Comments on SR-MSRB-2011-09

I am writing in support of the MSRB's proposal in its Notice 2011-61 regarding fair dealing practices of underwriters in their relationships with issuers pursuant to MSRB Rule G-17. Some underwriters desire to hold themselves out to issuers as acting for the benefit of the issuers and as providing sound advice to issuers, but without saying so to the issuers, reserving the perspective that the underwriters are not obligated to provide advice to issuers in the issuers' best interests. Of course, when something goes wrong, those same dealers emphasize their adverse relationships with issuers and that they deal on opposite sides of the table from the issuers.

Such contradictory postures are highly confusing to the vast majority of issuers. According to the Commission's estimates, there are 50,000 issuers of municipal securities (the MSRB estimates 80,000). My own estimate is that, of those very large universes, there may be no more than 1,000 issuers that could be regarded as particularly sophisticated in terms of finance concepts, risks and appropriate roles of professional firms. Whatever the universe of unsophisticated issuers, it is very large. Many, if not most, issuers do not understand well the distinctions between underwriters and advisors. The communications of some dealers do nothing other than to confuse the issues further.

If underwriters are not to be considered to be "municipal advisors," as I understand dealers to be arguing, then it is essential that the explicit disclosures and disclosure procedures outlined in MSRB Notice 2011-61 be approved and implemented. Without those disclosures, many issuers will not understand the importance of obtaining unconflicted and unbiased advice and will rely unwisely, often to the issuers' disadvantage, upon underwriters for that advice.

In recent years, some underwriters (as well as some advisors) have steered large numbers of unsophisticated issuers into highly risky derivatives transactions in many states. Apart from derivative transactions, there has been litigation brought by issuers against underwriters in half a dozen states when the issuers discovered after transactions unraveled that the underwriters did not advise the issuers in a sound manner as the issuers thought the underwriters had represented the underwriters' would do.

As I write these comments, some underwriters (and some advisors) are urging issuers to enter (1) into transactions with ten-year unconstrained interest rate resets that place the issuers into unknowable and undefinable interest rate risks, and (2) in other instances, into premium bond transactions involving 5% coupons well above the yields on the bonds that virtually guarantee the underwriters' (and advisors') participation in refundings *even if interest rates rise* (but without disclosure of that conflict of interest).

Rather than relying upon adverse underwriters for "advice," issuers should be encouraged to obtain unconflicted and unbiased advice in the issuers' best interests. The advice should be subject to the municipal advisors' fiduciary duty and the special new statutory antifraud provision that applies to municipal advisors. When issuers obtain such advice, whether from qualified dealer-advisors or nondealer-advisors, then investors also will be better protected as issuers are steered away from unwise and unduly risky transactions. Those protections will grow as the municipal advisor regulatory structure is implemented.

I do not wish for my comments to interpreted as suggesting that municipal advisors do not themselves need to make substantial disclosures to issuers. To the contrary, I believe that similar requirements should also be imposed upon municipal advisors, especially regarding transactional risks, disclosures of risks inherent in contingent compensation, other potential conflicts of interest, explicit disclosure at the outset of relationships, and disclosure to issuer decision-makers.

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