

incorporates a longstanding Board interpretation regarding disclosure to customers of initial offering prices in negotiated underwritings.² In view of these recent amendments and the continuing concerns of the Board and the enforcement agencies that some dealers may have inadequate procedures in place to ensure compliance with rule G-32,³ the Board is publishing this notice to review the requirements of the rule and to emphasize the importance of full and timely compliance.

Purpose and Structure of Rule G-32

Rule G-32 is designed to ensure that a customer who purchases new issue municipal securities is provided with all available information relevant to his or her investment decision by settlement of the transaction. The rule obligates all dealers selling new issue municipal securities to provide to their customers purchasing the securities certain disclosure materials by settlement. To effectuate this primary obligation, the rule further obligates all dealers that sell new issue municipal securities to other dealers, as well as the managing or sole underwriter for such securities, to provide to such purchasing dealers these disclosure materials so as to permit the purchasing dealers to comply with their primary delivery obligations to their own customers. Finally, the rule provides that a dealer that prepares an official statement in final form on behalf of an issuer while serving in the capacity of financial advisor to such issuer must make the official statement available to the underwriters promptly after the issuer approves its distribution. Compliance with each prong of the rule is crucial to ensure that the primary purpose of the rule is fulfilled.

New Issue Municipal Securities and the Underwriting Period

Rule G-32 applies to the sale of all new issue municipal securities. These are defined in section (c)(i)^[1] as any municipal securities (other than commercial paper⁴) that are sold by any dealer during the issue's underwriting period. Once the underwriting period has ended for an issue of municipal securities, the requirements of rule G-32 no longer apply to transactions in such municipal securities.

The underwriting period for an issue of municipal securities begins with the first submission to the underwriters of an order from a potential customer to purchase the securities or the purchase by the underwriters of the securities from the issuer (*i.e.*, the execution of the purchase contract in a negotiated sale or the award of the securities in a competitive sale), whichever occurs first. The underwriting period ends upon delivery by the issuer of the securities to the underwriters (*i.e.*, the bond closing) if the underwriters no longer retain an unsold balance at such time. If, however, the issue is not sold out by the bond closing, the underwriting period continues until the underwriters no longer retain an unsold balance; provided that, in the case of an issue underwritten by a sole underwriter, if the bond closing has occurred and the underwriter retains an unsold balance 21 calendar days after the first submission of an order, the underwriting period nonetheless ends after such 21st day.⁵

Delivery Obligations to Customers

A dealer selling new issue municipal securities to a customer is required to deliver (not merely send) certain information to such customer prior to settlement of the transaction. The Board has previously noted that the required information will be presumed to have been delivered to the customer if it was sent at least three business days prior to settlement.⁶

Official Statements. With only two exceptions, a dealer violates section (a) of rule G-32 if it sells, either as principal or agent, a new issue municipal security to a customer but fails to deliver an official statement in final form⁷ to such customer by no later than settlement of that transaction. Dealers should note that this obligation differs from the obligation imposed by SEC Rule 15c2-12(b)(4) in that rule G-32 mandates that any dealer selling new issue municipal securities (not just participating underwriters of the offering) must deliver (not just send) the official statement to the customer by settlement, regardless of whether the customer has requested a copy of the official statement.⁸

The first exception under rule G-32 arises where the issuer is not preparing an official statement in final form. In that case, the dealer must deliver to the customer by no later than settlement a written notice that an official statement in final form is not being prepared, together with a copy of a preliminary official statement, if one has been prepared.⁹ This exception is **not** available in cases where the official statement in final form is in the process of being prepared but is not yet available at the time that a dealer wishes to settle a transaction with a customer. Thus, in such a case, a dealer would violate rule G-32(a) by settling a customer transaction without delivery of the official statement in final form, even if a preliminary official statement is delivered by settlement and the official statement in final form is delivered to the customer as soon as it becomes available.

The second exception applies solely to municipal securities issued in a primary offering that qualifies for the exemption set forth in SEC Rule 15c2-12(d)(1)(iii) ("Exempt VRDOs"),¹⁰ but only if an official statement in final form is being prepared.¹¹ This exception permits a dealer to deliver a preliminary official statement to a customer by settlement in substitution for the official statement in final form so long as (1) the dealer provides written notice to the customer by settlement that the official statement in final form will be sent within one business day following its receipt by the dealer and (2) the dealer sends the official statement in final form to the customer within one business day of its receipt.¹² The Board believes, however, that if the official statement in final form is available in sufficient time to permit delivery to the customer by settlement, it would be in the dealer's best interest to make such delivery by settlement, as it would be required to do for any other new issue municipal securities. This would permit the dealer to satisfy its delivery obligation with a single delivery of the official statement in final form, rather than two separate deliveries of the preliminary and final official statements, thereby reducing the dealer's compliance burden.¹³

Additional Disclosures for Negotiated Underwritings.

