

City of San Diego Response to:

Request for Comment on Draft Amendments to 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (Notice 2018-29)

I - Nature, Timing and Manner of Disclosures of Conflicts of Interest

B. Potential Material Conflicts of Interest

It is reasonable to limit what constitutes a potential material conflict of interest to that which is reasonably foreseeable to mature into an actual conflict of interest. Inclusion of all potential conflicts without regard to likelihood of occurrence could make it difficult to discern real areas of concern.

A greater likelihood than “reasonable foreseeability” should not be set. Such a standard could eliminate the disclosure of some potential conflicts of interest that have a reasonable chance of occurring, even if they are not highly likely to occur.

The obligation requiring underwriters to provide disclosures of actual material conflicts of interest discovered or arising after the underwriter is engaged does not eliminate or reduce the need to disclose potential material conflicts of interest. It is important for an issuer to be apprised of potential material conflicts of interest up front, so the issuer can properly evaluate the potential conflicts and determine if it is prudent to move forward.

C. Syndicate Manager Disclosure of Standard and Transaction-Specific Disclosures on Behalf of Syndicate Members

Each syndicate member should be responsible for delivering the standard and transaction specific disclosures. Even for a frequent issuer, receipt of disclosures from each syndicate member is manageable. As such, all syndicate members should continue to be required to obtain acknowledgement of receipt from the issuer. The ability to handle this electronically should minimize any burdens. The standard and transaction specific disclosures should be bifurcated from the dealer specific disclosures to aide in the review of information.

D. Optional Alternative Manner of Providing Standard Disclosures

While the alternative manner could reduce the volume of disclosures, it may be confusing, particularly when a syndicate member in one transaction becomes a syndicate manager in a subsequent transaction and refers back to the disclosure provided by the syndicate manager in the prior transaction. It is most straight forward to require disclosures on a transaction by transaction basis. Even for a frequent issuer, receipt of disclosures from each syndicate member, and by transaction, is manageable.

E. Clear and Separate Identification of Disclosures

Many underwriters already separate dealer and transaction specific disclosures in the same document. The separation of the standard, dealer-specific and transaction specific disclosures, when they are provided within the same document, would not create challenges when the issuer reviews them. Conversely, the separation would aid in the review of the information.

G. Plain English

Many underwriters present disclosures in a clear manner when they are engaged for non-complex municipal securities financings. In these cases, some underwriters explicitly state in the disclosures that they are not recommending a complex municipal securities financing to the issuer. Such a statement should be required under these circumstances. Similarly, if the subject matter is so complex that it cannot be explained in plain English, that should be explicitly stated within the disclosures about the financing. Such a statement would alert an issuer that it needs to ask more questions, allows the issuer to consult with its municipal advisor or counsel, and may be important in the issuer's determination of whether it should recommend the transaction to its legislative body and proceed with execution.

II – Issuer Acknowledgement of Receipt of Underwriter Disclosures

The issuer should designate its primary contact for receipt of the underwriter disclosures. The primary contact should be someone with financial decision-making authority who leads the issuer's financing efforts. Delivery of disclosures by e-mail and confirmation via a read receipt should be permitted so long as the underwriter has delivered the disclosures to the issuer designated primary contact.

IV – Underwriter Discouragement of the Use of a Municipal Advisor

Since an issuer (particularly one that is not in the market often) could experience a situation where an underwriter discourages the issuer from engaging a municipal advisor, the strengthened language under the Amended Guidance is important. The draft amendment, by explicitly stating that an underwriter may not discourage an issuer from using a municipal advisor or otherwise imply that the hiring of a municipal advisor would be redundant because the underwriter can provide the same services that a municipal advisor would, should address the issue. In addition, the standard disclosures should include an affirmative statement that the issuer may retain a municipal advisor.