

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

The proposed rule change has taken effect upon filing pursuant to Section 19(b)(3)(A)(ii) of the Exchange Act<sup>14</sup> and subparagraph (f)(2) of Rule 19b-4.<sup>15</sup> At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**IV. Solicitation of Comments**

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

*Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NSX-2013-18 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-NSX-2013-18. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than

those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NSX-2013-18 and should be submitted on or before October 23, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

Kevin M. O'Neill,  
Deputy Secretary.

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**SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-70532; File No. SR-MSRB-2013-05]**

**Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Amend MSRB Rules G-8, G-11, and G-32 To Include Provisions Specifically Tailored for Retail Order Periods**

September 26, 2013.

**I. Introduction**

On June 17, 2013, the Municipal Securities Rulemaking Board ("MSRB") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change consisting of amendments to MSRB Rules G-8, G-11, and G-32, and conforming changes to Form G-32. The proposed rule change was published for comment in the **Federal Register** on June 28, 2013.<sup>3</sup> The Commission received eight comment letters on the

proposal.<sup>4</sup> On September 6, 2013, the MSRB submitted a response to these comments<sup>5</sup> and filed Amendment No. 1 to the proposed rule change.<sup>6</sup> The Commission is publishing this notice to solicit comments on Amendment No. 1 to the proposed rule change from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

**II. Description of the Proposed Rule Change**

The MSRB states that this proposed rule change will establish basic protections for issuers and customers and provide additional tools to assist with the administration and examinations of retail order period requirements, as described below. The thrust of the proposal, according to the MSRB, is to provide a mechanism by which issuers can have greater assurance that a dealer has, when directed to do so by the issuer, made a

<sup>4</sup> See Letters to Elizabeth M. Murphy, Secretary, Commission, from David L. Cohen, Managing Director and Associate General Counsel, SIFMA, dated July 18, 2013 ("SIFMA Letter"); Dustin McDonald, Director, Federal Liaison Center, Government Finance Officers Association ("GFOA"), dated July 18, 2013 ("GFOA Letter"); Jeanine Rodgers Caruso, President, National Association of Independent Public Finance Advisors, dated July 19, 2013 ("NAIPFA Letter"); Dorothy Donohue, Deputy General Counsel—Securities Regulation, Investment Company Institute, dated July 19, 2013 ("ICI Letter"); Robert J. McCarthy, Director of Regulatory Policy, Wells Fargo Advisors, LLC, dated July 19, 2013 ("WFA Letter"); Michael Nicholas, Chief Executive Officer, Bond Dealers of America, dated July 19, 2013 ("BDA Letter"); Leslie M. Norwood, Managing Director and Associate General Counsel, SIFMA, and Dustin McDonald, Director, Federal Liaison Center, GFOA, dated August 29, 2013 ("SIFMA and GFOA Joint Letter"); and David L. Cohen, Managing Director and Associate General Counsel, SIFMA, dated September 23, 2013 ("SIFMA Letter II").

<sup>5</sup> See Letter to Elizabeth M. Murphy, Secretary, Commission, from Michael L. Post, Deputy General Counsel, MSRB, dated September 6, 2013 ("MSRB Letter").

<sup>6</sup> In Amendment No. 1, the MSRB partially amended the text of the original proposed rule change to: (i) Revise the definition of "retail order period" in Rule G-11(a)(vii) to make clear the MSRB's intent that the definition covers order periods during which orders that meet the issuer's designated eligibility criteria for retail orders and for which the customer is already conditionally committed will be either (a) the only orders solicited or (b) given priority over other orders; (ii) revise proposed Rule G-11(k) to clarify that dealers submitting institutional orders during a retail order period are not required to submit certain additional information that is intended to relate to retail orders; (iii) eliminate the use of the defined term "going away order," while retaining the concept represented by the term; (iv) delete certain duplicative language from the definition of "selling group" in Rule G-11(a); and (v) synchronize the effective dates so that all parts of the proposed rule change would take effect at the same time. The MSRB also made minor technical changes to correct marking of rule text that was incorrect in the original filing.

<sup>16</sup> 17 CFR 200.30-3(a)(12).

<sup>15</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> Securities Exchange Act Release No. 69834 (June 24, 2013), 78 FR 39038 ("Notice").

<sup>14</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>15</sup> 17 CFR 240.19b-4.

*bona fide* public offering of securities to retail customers at their initial offering prices. According to the MSRB, the proposed rule change addresses specific concerns raised by issuers, dealers, and municipal advisors that (i) Orders have been mischaracterized as “retail”; (ii) syndicate managers fail to disseminate timely notice of the terms and conditions of a retail order period to all dealers, including selling group members; and (iii) requested pricing information is not delivered in sufficient time to allow for communication with the requesting dealer’s “retail” customers to determine whether the investor would like to purchase the bonds. The proposed rule change amends MSRB rules to include provisions specifically tailored to address these identified issues.

### 1. Proposed Changes to Rule G–11

MSRB Rule G–11 addresses syndicate practices and management of the syndicate. Among other things, the rule requires syndicates to establish priorities for different categories of orders and requires various disclosures to syndicate members, which are intended to assure that allocations are made in accordance with those priorities.