Where the underwriters have purchased an issue of municipal securities from the issuer in a negotiated sale, any dealer (not just syndicate or selling group members) selling such securities to a customer during the underwriting period is required to deliver to such customer prior to settlement, in addition to the official statement, information concerning (A) the underwriting spread;¹⁴ (B) the amount of any fee received by such dealer as agent for the issuer in the distribution of the securities, if applicable;¹⁵ and (C) the initial offering price for each maturity in the issue, including the initial offering price of maturities that are not reoffered.¹⁶ The obligation to make these further disclosures may be satisfied by inclusion by the issuer of such information in the official statement in final form and the delivery of such official statement to the customer by settlement. However, should the issuer elect not to include any such information in the official statement or if an official statement that includes this information is not delivered to the customer by settlement, a dealer selling such securities during the underwriting period must nevertheless provide such information in writing to the customer by settlement (for example, in a confirmation or other writing delivered to the customer by settlement). For example, if a dealer delivers a preliminary official statement to a customer at settlement for a new issue Exempt VRDO and any of the required disclosure information is left blank or is noted as preliminary and subject to change (with the expectation of the information being completed or finalized in the official statement in final form to be delivered after settlement), then disclosure of such information would be required in a separate writing delivered at or prior to settlement.

Delivery Obligations to Purchasing Dealers

Dealers selling new issue municipal securities to other dealers, and dealers serving as managing or sole underwriters for such new issues, are also required to deliver the official statement and the additional disclosures for negotiated underwritings, if applicable, to dealers purchasing such securities during the underwriting period.

Obligations of Selling Dealers. If a dealer sells a new issue municipal security to another dealer, the selling dealer is obligated under rule G-32(a)^[31] to send to the purchasing dealer, upon request, (i) the official statement in final form (or if no official statement in final form is being prepared, a written notice to that effect, together with a copy of a preliminary official statement, if one has been prepared) and (ii) if the underwriters originally purchased the securities from the issuer in a negotiated sale, the additional disclosures described above required in connection with a negotiated underwriting. The official statement and the additional disclosures related to negotiated underwritings, if applicable, must be sent by the selling dealer to the purchasing dealer within one business day of the purchasing dealer's request, provided that, if the official statement in final form is being prepared but has not yet been received from the issuer or its agent, then the official statement in final form and the additional disclosures must be

sent no later than the business day following such receipt.¹⁷ These items must be sent by first class mail or other equally prompt means, unless the purchasing dealer arranges some other method of delivery and pays or agrees to pay for such alternate delivery method. This obligation applies with respect to all requests to a selling dealer made by a dealer purchasing new issue municipal securities from such selling dealer during the underwriting period, even where the selling dealer did not participate as a syndicate or selling group member for the underwriting of the new issue municipal securities.

Obligations of Managing and Sole Underwriters. If an official statement in final form is prepared in connection with an issue of municipal securities, the dealer serving as managing underwriter or sole underwriter for such issue is obligated under rule G-32(b)(i)^[31] to send to any dealer purchasing such securities during the underwriting period, upon request, (i) one copy of the official statement in final form plus one additional copy per \$100,000 par value purchased by such purchasing dealer for resale to customers and (ii) if the underwriters originally purchased the securities from the issuer in a negotiated sale, the required additional disclosures. Managing and sole underwriters also are required to provide purchasing dealers, upon request, with instructions on how to order copies of the official statement in final form from the printer. The official statement and the additional disclosures related to negotiated underwritings, if applicable, must be sent by the managing or sole underwriter to the purchasing dealer within one business day of the purchasing dealer's request, provided that, if the official statement in final form is being prepared but has not yet been received from the issuer or its agent,¹⁸ then the official statement in final form and the additional disclosures must be sent no later than the business day following such receipt. These items must be sent by first class mail or other equally prompt means, unless the purchasing dealer arranges some other method of delivery and pays or agrees to pay for such alternate delivery method. This obligation applies with respect to all requests to the managing or sole underwriter made by purchasing dealers during the underwriting period, even where the managing or sole underwriter did not sell the new issue municipal securities to the purchasing dealer.

Obligations of Dealers Acting as Financial Advisors. Rule G-32(b)(ii)^[#] provides that, if a dealer that acts as financial advisor to an issuer prepares an official statement in final form on behalf of such issuer, such dealer must make that official statement available to the managing or sole underwriter promptly after the issuer approves distribution of the official statement in final form. This provision is designed to ensure that, once the official statement is completed and approved by the issuer for distribution, dealers acting as financial advisors will be obligated to commence the dissemination process promptly.¹⁹

Implications for Inter-Dealer Dissemination. The provisions of rule G-32 relating to dissemination among dealers of official statements and the additional disclosures related to negotiated underwritings is designed to ensure that a dealer

selling a new issue municipal security to a customer has a reliable and timely source for obtaining such items for delivery to the customer by settlement. In the case of a syndicate member that purchases a new issue municipal security in an underwriting, the rule, in conjunction with The Bond Market Association's Standard Agreement Among Underwriters, will effectively obligate the managing underwriter to send the official statement in final form (in the required quantity) and the additional disclosures to the syndicate member within one business day of its receipt from the issuer.²⁰ If for any reason such syndicate member needs to obtain a copy of the official statement more rapidly than by means of first class mail, it may arrange with the managing underwriter for delivery of the official statement by an alternate means so long as the requesting syndicate member covers the cost of such delivery.

