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MSRB Issues Advisory on Selective Disclosure of Material Information: Day Pitney

The Municipal Securities Rulemaking Board (MSRB) published an advisory on September 13 highlighting to municipal issuers, dealers and municipal advisors the importance of disclosing material information "fairly, equitably and in the public domain." The MSRB is concerned that "selective disclosure" creates an information imbalance favoring a limited group of bondholders, such as investment banking firms, investment advisors or institutional investors, who are given access to material information that others do not have. Selective disclosure can occur:

- during investor road shows, conferences and one-on-one investor calls or meetings;
- in the course of bank private placements of municipal issues;
- when there is a question/answer session, because the issuer might discuss information that is not included in a preliminary official statement;
- in the secondary market when the original disclosure documents were accurate and complete but new, nonpublic material information is provided by the issuer but not required to be disclosed pursuant to Rule 15c-2-12.

The MSRB advises that issuers make it a practice to consider whether material nonpublic information has been shared and to take steps to ensure any such information is made available to the general public promptly.

Selective disclosure, while not unique to the municipal market, is specifically prohibited in the corporate market under Securities and Exchange Commission Regulation Fair Disclosure (FD). Municipal issuers are not subject to Regulation FD, but the MSRB's advisory cautions about the potential for federal fraud liability if, for example, known material information is omitted from required public disclosures. Further, if an investor were to make a trade based on improperly disclosed material nonpublic information, that could constitute insider trading.

The MSRB stressed that along with issuers, dealers (acting as underwriters) and municipal advisors may incur liability for selective disclosure under anti-fraud provisions and MSRB Rule G-17, which requires that dealers and municipal advisors deal fairly with all persons and prohibits them from engaging in any deceptive, dishonest or unfair practice.

The MSRB noted that it is a common practice in the case of road shows and investor conferences for an attorney to review the oral script and distributed materials to be certain all the information is included in the disclosure documents available to the general market.

For your convenience, the advisory can be found here.

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