The MSRB proposes to amend Rule G–11 by adding definitions for terms used in the proposed new provisions addressing retail order periods. The term “retail order period” will be defined in subparagraph (a)(vii) to mean an order period during which orders that meet the issuers’ designated eligibility criteria for retail orders and for which the customer is already conditionally committed will be either (i) the only orders solicited or (ii) given priority over other orders.<sup>7</sup> In addition, the MSRB proposes to define the term “selling group” in subparagraph (a)(xii) to mean a group of brokers, dealers, or municipal securities dealers formed for the purpose of assisting in the distribution of a new issue of municipal securities for the issuer other than members of the syndicate.<sup>8</sup>

Rule G–11(f) requires that the senior syndicate manager furnish in writing to the other members of the syndicate a

written statement of all terms and conditions required by the issuer. The MSRB proposes to amend Rule G–11(f) to require expressly that the written statement also be delivered to selling group members. Additionally, the proposal requires that such written statement include all of the issuer’s retail order period requirements, if any, and all pricing information. The proposal also requires a written statement be provided to syndicate and selling group members of any changes in either the priority provisions or pricing information. The proposed rule change further requires that an underwriter furnish in writing to any other broker, dealer, or municipal securities dealer with which it has an arrangement to market the issuer’s securities all of the information provided by the senior syndicate manager.<sup>9</sup>

Rule G–11(f) also currently provides that if a senior syndicate manager, rather than the issuer, prepares the statement of all of the terms and conditions required by the issuer, such statement must be provided to the issuer. The proposed rule change adds the requirement to obtain the approval of the issuer of any statement prepared by the senior syndicate manager. This approval must be secured in all cases and is not limited solely to those instances when a retail order period is conducted.

Rule G–11(h)(i) currently provides, among other things, that management fees and discretionary fees for clearance costs to be imposed by a syndicate manager shall be disclosed to the syndicate members prior to submission of a bid. The proposed rule change will require the syndicate manager specifically to disclose to each syndicate member the *amount* of any management fees or discretionary fees for clearance costs imposed by the syndicate manager.

The MSRB also proposes to add new paragraph (k) to Rule G–11. New paragraph (k) will require any broker, dealer, or municipal securities dealer that submits an order that is designated as retail during a retail order period to provide certain information, which the MSRB states will assist in the determination that such order is a *bona*

*fide* retail order. Specifically, the broker, dealer, or municipal securities dealer must provide the following information relating to each order designated as retail submitted during a retail order period: (i) Whether the order is from a customer that meets the issuer’s eligibility criteria for participation in the retail order period; (ii) whether the order is one for which a customer is already conditionally committed; (iii) whether the broker, dealer, or municipal securities dealer has received more than one order from the retail customer for a security for which the same CUSIP number has been assigned; (iv) any identifying information required by the issuer, or the senior syndicate manager on the issuer’s behalf, in connection with such retail order (but not including customer names or social security numbers); and (v) the par amount of the order. This Rule G–11(k) information must be submitted no later than the Time of Formal Award,<sup>10</sup> and may be submitted electronically. The proposed rule change also provides that the senior syndicate manager may rely on the information furnished by such dealer, unless the senior syndicate manager knows, or has reason to know, that the information is not true, accurate, or complete.

### 2. Proposed Changes to Rule G–8

MSRB Rule G–8 imposes books and records requirements on brokers, dealers, and municipal securities dealers. Rule G–8(a)(viii)(A) requires that, for each primary offering for which a syndicate has been formed for the purchase of municipal securities, the syndicate manager must maintain a variety of records. Currently, the rule provides these records must show, among other things, a statement of all terms and conditions required by the issuer (including whether there was a retail order period and the issuer’s definition of “retail,”<sup>11</sup> if applicable) and all orders received for the purchase of the securities from the syndicate.<sup>12</sup> The MSRB proposes to amend Rule G–8(a)(viii)(A) so that senior syndicate managers also will need to maintain the

<sup>10</sup> As defined in MSRB Rule G–34(a)(ii)(C)(1)(a).

<sup>11</sup> The MSRB also proposes to alter Rules G–8(a)(viii)(A) and (B) by deleting the parenthetical reference to “whether there was a retail order period and the issuer’s definition of retail” and to replace it with “those of any retail order period.” The MSRB states that this part of proposed rule change is not intended to be a substantive change.

<sup>12</sup> See Rule G–8(a)(vii) relating to dealer records for principal transactions. Dealers are not required to retain records related to customer orders unless an order has been filled. The requirement in the rule for a memorandum of the transaction including a record of the customer’s order applies only in the event such purchase or sale occurs with the customer.

<sup>7</sup> The definition of “retail order period” was amended in Amendment No. 1 in response to comments received in order to make clear the MSRB’s intent that the definition covers retail order periods during which qualified orders are either the only orders solicited or are given priority over other orders. See *supra* note 6.

<sup>8</sup> The MSRB notes that selling groups are sometimes included by issuers in the distribution of new issues of municipal securities to expand the distribution channel beyond the customers of syndicate members. See Notice, *supra* note 3 at 39039.