For a non-syndicate member that purchases a new issue municipal security from the syndicate or from any other dealer, both the dealer that sold the security to the non-syndicate member and the managing or sole underwriter is obligated, if requested by such non-syndicate member, to send the official statement in final form and the additional disclosures within one business day of such request. If for any reason such non-syndicate member needs to obtain a copy of the official statement more rapidly than by means of first class mail, it may arrange with the dealer that is fulfilling the request for delivery of the official statement by an alternate means so long as the requesting non-syndicate member covers the cost of such delivery. Dealers purchasing new issue municipal securities from another dealer are advised that the obligation of the selling dealer or of the managing or sole underwriter to send an official statement to such purchasing dealer only takes effect upon the request of the purchasing dealer. Therefore, unless the purchasing dealer already has a copy of the official statement or has an alternate source for receiving it and the additional disclosures, such dealer will need to take the affirmative step of requesting such items from the selling dealer or the managing or sole underwriter.

A dealer that sells a new issue municipal security to a customer is not relieved of its obligation to deliver by settlement the official statement in final form and the additional disclosures related to negotiated underwriters because either the dealer from which it acquired the security or the managing or sole underwriter for the issue fails to fulfill its obligation to send these items to such dealer upon request. Such dealer may need to obtain the official statement in final form from other available sources. Such other sources of official statements include, but are not limited to, the nationally recognized municipal securities information repositories, other information vendors, or the Board's Municipal Securities Information Library® (MSIL®) system.²¹ Similarly, a managing or sole underwriter or a dealer selling a new issue municipal security cannot fulfill its obligation to send the official statement in final form and the additional disclosures to a purchasing dealer upon request by referring such dealer to such other sources of official statements.

Recordkeeping

Rule G-8(a)(xiii) requires that each dealer make and keep a record of all deliveries of official statements and of the additional disclosures related to negotiated underwritings made to purchasers of new issue municipal securities.²² Although the rule does not obligate a dealer to maintain such records in any given manner, such records must provide an adequate basis for the audit of such information. To this end, NASD Regulation, Inc. has noted:

Some firms establish a file containing a copy of the customer's new issue municipal purchase confirmation and/or a mailing label to demonstrate compliance with Rule G-8. However, NASD Regulation does not view this approach as adequately demonstrating compliance with MSRB Rule G-8. Instead, an adequate record of the delivery of new issue municipal securities disclosure information should, at a minimum, contain the following:

- customer name;
- security description;
- settlement date(s);
- type of disclosure sent (preliminary or final Official Statement);
- date the required disclosure was sent;
- and name of person(s) sending the disclosures.

At times, a firm assigns the new issue municipal securities disclosure function to a third party vendor. As a result, the member [dealer] does not maintain "a record of delivery" of the new issue disclosure. Nevertheless, from a regulatory perspective, the firm remains fully responsible for disclosure. When firms have assigned the new issue disclosure function to a third party, NASD Regulation expects that the compliance review process will include, at a minimum, periodic test to assure that the new issue disclosures are being made at or before settlement.²³

Dealers should consult with the applicable enforcement agency regarding the adequacy of their recordkeeping under rule G-8(a)(xiii).

¹ See *MSRB Reports*, Vol. 18, No. 2 (Aug. 1998) at 15-17.

² See *MSRB Reports*, Vol. 18, No. 2 (Aug. 1998) at 19-21.

³ See *MSRB Reports*, Vol. 17, No. 2 (June 1997) at 23-24; See also NASD Regulation, Inc., "Municipal Securities Update — Disclosure to Purchasers of New Issue Securities," *Regulatory & Compliance Alert*, Vol. 12, No. 3 (Sept. 1998) at 19-20.

⁴ The exception for commercial paper applies solely to true commercial paper issues (*i.e.*, not to variable rate demand obligations with a nominal long maturity and having a so-called "commercial paper" mode).

⁵ See rules G-32(c)(ii) [currently codified at rule G-32(d)(ii)] and G-11(a)(ix).

⁶ See *MSRB Reports*, Vol. 7, No. 2 (March 1987) at 12.

⁷ Rule G-32 defines official statement as a document prepared by the issuer or its representatives setting forth, among other matters, information concerning the issuer and the proposed issue of securities. This definition is, of necessity, broader than the definition set forth in SEC Rule 15c2-12(f)(3)

