel on the ground'' would likely enforce the Exchange Act in an inconsistent manner, which the MSRB doubts that B–Payne Group would consider fair.

As stated above, all municipal advisors, regardless of their size, have a fiduciary duty to their municipal entity clients. Because the protection of their clients is paramount, in this context, the MSRB has concluded that it is appropriate to impose the same rules on small municipal advisors as it imposes on larger municipal advisors. However, the MSRB recognizes that there are costs of compliance. That is the reason the MSRB has included Appendix A to the Notice. By using Appendix A to provide disclosure concerning compensation conflicts, small municipal advisors would be able to satisfy the compensation disclosure requirement of the Notice without having to retain legal counsel to assist them in the preparation of such disclosure.

• *Comment: Implementation Period.* SIFMA suggested that because Rule G–36 would subject municipal advisors to rules they are not currently subject to, the MSRB should consider providing for an implementation period of no less than one year.

• *MSRB Response.* The MSRB recognizes that some municipal advisors may be subject to rules that are not currently applicable. However, the appropriate implementation period will depend upon the provisions of the SEC's rule relating to municipal advisors.

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

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

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

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

[10] ABA; AFSCME; Michigan Bankers; SIFMA; and EFC.

[11] *See* **Federal Register** Vol. 75, No. 245 (December 22, 2010).

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

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Exchange Act. Interested persons are also invited to submit views and arguments as to whether they can effectively comment on the proposed rule change prior to the date of final adoption of the Commission's permanent rules for the registration of municipal advisors. 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–2011–14 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–MSRB–2011–14. 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 Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m.

Copies of such filing also will be available for inspection and copying at the MSRB's offices. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MSRB–2011–14 and should be submitted on or before October 3, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–23259 Filed 9–9–11; 8:45 am]

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[12] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Docket No. SBA 2011–0003]

Community Advantage Pilot Program

AGENCY: U.S. Small Business Administration (SBA).

ACTION: Notice of change to Community Advantage Pilot Program.

SUMMARY: On February 18, 2011, SBA published a notice and request for comments introducing the Community Advantage Pilot Program. In that notice, SBA modified or waived as appropriate certain regulations which otherwise apply to the 7(a) loan program for the Community Advantage Pilot Program. To support SBA's commitment to expanding access to capital for small businesses and entrepreneurs in underserved markets, SBA is issuing this notice to revise certain of these regulatory waivers.

DATES: This notice is effective September 12, 2011.

FOR FURTHER INFORMATION CONTACT: Grady B. Hedgespeth, Director, Office of Financial Assistance, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416; (202) 205–7562; *grady.hedgespeth@sba.gov.*

SUPPLEMENTARY INFORMATION: On February 18, 2011, SBA issued a notice and request for comments introducing the Community Advantage Pilot Program (''CA Pilot Program'') (76 FR 9626). Pursuant to the authority provided to SBA under 13 CFR 120.3 to suspend, modify or waive certain regulations in establishing and testing pilot loan initiatives, SBA temporarily waived certain regulations, which otherwise apply to 7(a) loans, for the CA Pilot Program. Specifically, SBA waived 13 CFR 120.420 through 120.435 because CA Lenders were prohibited from including CA loans in participant lender financings and other conveyances, including securitizations, participations and pledges. This prohibition, however, may restrict the ability of CA Lenders to obtain access to capital from commercial banks and warehouse lenders. Therefore, SBA is revising the February 18, 2011 notice to allow CA Lenders participating in the CA Pilot Program to pledge CA loans as collateral for certain lender financings that are approved by SBA, provided the CA Lender complies with all applicable SBA regulations. To accomplish this, SBA is no longer waiving the regulations at 13 CFR 120.420, 120.430 –120.431 (only with respect to pledges), and 120.434. While SBA is permitting CA Lenders to pledge CA loans as collateral for certain lender financings in accordance with the aforementioned regulations, SBA will not permit CA Lenders to include CA loans in securitizations, any loan sales or participations. Therefore, SBA continues to waive the regulations at 13 CFR 120.421 through 120.428, 120.432, 120.433 and 120.435, as stated in the February 18, 2011 notice. This notice does not affect a CA Lender's ability to sell the guaranteed portions of CA loans in the secondary market, as further described in the February 18, 2011 notice.

In addition to issuing this notice, SBA will modify the Community Advantage Pilot Program Loan Guaranty Agreement (SBA Form 750CA) to allow lenders to pledge CA loans as collateral for certain lender financings. SBA will make the revised SBA Form 750CA available to CA Lenders. All participants in the CA Pilot Program must execute the revised SBA Form 750CA and return it to SBA prior to pledging any CA loans.

All other SBA guidelines and regulatory waivers related to the CA Pilot Program remained unchanged.

SBA has provided more detailed guidance in the form of a participant guide which is available on SBA's Web site, *http://www.sba.gov.* SBA may also provide additional guidance, if needed, through SBA notices, which will also be published on SBA's Web site, *http://www.sba.gov.*

Questions on the CA Pilot Program may be directed to the Lender Relations Specialist in the local SBA district office. The local SBA district office may be found at *http://www.sba.gov/about-offices-list/2.*

Authority: 15 U.S.C. 636(a)(25) and 13 CFR 120.3.

Karen G. Mills,

Administrator.

[FR Doc. 2011–23244 Filed 9–9–11; 8:45 am]

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