<sup>9</sup> The MSRB states that this arrangement, commonly referred to as a “distribution or marketing agreement,” is used by some firms to enhance the firm’s ability to “reach” retail customers, such as in the case where a firm does not have a significant retail distribution network. Notice, *supra* note 3 at 39040, n. 9. Under the proposed rule change, the onus to furnish the information would be placed on the underwriter that has entered into such arrangement, rather than the senior syndicate manager.

following records: (i) All orders received for the purchase of the securities from the selling group; (ii) the information required by Rule G–11(k) (as discussed below); and (iii) all pricing information distributed pursuant to Rule G–11(f) (as discussed below).

Rule G–8(a)(viii)(B) requires that, for each primary offering for which a syndicate has not been formed for the purchase of municipal securities, the sole underwriter must maintain a variety of records which show, among other things, all terms and conditions required by the issuer (including whether there was a retail order period and the issuer's definition of "retail,"<sup>13</sup> if applicable). The MSRB proposes to change Rule G–8(a)(viii)(B) to require the sole underwriter also to maintain in its files the information required by Rule G–11(k) (as discussed below).

### 3. Proposed Changes to Rule G–32

MSRB Rule G–32 governs disclosures in connection with primary offerings. Specifically, Rule G–32(a) provides requirements for the disclosure to customers of certain information in connection with primary offerings of municipal securities. Rule G–32(a)(i) provides, among other requirements, that no broker, dealer, or municipal securities dealer shall sell, whether as a principal or agent, any offered municipal securities to a customer unless such broker, dealer, or municipal securities dealer delivers to the customer a copy of the official statement by no later than the settlement of the transaction. The proposed rule change amends Rule G–32(a)(i) to replace the terms "whether as principal or agent" with the phrase "whether as an underwriter or otherwise" to clarify that all brokers, dealers, and municipal securities dealers, not just underwriters, are subject to the official statement delivery requirement of the rule during the primary offering disclosure period. The MSRB notes that this proposed change codifies its long-standing interpretation of Rule G–32(a)(i).

Rule G–32(b) provides detailed requirements for underwriters submitting documents or disclosure-related information to the Electronic Municipal Market Access ("EMMA") system. Rule G–32(b)(v) provides that in the event a syndicate or similar account has been formed for the underwriting of a primary offering, the managing underwriter shall take the actions required under the provisions of the rule and shall also comply with the recordkeeping requirements of Rule G–8(a)(xiii)(B), which addresses the

recordkeeping requirements in the case of a primary offering in which a syndicate has *not* been formed. The MSRB proposes to delete the reference in Rule G–32(b)(v) to such recordkeeping requirements because the cross reference to "(B)" is incorrect.

Rule G–32(b)(vi)(C)(1)(a) provides that an underwriter must submit data, including: (i) CUSIP numbers; (ii) initial offering prices or yields, if applicable; (iii) the expected closing date for the transaction; and (iv) whether the issuer or other obligated persons have agreed to undertake to provide continuing disclosure information as contemplated by Rule 15c2–12 under the Act. The proposed change to Rule G–32(b)(vi)(C)(1)(a) adds to the data that must be submitted a requirement that the underwriter report to EMMA (for solely regulatory purposes) whether a primary offering of securities included a retail order period and each date and time (beginning and end)<sup>14</sup> it was conducted.<sup>15</sup>

### 4. Implementation Date

The MSRB proposes that the implementation date would be no later than March 31, 2014, or such earlier date to be announced by the MSRB in a notice published on the MSRB Web site with at least a thirty-day advance notification prior to the effective date.<sup>16</sup>

## III. Summary of Comments Received and the Commission's Response

As previously noted, the Commission received eight comment letters on the proposed rule change and a response letter from the MSRB.<sup>17</sup> The commenters generally supported the proposed rule change, but raised some specific concerns discussed in more detail below.

<sup>14</sup> All times will be required to be reported as Eastern Time.

<sup>15</sup> Under the proposed rule change, the underwriter will be required to report to EMMA that a retail order period has occurred by no later than the closing date of the transaction. Under Rule G–32(b)(vi)(C)(1)(a), Form G–32 submissions shall be "initiated on or prior to the date of first execution . . ." The "date of first execution" is defined in Rule G–32(d)(xi) and, for purposes of this report, is deemed to occur by no later than the closing date.

<sup>16</sup> See Amendment No. 1 at 4. As originally proposed, the amendments to Rules G–8 and G–11 would have become effective six months following the date of this order while the amendments to Rule G–32 would have taken effect no later than March 31, 2014, or such earlier date as announced by the MSRB in a notice published on its Web site with at least a thirty-day advance notification prior to the effective date. The MSRB determined that, consistent with the suggestion of commenters, it would be appropriate to synchronize these effective dates.

<sup>17</sup> See *supra* notes 4 and 5.