- for the term “final official statement” since rule G-32 applies to all issues of municipal securities (other than commercial paper issues), not just those issues subject to SEC Rule 15c2-12. However, the Board believes that, in the case of new issue municipal securities subject to SEC Rule 15c2-12, the official statement in final form for purposes of rule G-32 would be the same as the final official statement for purposes of SEC Rule 15c2-12.
- ⁸ SEC Rule 15c2-12(b)(4) provides that an underwriter participating in an offering subject to the Rule must send a copy of the final official statement to a potential customer within one business day of a request until the earlier of (i) 90 days from the end of the underwriting period or (ii) the time when the official statement is available from a nationally recognized municipal securities information repository, but in no case less than 25 days following the end of the underwriting period.
- ⁹ Since SEC Rule 15c2-12(3) provides that an underwriter participating in an offering subject to the Rule must contract with the issuer to receive final official statements, the Board expects that a final official statement will be prepared for all such offerings and therefore delivery of preliminary official statements for such issues would never satisfy the delivery obligation under rule G-32(a).
- ¹⁰ A primary offering qualifies for this exemption if the municipal securities are in authorized denominations of \$100,000 or more and, at the option of the holder thereof, may be tendered to the issuer or its designated agent for redemption or purchase at par value or more at least as frequently as every nine months until maturity, earlier redemption or purchase by the issuer or its designated agent.
- ¹¹ If an official statement in final form is not being prepared, then the first exception described above would apply.
- ¹² See *MSRB Reports*, Vol. 18, No. 2 (Aug. 1998) at 15-17. If no preliminary official statement is prepared for such issue, then the dealer must still provide written notice by settlement that an official statement in final form will be sent within one business day of receipt.
- ¹³ In addition, ensuring that the official statement in final form, rather than merely the preliminary official statement, is in the possession of the customer by settlement may help to avoid potential liabilities that could result if there are any material differences between the preliminary official statement and the official statement in final form. The fact that rule G-32 permits a dealer to deliver the preliminary official statement, rather than the official statement in final form, to a customer by settlement in this specific situation does not in any way limit or reduce the dealer’s disclosure obligations under the federal securities laws, including in particular the dealer’s obligation under rule G-17 to disclose, at or before execution of a transaction, all material facts concerning the transaction which could affect the customer’s investment decision and not omit any material facts which would render other statements misleading.
- ¹⁴ This provision obligates a dealer to disclose the gross spread (*i.e.*, the difference between the initial offering price and the amount paid to the issuer), expressed either in dollars or points per bond. The underwriting spread may be shown either as a total amount or as a listing of the components of the gross spread. If components of the gross spread are listed, that portion of the proceeds which represents compensation to the underwriters must be clearly identified as such. For example, the Board believes that use of the terms “underwriters’ discount” or “net to underwriters” would be acceptable but that the term “bond discount” is confusing and, therefore, inappropriate. See *MSRB Reports*, Vol. 7, No. 2 (March 1987) at 13.
- ¹⁵ If no fee is received by the dealer for acting as an agent for the issuer in the distribution of the securities, the dealer need not affirmatively state that no such fee was received but may instead omit any statement regarding such fee.
- ¹⁶ The initial offering price may be expressed either in terms of dollar price or yield.
- ¹⁷ Thus, if a purchasing dealer requests a copy of the official statement in final form from a selling dealer before the issuer has delivered the official statement to the underwriters, then the obligation of the selling dealer to send the official statement is deferred until the business day after the underwriters receive the official statement from the issuer.
- ¹⁸ The Board is of the view that an underwriter that prepares an official statement on behalf of an issuer would be deemed to have received the official statement from the issuer immediately upon such issuer approving the distribution of the completed official statement in final form (*i.e.*, when the issuer releases the completed official statement for distribution).
- ¹⁹ The Board urges issuers that utilize the services of non-dealer financial advisors to hold such financial advisors to the same standards for prompt delivery of official statements to the underwriters.
- ²⁰ The Bond Market Association’s Standard Agreement Among Underwriters provides that syndicate members must place orders for the official statement by the business day following the date of execution of the purchase contract and states that any syndicate member that fails to place such an order will be assumed to have requested the quantity required under rule G-32(b)(i) [currently codified at rule G-32(c)(i)]. See *The Bond Market Association, Agreement Among Underwriters — Instructions, Terms and Acceptance* (Oct. 1, 1997) at ¶ 3. Thus, except in the rare instances where an official statement in final form is completed and available for distribution on the date of sale, syndicate members will have made or have been deemed to have made their requests for official statements by the time the managing underwriter receives the official statement from the issuer, thereby obligating the managing underwriter to send the official statement to syndicate members within one business day of receipt.
- ²¹ Municipal Securities Information Library and MSIL are registered trademarks of the Board.
- ²² Rule G-9(b)(x) provides that these records must be preserved for a period of not less than 3 years.
- ²³ NASD Regulation, Inc., “Municipal Securities Update — Disclosure to Purchasers of New Issue Securities,” *Regulatory & Compliance Alert*, Vol. 12, No. 3 (Sept. 1998) at 19-20. The views of the bank regulatory agencies regarding adequacy of any particular recordkeeping practice for the purpose of demonstrating compliance with rule G-8 may differ.
- ^[a] [Currently codified at rule G-32(d)(i).]
- ^[b] [Currently codified at rule G-32(b).]
- ^[c] [Currently codified at rule G-32(c)(i).]
- ^[d] [Currently codified at rule G-32(c)(ii).]

Notice Regarding Electronic Delivery and Receipt of Information by Brokers, Dealers and Municipal Securities Dealers

November 20, 1998

On May 9, 1996, the Securities and Exchange Commission (the “SEC”) issued an interpretative release expressing its views on the use of electronic media for delivery of information by, among others, brokers and dealers.¹ The SEC stated that brokers, dealers and others may satisfy their delivery obligations under federal securities laws by using electronic media as an alternative to paper-based media within the framework established in the SEC’s October 1995 interpretive release on the use of electronic media for delivery purposes.² The SEC also indicated that an electronic communication from a customer to a broker or dealer generally would satisfy the requirements for written consent or acknowledgment under the federal securities laws.

