

It's the Issuer's Prerogative

MSRB Proposes Rule Amendments for Retail Order Periods for Bond Offerings

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Background and Purpose²

For various types of municipal bonds or notes that are publicly offered, the marketing process may often involve a retail order period that is for a day or so prior to pricing the bonds with institutional investors. Retail order periods are meant to gain access to individual investors who typically purchase bonds in smaller lots than institutional investors. A significant percentage of municipal securities is held by individual investors both directly and indirectly through mutual funds. Mutual funds, however, have been involved in the institutional order period rather than the retail order period.

Recently, the Municipal Securities Rulemaking Board (the "MSRB") issued Notice 2012-13, dated March 6, 2012 (the "Notice") requesting comments on proposed rule amendments related to retail order periods and a related proposed interpretive notice. The comment period extended to April 13, 2012.³

The MSRB stated it is proposing the amendments and interpretive notice "as part of its mandate to protect municipal entities⁴ and investors and in consideration of the prevalence of retail order periods."

The purpose of this article is to summarize major points from the MSRB's proposal and to focus upon the potential practical significance for governmental issuers.

It is important to underscore that subsequent to the conclusion of the comment period, the MSRB may change its proposal. MSRB rule changes are filed with the Securities and Exchange Commission for review and approval.

Deference to Issuers

The fundamental thrust of the MSRB's proposals set forth in the Notice is deference to issuers. Specifically, proposed amendments to Rule G-11 would include a definition of "retail order period" that, as stated by the Notice, "would make it clear that it is the prerogative of the issuer to establish the definition of 'retail' for that purpose." The related interpretative notice would provide that "issuers may reasonably expect that all dealers⁵ will deal fairly with them by abiding by the terms and conditions established by the issuers for the retail order periods, including the issuers' respective definitions of 'retail'."

Certain Obligations to Communicate Issuer's Terms and Conditions

Relevant for transactions large enough to have a selling group, is a proposed requirement that a senior syndicate manager furnish in writing to members of the selling group, a written statement of the issuer's terms and conditions for the offering (including any retail order period requirements).

Certain Reporting through the MSRB's Electronic Municipal Market Access system

One of the MSRB's proposals may be useful for issuers in assessing prevailing market practices about whether retail order periods are conducted. Specifically, the MSRB is proposing amendments to Rule G-32 that would require an underwriter to report to the MSRB's Electronic Municipal Market Access system whether a primary offering of securities included a retail order period and when the retail order period was conducted.

Concluding Thoughts

Although much of the MSRB's proposal relates to relationships among dealers and reporting and recordkeeping requirements on underwriters and other dealers, it nonetheless is relevant for issuers—particularly by underscoring that issuers are to define the parameters (including the "if", "when" and "to whom") for retail order periods.

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³In addition to trade groups and market professionals, issuers also submit comments from time to time on MSRB proposals. For example, the MSRB's recent request for comments on its draft interpretive notice concerning bondholder consents provided by underwriters of municipal securities was commented upon by a housing and community development authority, an airport authority and a metropolitan transportation authority. Rulemaking proposals and comments are available at the MSRB's website (www.msrb.org) under "Requests for Comments" under the "Rules and Interpretations" tab.

⁴The MSRB's mandate was expanded as part of the Dodd-Frank financial regulation legislation to include the protection of municipal entities.

⁵"Dealers" is a broad term that would encompass underwriters and others, including any selling group members.