### 1. Definition of "Retail" Customer

Three commenters addressed the MSRB's proposal to allow issuers to determine eligibility criteria for participating in a retail order period on an issue-by-issue basis in lieu of proposing a rule to define "retail" customer.<sup>18</sup> One commenter stated that, although it supports MSRB's intention of allowing the issuer to establish its own terms and conditions, including order priority provisions, for offerings, it believes the MSRB could do more to protect issuers by developing a non-binding definition of the term "retail" customer.<sup>19</sup> This commenter noted that many issuers would benefit from a baseline definition of "retail" that they could tailor to their specific needs.<sup>20</sup> Another commenter suggested that the MSRB adopt a uniform definition of "retail" that recognizes that retail investors access the municipal bond markets in many ways, including through collective investment vehicles such as mutual funds.<sup>21</sup>

In response to these comments, the MSRB reiterated its belief that it is appropriate to allow issuers the flexibility to designate the eligibility criteria for their retail order periods on an issue-by-issue basis and adopt criteria that best suits their unique circumstances. The MSRB noted that this discretion is necessary given the vast array of potential factors that an issuer may consider in developing the eligibility criteria and the wide range of issuers in the municipal market.<sup>22</sup> Although declining to provide a definition of "retail" order in the rule, in its response letter, the MSRB provided a number of non-exclusive examples of some of the options that issuers may choose from when establishing eligibility criteria for orders solicited through its retail order period. The MSRB noted, for example, that an issuer could determine that retail orders include orders from a specific type of person, such as a natural person or a trust department or registered investment adviser acting on behalf of a natural person.<sup>23</sup> The MSRB also noted that an issuer also could choose to define "retail" to include only orders from "local" investors, defined by reference to the residency or domicile of the investor. Alternatively, an issuer

<sup>18</sup> See GFOA Letter; ICI Letter; NAIPFA Letter.

<sup>19</sup> See GFOA Letter at 1.

<sup>20</sup> See GFOA Letter at 1.

<sup>21</sup> See ICI Letter at 1–2. This commenter believes that, absent a definition of "retail" that includes collective investment vehicles, retail investors that seek exposure to the municipal bond markets through these vehicles will be disadvantaged.

<sup>22</sup> MSRB Letter at 2.

<sup>23</sup> MSRB Letter at 2.

<sup>13</sup> See *supra* note 11.

also could choose to include an order from an institutional investor that represents a family foundation or trust or an order from a mutual fund. The MSRB also stated that an issuer could determine which orders are “retail” orders by imposing an aggregate limitation on the total par amount of the order.<sup>24</sup>

Further, the MSRB noted that even a non-binding definition of “retail” customer could have the effect of skewing issuers’ selection of eligibility criteria, which would be contrary to the MSRB’s intention of granting broad flexibility to issuers. As an alternative to imposing eligibility criteria for retail order periods, the MSRB committed to develop educational materials concerning retail order periods that would assist issuers in developing such criteria.<sup>25</sup> The MSRB stated that it intends to solicit and incorporate input from issuers in developing these educational materials.<sup>26</sup>

Two commenters expressed concerns about issuers not having the requisite experience and having to rely on advice from their brokers or underwriters in developing their eligibility criteria in the absence of a definition of “retail” in the rule.<sup>27</sup> One commenter argued that an issuer is likely to believe that its underwriters’ advice is provided with the issuer’s best interest in mind, but this may not be the case, as underwriters are likely to advise issuers to use a definition of “retail” customer that suits the underwriters’ business model and/or distribution channels without regard to the interests of the issuer.<sup>28</sup> Another commenter noted that dealers do not have a fiduciary duty to the issuer, and thus, it would be helpful for issuers to have a baseline definition of “retail” to reference, rather than relying solely on the advice of the dealer.<sup>29</sup>

In response, the MSRB noted that an issuer could engage a municipal advisor experienced in retail order periods to assist the issuer in managing all aspects of the primary offering process, including the development of eligibility criteria, to help ensure that the issuer’s objectives for the offering will be met.<sup>30</sup> The MSRB also noted that today underwriters may assist issuers in establishing eligibility criteria for retail order periods without a standard

definition of retail customer and that the commenter provided no argument as to why this is violative of existing MSRB rules. The MSRB further observed that the proposed rule change “simply seeks to reinforce dealer compliance with the terms of a retail order period” and that concerns about an underwriter’s ability to manipulate the marketing process in order to be engaged by an issuer do not speak to the substance of the proposal.<sup>31</sup>

One commenter also noted that the MSRB’s use of the term “retail” throughout its proposal suggests that the MSRB believes the term is generally understood by market participants, but that absent a definition of “retail,” it is not possible to evaluate the MSRB’s assessment that retail investors will benefit from its proposed rule.<sup>32</sup> This commenter expressed the view that *bona fide* retail investors will, in fact, be hurt by the MSRB’s proposal because they will be squeezed out by issuers that use definitions, developed with underwriter advice, favoring *non-bona fide* retail investors.<sup>33</sup> In response, the MSRB defended its statement that retail investors will benefit from the proposed rule change by explaining that, in context, the statement refers to retail investors that *issuers have determined* should have the opportunity to compete to buy their bonds in the primary market.<sup>34</sup> Further, the MSRB stated its belief that the proposed rule change will benefit those investors that meet the issuer’s eligibility criteria, because all orders participating in the retail order period will be more likely to comply with the issuer’s eligibility criteria and regulatory authorities will have additional tools to enforce compliance with Rule G–11.