The Municipal Securities Rulemaking Board (the “Board”) is publishing this notice to address the use by brokers, dealers and municipal securities dealers (“dealers”) of electronic media to deliver and receive information under Board rules.³ The Board will permit dealers to transmit documents electronically.

ly that they are required or permitted to furnish to customers under Board rules provided that they adhere to the standards set forth in the SEC Releases and summarized below.⁴ Dealers also may receive consents and acknowledgments from customers electronically in satisfaction of required written consents and acknowledgments. Furthermore, the Board believes that the standards applied by the SEC to communications with customers should also apply to communications among dealers and between dealers and issuers. However, although it is the Board's goal ultimately to permit dealers to make required submissions of materials to the Board electronically if possible, this notice does not affect existing requirements for the submission of materials to the Board, its designees and certain other entities to which information is required to be delivered under Board rules.⁵

Dealers are urged to review the SEC Releases in their entirety to ensure that they comply with all aspects of the SEC's electronic delivery requirements. Although the examples provided in the SEC Releases are based on SEC rules, the examples nonetheless provide important guidance as to the intended application of the standards set out by the SEC with respect to electronic communications.

Electronic Communications from Dealers to Customers

General. According to the standards established by the SEC, dealers may use electronic media to satisfy their delivery obligations to customers under Board rules, provided that the electronic communication satisfies the following principles:⁶

1. Notice — The electronic communication should provide timely and adequate notice to customers that the information is available electronically.⁷ Since certain forms of electronic delivery may not always provide a likelihood of notice that recipients have received information that they may wish to review, dealers should consider supplementing such forms of electronic communication with a separate communication, providing notice similar to that provided by delivery in paper through the postal mail, that information has been sent electronically that the recipients may wish to review.⁸

2. Access — Customers who are provided information through electronic delivery should have access to that information comparable to the access that would be provided if the information were delivered in paper form.⁹ The use of a particular electronic medium should not be so burdensome that intended recipients cannot effectively access the information provided.¹⁰ A recipient should have the opportunity to retain the information through the selected medium (*e.g.*, by downloading or printing the information) or have ongoing access equivalent to personal retention.¹¹ Also, as a matter of policy, the SEC believes that a person who has a right to receive a document under the federal securities laws and chooses to receive it electronically should be provided with a paper version of the document upon specific request or if consent to receive documents electronically is revoked.¹²

3. Evidence to Show Delivery — Dealers must have reason to believe that electronically delivered information will result in the satisfaction of the delivery requirements under the federal securities laws. Dealers should consider the need to establish procedures to ensure that applicable delivery obligations are met, including recordkeeping procedures to evidence such satisfaction.¹³ Such procedures should also be designed to ensure the integrity and security of information being delivered so as to ensure that it is the information that was intended to be delivered.¹⁴ Dealers may be able to evidence satisfaction of delivery obligations, for example, by:

- (1) obtaining the intended recipient's informed consent¹⁵ to delivery through a specified electronic medium and ensuring that the recipient has appropriate notice and access;
- (2) obtaining evidence that the intended recipient actually received the information, such as by an electronic mail return-receipt¹⁶ or by confirmation that the information was accessed, downloaded, or printed; or
- (3) disseminating information through certain facsimile methods (*e.g.*, faxing information to a customer who has requested the information and has provided the telephone number for the fax machine).

Personal Financial Information. The SEC has noted, and the Board agrees, that special precautions are appropriate when dealers are delivering information to customers that is specific to that particular customer's personal financial information, including but not limited to information contained on confirmations and account statements.¹⁷ In transmitting such personal financial information, dealers should consider the following factors:

1. Confidentiality and Security — Dealers sending personal financial information through electronic means or in paper form should take reasonable precautions to ensure the integrity, confidentiality, and security of that information. Dealers transmitting personal financial information electronically must tailor those precautions to the medium used in order to ensure that the information is reasonably secure from tampering or alteration.

2. Consent — Unless a dealer is responding to a request for information that is made through electronic media or the person making the request specifies delivery through a particular electronic medium, the dealer should obtain the intended recipient's informed consent prior to delivering personal financial information electronically. The customer's consent may be made either by a manual signature or by electronic means.

Electronic Communications from Customers to Dealers

Consistent with the position taken by the SEC, dealers may rely on consents and acknowledgments received from customers by electronic means for purposes of Board rules. In relying on such communications from customers, dealers must be cognizant of their responsibilities to prevent, and the

potential liability associated with, unauthorized transactions. In this regard, the SEC states, and the Board agrees, that dealers should have reasonable assurance that the communication from a customer is authentic.

Electronic Transmission of Non-Required Communications

The 1996 SEC Release states that the above standards are intended to permit dealers to comply with their delivery obligations under federal securities laws when using electronic media. While compliance with the guidelines is not mandatory for the electronic delivery of non-required information that, in some cases, is being provided voluntarily to customers, the Board believes adherence to the guidelines should be considered, especially with respect to delivery of personal financial information.

