
MSRB: Issuers Shouldn't Choose Underwriter's Counsel.

PHOENIX – Issuers should not be the ones selecting underwriter's counsel in bond transactions because the practice, while common, gives rise to serious conflict of interest concerns, the Municipal Securities Rulemaking Board said Thursday.

The MSRB noted that the practice of issuers either selecting or influencing the selection of underwriter's counsel for a transaction remains widespread, despite long-held concerns previously raised by the board. The MSRB was worried about the issue as far back as 1997. In 1998, it issued a notice stating that there were "demonstrated problems regarding the practice" and that underwriters must feel free to select their own lawyers in transactions.

"This practice gives rise to actual or potential conflicts of interest in the counsel's representation of the underwriter, and calls into question counsel's ability to carry out its responsibilities with the necessary degree of independence from the issuer, to act with undivided loyalty and to be free from conflicting allegiances in providing legal counsel to the underwriter," the MSRB said in the advisory notice it released Thursday. "Issuer designation of counsel also may compromise an underwriter's ability to retain counsel that has the requisite expertise and experience with the federal securities laws, and the resources needed to assist the underwriter in fulfilling its due diligence responsibilities."

The Government Finance Officers Association's current best practices on underwriter selection do not address whether issuers should avoid designating the underwriter's counsel, but note that issuers and their municipal advisors inherently sit on the opposite side of the deal table from underwriters.

"The MSRB is responding to the continuation of this practice with this market advisory to restate its concerns that investors may be harmed in a variety of ways in any offering process that does not properly utilize the review, guidance and counseling of an independent, competent and appropriately critical underwriter's counsel," the advisory concluded.

"To minimize conflicts of interest and to reduce any influence by an issuer that may call into question the qualifications or independence of the underwriter's counsel, the MSRB suggests that an issuer refrain from involving itself in the underwriter's selection of counsel or that an issuer's involvement in such process be minimal and limited to concerns regarding competency, conflicts of interest and the avoidance of excessive costs."

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