## 2. Definition of “Retail Order Period”

Commenters addressed three aspects of the MSRB’s proposed definition of “retail order period” in proposed Rule G–11(a)(vii). One commenter urged the MSRB to revise the definition of “retail order period” to cover order periods in which both retail and institutional investors are permitted to place orders, but retail orders are given priority over other orders.<sup>35</sup> The commenter noted that many issuers currently conduct order periods in this manner, particularly those whose bond issues are not large in size.<sup>36</sup> In response to this comment, the MSRB proposed to revise the definition to clarify that “retail order

period” includes both: (i) Order periods where orders for retail customers are the only orders solicited; and (ii) order periods where retail orders are given priority over other orders.<sup>37</sup> The MSRB also noted that it had originally intended for the rule to be flexible enough to accommodate an order period that runs concurrently as well as sequentially, stating that the term “issuer’s designated eligibility criteria” was designed to be broad enough to encompass an order period where retail orders are given priority.

Two commenters recommended replacing all references to “going away orders” with references to “*bona fide*” customer orders.<sup>38</sup> As originally proposed, the term “retail order period” was defined as a period during which solely going away orders would be solicited solely from customers that met the issuer’s designed eligibility criteria, and “going away order” was defined to mean an order for which a customer was already conditionally committed.<sup>39</sup> One of the commenters argued that the proposal’s usage of the term “going away orders” was inconsistent with the commonly accepted meaning of the term.<sup>40</sup> The commenter further explained that the terms used by many issuers for retail order periods are designed to have the bonds purchased during the retail order period by “ultimate investors” who will buy and hold the bonds, rather than “intermediate investors” who will sell the bonds quickly and affect the secondary market pricing of the issuer’s securities even prior to closing.<sup>41</sup> While acknowledging that the MSRB’s definition would exclude dealer orders (which is one of the stated goals of the proposal), this commenter advocated for the use of the term “*bona fide*,” arguing that this term is commonly understood to mean “real” or “genuine,” and therefore would enhance the likelihood of bonds going to “ultimate investors.” As such, the commenter argued that adoption of this term would address more appropriately the concern that issuers’ directions concerning retail order periods are being ignored.<sup>42</sup> The other commenter observed that the term “conditionally committed” is less precise than “*bona fide*” customer

<sup>24</sup> MSRB Letter at 2.

<sup>25</sup> MSRB Letter at 3.

<sup>26</sup> MSRB Letter at 6.

<sup>27</sup> See NAIPFA Letter at 1–2 and GFOA Letter at 1.

<sup>28</sup> See NAIPFA Letter at 1–2.

<sup>29</sup> See NAIPFA Letter at 1–2 and GFOA Letter at 1.

<sup>30</sup> MSRB Letter at 2.

<sup>31</sup> MSRB Letter at 3.

<sup>32</sup> See NAIPFA Letter at 2–3.

<sup>33</sup> See NAIPFA Letter at 3.

<sup>34</sup> MSRB Letter at 2–3 (emphasis in original).

<sup>35</sup> See GFOA Letter at 2.

<sup>36</sup> See GFOA Letter at 2.

<sup>37</sup> See Amendment No. 1 at 3–4; MSRB Letter at 5.

<sup>38</sup> See GFOA Letter at 2–3; SIFMA Letter at 2, n.5; SIFMA Letter II at 2.

<sup>39</sup> See Notice, *supra* note 3.

<sup>40</sup> See GFOA Letter at 2.

<sup>41</sup> See GFOA Letter at 2.

<sup>42</sup> See GFOA Letter at 2.

orders that meet the issuer's designated eligibility criteria.<sup>43</sup>

In response, the MSRB proposed to eliminate the term "going away order," while retaining the concept represented by the term to ensure that orders for dealer inventory are not permitted to be submitted during a retail order period.<sup>44</sup> The MSRB declined to use the term "*bona fide*" because, in the MSRB's view, the use of the *bona fide* concept to categorize customers that are likely to hold newly-issued municipal bonds rather than sell them quickly would lead to a highly subjective inquiry.<sup>45</sup> Moreover, the MSRB noted that the commenters did not clearly distinguish between intermediate investors and ultimate investors.<sup>46</sup> The MSRB also noted that the proposed rule change is not intended to prescribe a holding period in order to participate in a retail order period and, accordingly, the MSRB has not conducted an assessment of whether a holding period requirement would be consistent with the promotion of a free and efficient market.<sup>47</sup>

Lastly, one commenter recommended that any educational materials regarding the definition of "retail order period" developed by MSRB should include a recommendation that issuers reserve the right to conduct an audit of compliance by the syndicate of the issuer's retail order period rules.<sup>48</sup> In its comment letter, the MSRB confirmed that issuers may audit customer orders.<sup>49</sup>

### 3. Representations by Dealers Required by MSRB Rule G-11(k)

Five comments addressed the new representations that dealers would need to make to comply with proposed Rule G-11(k).<sup>50</sup> One commenter stated that the representations required by the rule should account for order periods during which both retail and institutional orders are accepted.<sup>51</sup> The MSRB addressed this comment by proposing to amend the definition of "retail order period" to include both: (i) Order periods where orders for retail customers are the only orders solicited;

and (ii) order periods where retail orders are given priority over other orders, as described above.<sup>52</sup>