Electronic Communications Among Dealers and Between Dealers and Issuers

The Board believes that the standards applied by the SEC to communications with customers should also apply to mandated communications among dealers and between dealers and issuers. Thus, a dealer that undertakes communications required under Board rules with other dealers and with issuers in a manner that conforms with the principles stated above relating to customer communications will have met its obligations with respect to such communications. In addition, a dealer may rely on consents and acknowledgments received from other dealers or issuers by electronic means for purposes of Board rules, provided that the dealer should have reasonable assurance that the communication from such other party is authentic. However, any Board rule that explicitly requires that a dealer enter into a written agreement with another party will continue to require that such agreement be in written form.¹⁸ Financial information, as well as other privileged or confidential information, relating to another dealer or an issuer (or relating to another person or entity contained in a transmission between a dealer and another dealer or an issuer) should be transmitted using precautions similar to those used by a dealer in transmitting personal financial information to a customer.

Rules to Which this Notice Applies

Set forth below is a list of current Board rules to which dealers may apply the guidance provided in this notice. The Board believes that the list sets forth all of the rules that require or permit communications among dealers and between dealers and customers and issuers.¹⁹ The summaries provided of the delivery obligations under the listed rules is intended for ease of reference only and are not intended to be complete statements of all the requirements under such rules.

- Rule G-8, on books and records to be made by dealers, prohibits dealers from obtaining or submitting for payment a check, draft or other form of negotiable pa-

per drawn on a customer's checking, savings, share or similar account without the customer's express written authorization.

- Rule G-10, on delivery of investor brochure, requires dealers to deliver a copy of the investor brochure to a customer upon receipt of a complaint by the customer.
- Rule G-11, on sales of new issue municipal securities during the underwriting period, requires certain communications between senior syndicate managers and other members of the syndicate.²⁰
- Rule G-12, on uniform practice, provides for confirmation of inter-dealer transactions and certain other inter-dealer communications.²¹
- Rule G-15, on confirmation, clearance and settlement of transactions with customers, provides for confirmation of transactions with customers and the provision of additional information to customers upon request.²²
- Rule G-19, on suitability of recommendations and transactions and discretionary accounts, requires that dealers obtain certain information from their customers in connection with transactions and recommendations and also receive customer authorizations with respect to discretionary account transactions.
- Rule G-22, on control relationships, requires certain disclosures from a dealer effecting a transaction for a customer in municipal securities with respect to which such dealer has a control relationship and customer authorization of such transaction with respect to discretionary accounts.
- Rule G-23, on activities of financial advisors, requires that, under certain circumstances, dealers acting as financial advisors to issuers provide various disclosures to issuers and customers and receive certain consents and acknowledgments from issuers.²³
- Rule G-24, on use of ownership information obtained in fiduciary or agency capacity, requires a dealer seeking to use for its own purposes information obtained while acting in a fiduciary or agency capacity for an issuer or other dealer to receive consents to the use of such information.
- Rule G-25, on improper use of assets, provides that put options and repurchase agreements will not be deemed to be guaranties against loss if their terms are provided in writing to customers with or on the transaction confirmation.
- Rule G-26, on customer account transfers, provides for written notice from customers requesting account transfers between dealers and the use of Form G-26 to effect such transfer.²⁴
- Rule G-28, on transactions with employees and partners of other municipal securities professionals, requires that a dealer opening an account for a customer who is an employee or partner of another dealer must provide no-

tice and copies of confirmations to such other dealer and permits such other dealers to provide instructions for handling of transactions with such customer.

- Rule G-29, on availability of Board rules, provides that dealers must make available to customers for examination promptly upon request a copy of the Board's rules required to be kept in their offices.²⁵
- Rule G-32, on disclosures in connection with new issues, requires dealers selling new issue municipal securities to customers to deliver official statements²⁶ and certain other information by settlement and requires selling dealers, managing underwriters and certain dealers acting as financial advisors to deliver such materials to dealers purchasing new issue municipal securities, upon request.²⁷
- Rule G-34, on CUSIP numbers and new issue requirements, requires underwriters to communicate information regarding CUSIP numbers and initial trade date to syndicate and selling group members.²⁸
- Rule G-38, on consultants, requires dealers to provide certain information to issuers regarding consulting arrangements.²⁹
- Rule G-39, on telemarketing, prohibits certain telemarketing calls without the prior consent of the person being called.³⁰

¹ See Securities Act Release No. 7288, Exchange Act Release No. 37182 (May 9, 1996), 61 FR 24644 (May 15, 1996) (the "1996 SEC Release").

² See Securities Act Release No. 7233, Exchange Act Release No. 36345 (October 6, 1995), 60 FR 53458 (October 13, 1995) (the "1995 SEC Release" and, together with the 1996 SEC Release, the "SEC Releases").

³ This notice has been filed with the SEC as File No. SR-MSRB-98-12.

⁴ The Board also reminds dealers that the SEC indicated in the 1996 SEC Release that dealers may fulfill their obligation to deliver to customers, upon request, preliminary official statements and final official statements in connection with primary offerings of municipal securities subject to SEC Rule 15c2-12 by electronic means, subject to the guidelines set forth in the 1996 SEC Release. See 1996 SEC Release at note 47.

