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MSRB Release on Offering Practices Draws Frosty Reception From Some.

PHOENIX – Dealers and municipal advisors don't believe that the Municipal Securities Rulemaking Board's rules on primary offering practices require much of an overhaul and are concerned the MSRB may be proposing to exceed its authority, they told the board this week.

Various market participants voiced these thoughts in comments responding to the MSRB's September concept release seeking market input on numerous aspects of primary offering practices.

Concept releases are often precursors to proposed rules or rule changes. Market groups had initially said they were uncertain what the MSRB's goals might be. The concept release potentially affects Rules G-11 on primary offering practices and G-32 on disclosures in connection with primary offerings.

The dealers and muni advisors bound by the MSRB's rules told the board the proposals contained in the release aren't necessary or perhaps even within the board's authority. The board asked, for example, whether it should amend G-11 to require members of syndicates to make a bona fide public offering of the bonds allocated to them at the public offering price. Syndicate members sometimes agree to this in documents signed before the sale, but do not always follow through on it.
Leslie Norwood, a managing director, associate general counsel and co-head of municipal securities at the Securities Industry and Financial Markets Association, wrote that underwriters must abide by their agreements but that the MSRB should not create a new requirement.

"SIFMA strongly believes that the issuer has the right to determine whether it wants its new issue to be sold in a bona fide public offering or by some other means," Norwood wrote, noting that SIFMA is concerned that such a rule would require "line drawing" to account for instances where a bonafide public offering would be inappropriate, such as in a private placement or limited offering.

"Any such line-drawing raises the considerable risk of regulations driving market decisions rather than the intentions of the party or free market forces," Norwood wrote.

MAs took issue with the MSRB's question of whether it should require the submission of preliminary official statements to EMMA, which some issuers already submit voluntarily.

"We believe that the MSRB lacks the statutory authority to create such a rule for either municipal advisors or broker/dealers and that such a requirement would violate the Securities Exchange Act" of 1934, wrote National Association of Municipal Advisors executive director Susan Gaffney. Section 15B(d) of that law specifically denies the board the power to require that, Gaffney argued.

The National Federation of Municipal Analysts, however, said it supports requiring issuers to post the POS. The NFMA also threw its support behind another one of the concept release's proposals: requiring underwriters in an advance refunding deal to disclose within a shorter timeframe, and to all market participants at the same time, the CUSIPs refunded and the percentages.

“We believe the most effective and least costly solution to ensure that all investors have equal access to refunded CUSIP information is the disclosure of all credit and security information to EMMA at the same time, as soon as practicable,” wrote NFMA chair Julie Egan and the group’s industry practices & procedures chair Lisa Washburn.

SIFMA generally also said it doesn’t see a need for a new MSRB requirement for the senior syndicate manager to inform all other syndicate members simultaneously when a bond purchase agreement is executed, and explicitly state that, in negotiated sales, retail or institutional priority orders must be allocated up to the amount of priority set by the issuer before being allocated to lower priority orders.

Robert Doty, the president and proprietor of muni bond consulting company AGFS told the board that it should amend G-32 to require a dealer that sells any offered municipal securities to a customer to disclose all of its compensation in a negotiated offering that is dependent upon the completion of either specific stages in an offering or the entire offering. Doty noted that undisclosed compensation based on specific stages of the transaction were key pieces of a 2016 Securities and Exchange Commission enforcement action against the Rhode Island Economic Development Corporation and Wells Fargo (WFC), in which the commission alleged a conflict of interest that should have been disclosed to bond investors.

The MSRB can choose to ask for additional market comments, propose rules or rule changes for further comment, file proposals with the SEC, or take no further action.

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