Three commenters raised concerns about the scope of information required by proposed Rule G-11(k).<sup>53</sup> One commenter argued that proposed Rule G-11(k) is too prescriptive and burdensome and suggested that dealers should be permitted to make certain representations required by the rule only once, rather than each time an order is submitted during a retail order period.<sup>54</sup> The commenter recommended that this single set of representations could be made in either the Master Agreement Among Underwriters or the Selling Group Agreement.<sup>55</sup> The commenter further suggested that dealers should only be required to separately inform the syndicate manager in writing if an order does not comply with proposed Rule G-11(k)(i), (ii), or (iii).<sup>56</sup>

In its response letter, the MSRB noted that the order-by-order information submission requirement is intended to highlight the importance of submitting (as retail orders) only orders that meet an issuer's eligibility criteria. In the MSRB's view, accepting this commenter's proposal would result in a rule that is not materially different from what is required today.<sup>57</sup> MSRB further noted that, in practice, the diligence necessary for a dealer to provide a blanket statement is likely to approximate, if not exceed, the requirements set forth in the proposed rule change.<sup>58</sup> With regard to the commenter's suggestion that dealers should only be required to separately contact the syndicate manager when an order does not comply with the rule, the MSRB stated that a dealer should not submit any orders that do not comply with applicable provisions of Rule G-11(k).<sup>59</sup>

Another commenter stated that proposed Rule G-11(k) will impose a costly, unreasonable, and unnecessary burden on dealers and recommended that issuers be able to determine the scope of information that dealers are required to compile to assess the validity of retail orders, in addition to

the information required by current MSRB rules.<sup>60</sup> The other commenter noted that requiring a dealer to submit any identifying information required by or on behalf of an issuer creates legitimate customer privacy protection issues that should be addressed within the rule.<sup>61</sup> This commenter stated that Rule G-11(k) should prohibit issuers from requiring the submission of customer account numbers, addresses, phone numbers, and tax identification numbers, in addition to social security numbers and customer names.<sup>62</sup>

The MSRB responded that issuers should be given the tools to verify orders for their municipal securities.<sup>63</sup> The MSRB noted that although it is aware of the responsibilities imposed on dealers to protect customer information, it does not believe that the regulations that address the protection of customer specific information prohibit regulatory authorities from requiring dealers to provide specific customer information to advance a legitimate regulatory objective, in this case, giving issuers the tools to verify orders for their municipal securities.<sup>64</sup> The MSRB further noted that it believes issuers will be sensitive to concerns regarding customer privacy and that issuers should be open to modifying, at a dealer's request, a specific information collection requirement if the dealer can demonstrate legitimate customer privacy concerns or that capturing such information may violate applicable laws.<sup>65</sup> The MSRB also stated that the amount of customer specific information that is required by the proposed rule change is not significantly greater than the amount of information that dealers routinely collect and submit today.<sup>66</sup> Moreover, the MSRB noted that GFOA and NAIPFA, two professional associations who may represent the interest of issuers in this regard, generally support the proposed requirement to provide additional information about each order.<sup>67</sup>

<sup>60</sup> See BDA Letter at 1-2.

<sup>61</sup> See WFA Letter at 3.

<sup>62</sup> See WFA Letter at 3.

<sup>63</sup> MSRB Letter at 3.

<sup>64</sup> See MSRB Letter at 3.

<sup>65</sup> See MSRB Letter at 3-4.

<sup>66</sup> MSRB Letter at 3.

<sup>67</sup> MSRB Letter at 4 (referencing letters that GFOA and NAIPFA submitted in response to one of the MSRB's earlier requests for comment on this proposed rule change). In its earlier letter, NAIPFA argued that proposed Rule G-11(k) would likely result in increased market transparency and would allow issuers to better assess the effectiveness of their underwriter both in terms of the underwriter's ability to sell the issuer's securities as well as the underwriter's adherence to the issuer's desires. Letter to Ronald W. Smith, Corporate Secretary,

<sup>43</sup> SIFMA Letter II at 2.

<sup>44</sup> Amendment No. 1 at 4, MSRB Letter at 4-5.

<sup>45</sup> MSRB Letter at 5.

<sup>46</sup> MSRB Letter at 5.

<sup>47</sup> MSRB Letter at 5. The MSRB did note that although they were not prescribing a holding period, issuers have the ability to establish customer eligibility criteria to define the customers that they would like to participate in the retail order period to the extent consistent with applicable laws and regulations.

<sup>48</sup> See BDA Letter at 2.

<sup>49</sup> MSRB Letter at 4.

<sup>50</sup> See BDA Letter; GFOA Letter; SIFMA Letter; SIFMA Letter II; WFA Letter.

<sup>51</sup> See GFOA Letter at 2.

<sup>52</sup> See *supra* note 6; Amendment No. 1 at 3-4.

<sup>53</sup> BDA Letter at 1-2; SIFMA Letter at 2-3; SIFMA Letter II at 2; WFA Letter at 3.