⁵ For example, this notice does not apply to any requirements that dealers supply the Board with written information pursuant to Board rules A-12, A-14, A-15, G-36, G-37 and G-38. The Board has begun the planning process for electronic submission of information required under rule A-15 and of Form G-37/G-38 under rules G-37 and G-38. At such time as electronic submission becomes available, the Board will publish notice thereof and of the procedures to be used for such submission. Although submission of Forms G-36(OS) and G-36(ARD) under rule G-36 could also be made electronically by means similar to those which the Board may develop for Form G-37/G-38, such electronic submission is complicated by the requirement that Forms G-36(OS) and G-36(ARD) be accompanied by an official statement or advance refunding document, as appropriate. Given the current debate and lack of consensus among the various sectors of the municipal securities industry regarding electronic formatting of disclosure materials, and since the Board does not have the authority to dictate the format of issuer documents, the Board believes that any further action regarding electronic submissions under rule G-36 should await resolution of these issues. Finally, the Board does not at this time anticipate permitting electronic submission of information required under rules A-12 and A-14 since such information must be accompanied by payment of certain required fees.

Electronic submission of information under rule G-14 will continue to be governed by rule G-14 and associated Transaction Reporting Procedures. In addition, this notice does not alter the current submission standards applicable to the Board's Continuing Disclosure Information (CDI) System of the Municipal Securities Information Library[®] (MSIL[®]) system. The Municipal Securities Information Library and MSIL are registered trademarks of the Board.

Furthermore, submission of information to the Board's designees or certain other designated entities under Board rules must continue to be done in accordance with the procedures established by such designees or other entities. Board rules in which such requirements currently appear include rules G-7 (with respect to information required to be filed with the appropriate enforcement agencies), G-12 and G-15 (with respect to information to be submitted to registered clearing agencies and registered securities depositories), G-26 (with respect to customer account transfer instructions (other than Form G-26) required by registered clearing agencies), G-34 (with respect to information to be submitted to the Board's designee for assignment of CUSIP numbers and to registered securities depositories) and G 37 (with respect to application to the appropriate enforcement agencies for exemptions from the ban on municipal securities business).

⁶ Dealers that structure their deliveries in accordance with the principles set forth in this notice can be assured, except where otherwise noted, that they have satisfied their delivery obligations under Board rules. However, as the SEC stated in the 1995 SEC Release, the three enumerated principles are not the only factors relevant to determining whether the legal requirements pertaining to delivery of documents have been satisfied. Consistent with the SEC's view, the Board believes that, if a dealer develops a method of electronic delivery that differs from the principles discussed herein, but provides assurance comparable to paper delivery that the required information will be delivered, that method may satisfy delivery obligations. See 1995 SEC Release, text following note 22. For example, a dealer can satisfy its obligation to send a confirmation to a customer under rule G-15 by electronic means in a manner that meets the principles set forth in this notice. In addition, dealers may continue to deliver confirmations electronically through the OASYS Global system established by Thomson Financial Services, Inc. on the conditions described in the Board's *Notice Concerning Use of the OASYS Global Trade Confirmation System to Satisfy Rule G-15(a)*, dated June 6, 1994, without specifically complying with the principles described in this notice. See *MSRB Reports*, Vol. 14, No. 3 (June 1994) at 37. See also 1996 SEC Release, note 38, and 1995 SEC Release, note 12. Also, rule G-29 provides that dealers must make available to customers for examination promptly upon request a copy of the Board's rules required to be kept in their offices. Dealers may continue to comply with such requirement by giving customers access to the rules either in printed form or by viewing the rules on screen from the Board's Internet web site (www.msrb.org) or from software products produced by other companies. See *Interpretive Notice on Availability of Board Rules*, dated May 20, 1998, in *MSRB Reports*, Vol. 18, No. 2 (August 1998) at 37.

⁷ See 1996 SEC Release, text at note 20.

⁸ See 1996 SEC Release, text at note 21, and 1995 SEC Release, text at note 23. The SEC notes, for example, that if information is provided by physically delivering material (such as a diskette or CD-ROM) or by electronic mail, such communication itself generally should be sufficient notice. However, if information is made available electronically through a passive delivery system, such as an Internet web site, separate notice would be necessary to satisfy the delivery requirements unless the dealer can otherwise evidence that delivery to the customer has been satisfied. 1996 SEC Release, note 21.

⁹ The SEC states that, regardless of whether information is delivered in paper form or by electronic means, it should convey all material and required information. For example, if a paper document is required to present information in a certain order, then the information delivered electronically should be in substantially the same order. 1996 SEC Release, text at note 14.

¹⁰ The SEC notes, for example, that if a customer must proceed through a confusing series of ever-changing menus to access a required document so that it is not reasonable to expect that access would generally occur, this

