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Dealers Like MSRB Retail Order Proposals; MAs Warn Issuers Can Be Exploited.

Dealer groups said Tuesday that they support Municipal Securities Rulemaking Board proposed rule changes on retail order periods, but non-dealer financial advisors warn issuers can be exploited, with underwriters simply determining for them which "retail" investors can buy the bonds in offerings.

The reaction comes after the MSRB filed rule changes with the Securities and Exchange Commission Monday that are designed to ensure underwriters follow issuers' orders that a certain amount of their bonds be offered to retail investors at the initial offering price.

"The proposed rule change addresses concerns related to retail order periods presented from issuers, dealers and municipal advisors," the MSRB said in its filing. "Those concerns include the mischaracterization of orders as "retail" and the failure of syndicate managers to disseminate timely notice of the terms and conditions of a retail order period to all dealers, including selling group members.

The board also said that another concern is that pricing information was required but not delivered at all or in time to allow the requesting dealer's retail customers to determine whether they would like to purchase the bonds.

"To address these concerns, the proposed rule change establishes specific obligations on the senior syndicate manager to disseminate to the syndicate and selling group members detailed information about the terms and conditions of any retail order period," the board said. "The proposed rule change also requires dealers to capture certain additional information in connection with orders placed under a retail order period to ensure that such orders are from bona fide retail customers."

Bond Dealers of America president and chief executive officer Mike Nicholas said BDA is pleased the MSRB did not develop one definition of retail orders for all issuers because this would have proven costly and unnecessary.

"The BDA believes retail order periods can be beneficial both to the issuer and retail customer as long as issuers are permitted to proscribe how they want dealers to document their compliance with the retail order period, rather than establish a one-size-fits-all dealer mandate that does not provide additional issuer benefit but does add compliance costs by requiring the production of information that is, potentially, not necessary," Nicholas said.

David Cohen, managing editor and associate general counsel at the Securities Industry and Financial Markets Association, said his group had supported moving forward with existing MSRB guidance, such as the board's Rule G-17 on fair dealing.

"Now the MSRB has decided to reorganize some of its interpretive guidance associated with MSRB Rule G-17 into new or revised rules," Cohen said. "Consequently, we support the proposed rule changes to the extent they would protect dealers that follow issuers' instructions and require timely

notice of retail order period terms and conditions to all syndicate and selling group members."

National Association of Independent Public Finance Advisors president Jeanine Rodgers Caruso said some issuers could be left vulnerable by the MSRB's proposal.

"Where issuers do not retain municipal advisors, they will likely place an undue amount of trust in their underwriter and will rely upon them to supply a definition of 'retail,' which may result in issuers receiving less favorable sales outcomes than they may otherwise have been able to achieve," said Rodgers Caruso, a muni advisor with Fiscal Advisors and Marketing, Inc.

The board punted on the controversial issue of whether to develop interpretative guidance to its Rules G-17 and R-30 on prices that would have addressed whether underwriters could offer munis at different prices to retail and institutional customers. Some market participants have complained that some underwriters set up two CUSIPs for the same bond, one to be sold to institutional investors at a lower price and one to retail investors at a higher price.

"The comments received on retail order periods and the board's study of such programs does not establish a basis for additional pricing guidance at this time," the MSRB told the SEC. "In particular, the MSRB is mindful that any guidance should be grounded in further study and analysis and should consider the extent to which pricing differentials may affect an issuer's willingness to use a retail order period."

Instead, the MSRB is asking the SEC to approve changes to its Rule G-8 on books and records, G-11 on primary offering practices and G-32.

The board is recommending a two-stage implementation process, with the changes to Rules G-8 and G-11 occurring six months after SEC approval and the changes to Rule G-32 implemented no later than March 31, 2014 or at a later announced date. This longer period would allow the MSRB to design an automated system for dealers to report to the EMMA system.

"These provisions will establish basic protections for issuers and customers and provide additional tools to assist with the administration and examinations of retail order periods," the MSRB said in the filing.

In the proposed changes to Rule G-11, the MSRB wants to define "retail order period" to mean when "going away orders" will be solicited from customers that meet the issuer's designated eligibility criteria. A going away order means an order for which a customer is already conditionally committed.

The MSRB proposes the senior syndicate manager deliver to other members of the syndicate a written statement of all terms, conditions and pricing information required by the issuer and to obtain the issuer's approval of the statement. An underwriter must provide the issuer's information to each dealer with which it has an arrangement with to market the issuer's securities.

Any dealer placing an order during a retail order period would have to provide certain information, possibly through an electronic order entry system, before the time of formal award of the bonds. This would include, among other things, whether the order met the issuer's eligibility criteria, whether the order was a going away order and the par amount of the order.

Under the proposed changes to Rule G-8, the syndicate manager for each primary offering must maintain records that show various things such as: the description and aggregate par value of the securities; the name and percentage of participation of each syndicate member; the terms and conditions required by the issuer; all orders received for the purchase of the securities from the

syndicate; the dates of the settlement with the issuer and the closing of the account; and a reconciliation of profits and expenses of the account. An underwriter must keep similar records, including for those instances in which it accorded equal or greater priority over other orders to orders for its own account or its related accounts and the specific reason for doing so.

The proposed changes to Rule G-32 requires underwriters to report to EMMA whether a primary offering included a retail order period and the period during which it was conducted.

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