<sup>54</sup> See SIFMA Letter at 2-3. Specifically this commenter noted that the dealer could make a single representation that: (i) Each order meets the issuer's eligibility criteria for retail; (ii) each order is a *bona fide* customer order; and (iii) such order is not duplicative. See also SIFMA Letter II at 2.

<sup>55</sup> See SIFMA Letter at 2-3.

<sup>56</sup> See SIFMA Letter at 3.

<sup>57</sup> See MSRB Letter at 4.

<sup>58</sup> MSRB Letter at 4.

<sup>59</sup> MSRB Letter at 4.

#### 4. Issuer Approval of Terms and Conditions

One commenter opposed the proposed amendment to Rule G–11(f) to require that an issuer approve any written statement of the terms and conditions required by the issuer if the senior syndicate manager prepares such statement, rather than the issuer.<sup>68</sup> The commenter stated that the current language of Rule G–11(f) is sufficient and, in any event, this proposed change likely will result in some unintended consequences, including questions as to what will result in the event that issuers are unwilling to provide the required approval, among others.<sup>69</sup> The MSRB responded to this comment by stating that it believes the new requirement is desirable and will help ensure that issuers understand their role and choices with respect to the syndicate process.<sup>70</sup>

#### 5. Implementation Timeline

Two commenters addressed the MSRB's proposed implementation timeline, which, as originally proposed, would have had two separate dates for requiring compliance: the amendments to Rules G–8 and G–11 would become effective six months following the date of the order; and the amendments to Rule G–32 would take effect no later than March 31, 2014, or such earlier date to be announced by the MSRB in a notice published on the MSRB Web site with at least a thirty-day advance notification prior to the effective date.<sup>71</sup> One of the two commenters that addressed the MSRB's implementation timeline supported the timeline as proposed.<sup>72</sup> The other urged the MSRB to align the implementation date for the proposed changes to Rules G–8 and G–11 with the amendments to Rule G–32.<sup>73</sup> This commenter noted that dealers will need time to design and test software to ensure that they can comply with the changes to Rules G–8 and G–11.<sup>74</sup> In response, the MSRB agreed that the effective dates for the proposed amendments to Rules G–8 and G–11 could be synchronized with the later

effective date for Rule G–32.<sup>75</sup> The new effective dates for the changes to Rules G–8 and G–11 are reflected in the proposed rule change, as modified by Amendment No. 1.<sup>76</sup>

#### 6. Proposed Rule Change Process

Prior to the filing of Amendment No. 1, two professional associations submitted a joint letter urging the Commission not to permit the proposed rule change to become immediately effective without public input.<sup>77</sup> These commenters speculated that Amendment No. 1 would make significant and material amendments to controversial aspects of the proposed rule change. The commenters asked that the proposed rule change, as modified by Amendment No. 1, be resubmitted for public comment rather than becoming immediately effective.<sup>78</sup>

In response, the MSRB stated that the only substantive change made by Amendment No. 1—the modification of the definition of “retail order period” to cover concurrent as well as sequential retail order periods—was made in response to comments submitted by one of the professional associations that authored the joint comment letter.<sup>79</sup> MSRB further noted that it does not believe this refinement itself is significant or likely to result in controversy, in light of the stated goal of the original proposed rule change of enhancing the regulation of customer orders meeting an issuer's eligibility criteria for retail orders.<sup>80</sup>

#### IV. Discussion and Commission Findings

The Commission has carefully considered the proposed rule change, as well as the comment letters received and the MSRB's response, and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to the MSRB.<sup>81</sup> In particular, the proposed rule change is consistent

with Section 15B(b)(2)(C) of the Act, 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.<sup>82</sup>

The MSRB states that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Act, because it is intended to protect, among others, investors and municipal entities by establishing certain basic regulatory standards to support the use of retail order periods. As the MSRB explained in its Notice, the proposed rule change is designed to address concerns that had been highlighted by issuers, dealers, and municipal advisors regarding the mischaracterization of orders as “retail,” the failure of syndicate managers to disseminate timely notice of the terms and conditions of a retail order period to all dealers, and the failure to deliver requested pricing information in a timely manner. The thrust of the proposal, according to the MSRB, is to provide a mechanism by which issuers can have greater assurance that a dealer has, when directed to do so by the issuer, made a *bona fide* public offering of securities to retail customers at their initial offering prices.

According to the MSRB, the proposed rule change will prevent fraudulent and manipulative acts and practices by requiring additional representations and disclosures to support whether the orders placed during a retail order period meet the eligibility criteria for retail orders established by issuers. In addition, the MSRB states that the proposed rule change will reduce the opportunities for misrepresentation of orders as “retail orders” by requiring that certain information about each order is submitted in writing to the syndicate manager or sole underwriter in sufficient time so that the information can be examined by issuers and their financial advisors before bonds are allocated to dealers. The MSRB further states that the proposed rule change will provide enhanced recordkeeping to assist regulators in determining whether the requirements of Rule G–11 are being

MSRB, from Colette J. Irwin-Knott, President, NAIPFA, dated April 13, 2012, at 1.

<sup>68</sup> See SIFMA Letter at 3.