- procedure would likely be viewed as unduly burdensome. In that case, the SEC would deem delivery not to have occurred unless delivery otherwise could be shown. 1995 SEC Release, note 24.
- ¹¹ See 1996 SEC Release, note 22 and accompanying text, and 1995 SEC Release, notes 25-26 and accompanying text.
- ¹² See 1996 SEC Release, note 17 and accompanying text, and 1995 SEC Release, note 27 and accompanying text.
- ¹³ See 1996 SEC Release, text following note 22, and 1995 SEC Release, note 22 and text at note 28. The Board is of the view that dealers that choose to deliver information to customers electronically should consider establishing systems and procedures for providing paper copies or using alternate electronic means in a timely manner should the primary electronic media fail for any reason.
- ¹⁴ See 1996 SEC Release, text at note 25, and 1995 SEC Release, note 22. Dealers also should consider the need for systems and procedures to deter or detect misconduct by firm personnel in connection with the delivery of information, whether by electronic or paper means. 1996 SEC Release, text at note 16.
- ¹⁵ In order for a consent to be an informed consent, the SEC has stated that the consent should specify the electronic medium or source through which the information will be delivered and the period during which the consent will be effective, describe the information that will be delivered using such means, and disclose the potential for the customer to incur costs in accessing the information. See 1996 SEC Release, note 23, and 1995 SEC Release, note 29.
- ¹⁶ To the extent that material is distributed as an attachment to an electronic mail transmission, dealers must have a reasonable basis for believing that the attachment will in fact be transmitted along with the electronic mail transmission and that the attachment will be received by the recipient in an accessible format.
- ¹⁷ In addition, the Board believes that other information that is privileged or confidential, regardless of whether such information is financial in nature, should be accorded the same precautions as is personal financial information.
- ¹⁸ For example, the written agreements required under rules G-20(c), G-23(c) and G-38(b) must continue to be entered into in paper form.
- ¹⁹ Unless otherwise provided in connection with the adoption by the Board of any new rules or amendments to existing rules that require or permit communications among dealers and between dealers and customers, issuers and others, the guidance provided in this notice would also apply to any such communications.
- ²⁰ Rule G-11 also requires that syndicate members furnish certain information to others, upon request. The Board believes that, solely for purposes of this requirement under rule G-11, such information may be provided to others by electronic means so long as the standards established in this notice with respect to electronic deliveries to customers are met.
- ²¹ See, however, note 5 above with respect to information to be submitted to registered clearing agencies and registered securities depositories.
- ²² See, however, note 5 above with respect to information to be submitted to registered clearing agencies and registered securities depositories. See also note 6 above regarding alternate electronic means previously reviewed by the Board.
- ²³ See, however, note 18 above and accompanying text regarding the written agreement to be entered into between a dealer acting as financial advisor and the issuer.
- ²⁴ See, however, note 5 above with respect to use of customer account transfer instructions (other than Form G-26).
- ²⁵ See note 6 above regarding alternate electronic means previously reviewed by the Board.
- ²⁶ The Board believes that dealers must be particularly cautious in delivering official statements by electronic means since they may present special challenges in ensuring that they are received by customers and other dealers without material omissions or distortions in formatting (for example,

tables in which data is more than negligibly misaligned) that may cause such materials not to meet the standard for electronically transmitted information comparable to information delivered in paper form. See note 9 above and accompanying text.

- ²⁷ The Board believes that, to the extent that rule G-32(b)(i) [currently codified at rule G-32(c)(i)] obligates a managing or sole underwriter to provide, upon request, multiple copies of the official statement to a dealer with respect to new issue municipal securities sold by such dealer to customers, such obligation must continue to be met with paper copies of the official statement unless the purchasing dealer has consented to electronic delivery of the official statement in lieu of delivery of multiple paper copies. Compare 1995 SEC Release, example 11.
- ²⁸ See, however, note 5 above with respect to information to be submitted to the Board's designee with respect to CUSIP number assignment and to registered securities depositories.
- ²⁹ See, however, note 18 above and accompanying text regarding the written agreement to be entered into between a dealer and its consultant and note 5 above with respect to submission of Form G-37/G-38 to the Board.
- ³⁰ Although the person receiving such telemarketing call may in many cases not be a customer, the Board believes that, solely for purposes of this provision of rule G-39, such consent may be accepted by the dealer by electronic means so long as the standards established in this notice with respect to electronic communications from customers to dealers are met.

Interpretation on the Application of Rules G-32 and G-36 to New Issue Offerings Through Auction Procedures

March 26, 2001

Traditionally, brokers, dealers and municipal securities dealers ("dealers") have underwritten new issue municipal securities through syndicates in which one dealer serves as the managing underwriter. In some cases, a single dealer may serve as the sole underwriter for a new issue. Typically, these underwritings are effected on an "all-or-none" basis, meaning that the underwriters bid on the entire new issue. In addition, new issues are occasionally sold to two or more underwriters that have not formed a syndicate but instead each underwriter has purchased a separate portion of the new issue (in effect, each underwriter serving as the sole underwriter for its respective portion of the new issue).

In the primary market in recent years, some issuers have issued their new offerings through an electronic "auction" process that permits the taking of bids from both dealers and investors directly. In some cases, these bids may be taken on other than an all-or-none basis, with bidders making separate bids on each maturity of a new issue. The issuer may engage a dealer as an auction agent to conduct the auction process on its behalf. In addition, to effectuate the transfer of the securities from the issuer to the winning bidders and for certain other purposes connected with the auction process, the issuer may engage a dealer to serve in the role of settlement agent or in some other intermediary role.

Although the Municipal Securities Rulemaking Board (the "MSRB") has not examined all forms that these auction agent, settlement agent or other intermediary roles (collectively referred to as "dealer-intermediaries") may take, it believes that in most cases such dealer-intermediary is effecting a transac-