<sup>69</sup> See SIFMA Letter at 3–4; SIFMA Letter II at 3. To support its contention that the current language of Rule G–11(f) is sufficient, this commenter noted that it is not aware of enforcement actions taken against syndicate managers for not honoring terms and conditions required by the issuer. SIFMA Letter II at 3.

<sup>70</sup> See MSRB Letter at 6.

<sup>71</sup> See Notice, *supra* note 3.

<sup>72</sup> See GFOA Letter at 3.

<sup>73</sup> See WFA Letter at 3–4.

<sup>74</sup> See WFA Letter at 3–4.

<sup>75</sup> See MSRB Letter at 6.

<sup>76</sup> Amendment No. 1 at 4.

<sup>77</sup> SIFMA and GFOA Joint Letter at 1–2.

<sup>78</sup> SIFMA and GFOA Joint Letter at 1–2. The commenters state that a proposed rule change may take effect immediately only in limited circumstances under Section 19(b)(3)(A) of the Act, 15 U.S.C. 78s(b)(3)(A). The Commission notes that the MSRB filed this proposed rule change under Section 19(b)(2) of the Act, 15 U.S.C. 78s(b)(2), and, with this notice, the Commission is soliciting comment and accelerating approval because it “finds good cause for so doing” under Section 19(b)(2)(C)(iii) of the Act, 15 U.S.C. 78s(b)(2)(C)(iii).

<sup>79</sup> MSRB Letter at 5.

<sup>80</sup> MSRB Letter at 5–6.

<sup>81</sup> In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>82</sup> 15 U.S.C. 78o–4(b)(2)(C).

met. The MSRB also represents that, by ensuring that a syndicate manager must communicate an issuer's requirements for the retail order period and other syndicate information to all dealers, including selling group members, the proposed rule change will foster cooperation and coordination among all dealers engaged in the marketing and sale of new issue municipal securities. Finally, the MSRB states that, by requiring that issuers approve the statement required by Rule G-11(f) if such statement is prepared by the senior syndicate manager on the issuer's behalf, the proposed rule change will ensure that issuers are aware of and agree with any requirement imposed on the syndicate and selling group in its name.

The MSRB states that it 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. The MSRB has recognized that there are compliance costs with certain aspects of the proposed rule change, in particular, relating to the new representations that dealers will need to make in connection with retail orders submitted during retail order periods.<sup>83</sup> However, the MSRB believes these costs are properly balanced against the need for issuers to have confidence that orders placed during a retail order period are *bona fide* and meet the issuer's eligibility requirements for participation in the retail order period. In addition, the MSRB represented that the proposal attempts to minimize the potential burden on dealers by permitting the required information to be submitted electronically, noting that many dealers currently operate software platforms which can be modified to capture the new disclosures.<sup>84</sup>

As noted above, the Commission received eight comment letters on the filing.<sup>85</sup> The Commission notes that while many of the commenters suggested means to improve the filing or opposed certain aspects of the proposal, no commenters argued that the proposed rule change was inconsistent with the applicable provisions of the Act. For the reasons noted above, including those discussed in the MSRB Letter, the Commission believes that the proposed rule change, as amended by Amendment No. 1, is consistent with the Act.

## V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 to the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-MSRB-2013-05 on the subject line.

### Paper Comments

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

All submissions should refer to File Number SR-MSRB-2013-05. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change; 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-2013-05 and should be submitted on or before October 23, 2013.

## VI. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause for approving the proposed rule change, as

amended by Amendment No. 1, prior to the 30th day after the date of publication of notice in the **Federal Register**. As discussed above, Amendment No. 1 partially amends the text of the original proposed rule change to: (i) Revise the definition of "retail order period" in Rule G-11(a)(vii) to make clear the MSRB's intent that the definition covers order periods during which orders that meet the issuer's designated eligibility criteria for retail orders and for which the customer is already conditionally committed will be either (a) the only orders solicited or (b) given priority over other orders; (ii) revise proposed Rule G-11(k) to clarify that dealers submitting institutional orders during a retail order period are not required to submit certain additional information that is intended to relate to retail orders; (iii) eliminate the use of the defined term "going away order," while retaining the concept represented by the term; (iv) delete certain duplicative language from the definition of "selling group" in Rule G-11(a); and (v) synchronize the effective dates so that all parts of the proposed rule change would take effect at the same time. As noted by the MSRB, the only substantive change in the proposed amendment—the refinement of the definition of "retail order period"—was made to accommodate concerns raised during the comment period. MSRB has further noted that the modifications contained in Amendment No. 1 are unlikely to be controversial, in light of the stated goal of the original proposal to enhance the regulation of customer orders meeting the issuer's eligibility criteria for retail order. Moreover, the MSRB Letter responds to the concerns raised by other commenters. For the foregoing reasons, the Commission finds good cause for approving the proposed rule change, as amended, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>86</sup> that the proposed rule change (SR-MSRB-2013-05), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>87</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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<sup>83</sup> See Notice at 39042.

<sup>84</sup> See Notice at 39042.

<sup>85</sup> See *supra* Section III for a detailed discussion of the comment letters.

<sup>86</sup> 15 U.S.C. 78s(b)(2).

<sup>87</sup> 17 CFR 200.30-3(a)(12).