



**National Association of Independent
Public Finance Advisors**

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July 19, 2013

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File No. SR-MSRB-2013-05

The National Association of Independent Public Finance Advisors ("NAIPFA") appreciates this opportunity to provide comments to the Securities and Exchange Commission ("SEC" or "Commission") in regard to SR-MSRB-2013-05 – Proposed Rule Change Consisting of Amendments to MSRB Rules G-8, G-11 and G-32 to Include Provisions Specifically Tailored for Retail Order Periods (the "Notice").

Previously, in connection with MSRB Notices 2012-13 and 2012-50 (collectively referred to herein as the "Prior Notices"), we submitted comments to the Municipal Securities Rulemaking Board ("MSRB") voicing our concerns regarding the MSRB's failure to provide a uniform or model definition of the term "retail" for purposes of defining those investors permitted to place orders during a "retail order period." In general, we expressed concern that a lack of a uniform or model definition would result in the marginalization of those individuals who have traditionally been classified as "retail investors" and would place municipal issuers in a position where in many instances they will, in essence, be forced to rely upon the advice they receive from underwriters. NAIPFA has attached hereto as Exhibits A and B its comments to the Prior Notices.

With regard to the Notice, the MSRB acknowledges that it received many comments requesting that it develop a "uniform definition of 'retail' for use by issuers, or, in the alternative, create a 'model' definition that issuers can use or modify as appropriate."¹ However, contrary to the many comments received, the MSRB has determined to neither provide a uniform or model definition of the term "retail." NAIPFA finds this decision both unfortunate and ironic.

Impact on Issuers & Underwriters

As NAIPFA stated in its prior comments, in the absence of a municipal advisor, many issuers will be unable to develop a definition of "retail" without relying upon the advice they receive from an underwriter. This is troubling in two respects: (i) underwriters are likely to advise municipal issuers on the development of a definition of "retail" that best suits the underwriter's business model and/or distribution channels, without regard to the interests of the issuer; and (ii)

¹ Securities and Exchange Commission (Release No. 34-69834; File No. SR-MSRB-2013-05), June 24, 2013, at 18.

the reliance placed by issuers on broker-dealers acting as underwriters in terms of developing a definition of “retail” will likely cause these issuers to believe that the advice they are receiving is being provided with their best interest in mind, which will in turn cause issuers to view such broker-dealers not as underwriters but as advisors with corresponding fiduciary duties.

Due to the foregoing, it is clear that this proposed rule will be detrimental to the interests of issuers whose ability to obtain the most favorable interest rates will be diminished through their reliance upon the advice they receive from underwriters. Collaterally, this will negatively impact tax and rate payers as well as the public. In addition, this rule will not benefit broker-dealers serving as underwriters, as they will be placed in the untenable position of having to provide advice to an issuer that will invariably cause the issuer to believe that the broker-dealer is acting in their best interest and not at arm’s length, thereby triggering MSRB Rule G-23’s prohibition on underwriting. The foregoing results were likely not the intended consequences of these amendments. Regardless, NAIPFA is concerned that the foregoing will in fact be the ultimate outcome of these amendments, and as such, requests that the SEC reject this rule proposal absent the development of a definition of “retail”.

Impact on Retail Investors

Throughout the Notice, the MSRB uses a variety of terms interchangeably when referring to the group of investors who have traditionally been referred to as “retail customers.” The terms utilized by the MSRB in this manner include: “retail customer”; “retail client”; “individual investor”; and “individual client” (collectively referred to herein as “Retail Investor”).

In every instance in which the term Retail Investor is utilized within the Notice, the MSRB seemingly acts under the assumption that the term Retail Investor will be readily understood by the reader. We are led to this conclusion by virtue of the fact that the MSRB does not specify within the Notice who or what it is referring to with respect to its use of the term Retail Investor. For example, the MSRB states, “Retail investors will benefit from the proposed rule change because they will have greater access to bonds sold in the primary market.”² In addition, the MSRB asked in connection with the Prior Notices, “Would the Revised Draft Proposal effectively further the MSRB’s objective in protecting issuers and *retail investors*?” and “Would any aspects of the Revised Draft Proposal have a negative effect on the protection of issuers, *retail investors* or the public interest [...]?”³

Therefore, we are left to presume that the MSRB’s utilization of the term Retail Investor without clarification indicates that the MSRB believes that this term is generally understood by market participants. As such, there seems to be little justification for not codifying a uniform or model definition of the term “retail” that will benefit issuers who are not readily familiar with the term Retail Investor.

Ironically, however, the MSRB has determined not to propose a standard definition of “retail” or any indication for that matter as to who it is referring to when it utilizes the term Retain Investor.

² SR-MSRB-2013-05, at 13.

³ *Id.*



We are therefore left to speculate as to which “retail” investors the MSRB is referring to with respect to, in particular, the alleged benefits that are to be obtained by these amendments. In addition, if we are to presume that there is not a generally accepted definition of the term Retail Investor, numerous statements within the Notice become nonsensical. For example, when the MSRB states that “Retail investors will benefit from the proposed rule change,” it is unclear to NAIPFA which “retail” investors the MSRB is referring to. Thus, such statements are of little value in terms of analyzing the impact of the Notice.

For purposes of these comments, as well as our prior comments, it is important to note that NAIPFA’s understanding of the term “retail” is consistent with the MSRB’s glossary of terms definition of “retail customer” and the generally accepted definition of the same, which is: Any customer other than an institutional customer, which generally includes individual investors and small organizations (herein after referred to as “bona fide Retail Investors”).

NAIPFA’s concern with respect to the MSRB’s seemingly cavalier use of the term Retail Investor is that it indicates on the one hand that there is a generally accepted definition of the term “retail”, yet on the other hand leaves us questioning precisely whom the intended beneficiaries of this rule proposal are given the lack of clarity within the Notice. Again, for example, the Notice states that it will benefit “retail investors.” However, the Notice also makes clear that only certain “retail” investors will have access to an issuer’s bonds.⁴ Thus, contrary to the MSRB’s statement, and absent a uniform or model definition of “retail”, Retail Investors likely will not have greater access to bonds sold in the primary market since there is no assurance that issuers will include any bona fide Retail Investors within their “retail order period”. Therefore, NAIPFA is unable to address within the context of this Notice whether the MSRB believes that this proposal is designed to, or will, benefit bona fide Retail Investors.

Conversely, NAIPFA’s view of this issue is clear; this rule proposal will have a detrimental impact on bona fide Retail Investors. Bona fide Retail Investors will be squeezed out of the market by underwriters who provide a definition of the term “retail” to municipal issuers that diminishes the availability of bonds to those investors and instead favors non-bona fide Retail Investors who may not have otherwise been included within a retail order period but for issuer reliance upon underwriter advice regarding the development of a definition of “retail”. NAIPFA does not intend to imply that underwriters will not include bona fide Retail Investors within their advised upon definition of “retail” for nefarious purposes. Rather, NAIPFA believes that these underwriters will do so because their business models and/or distribution channels do not support widespread sales to bona fide Retail Investors. Thus, in essence, these underwriters are forced to coerce the issuer to develop a definition of “retail” that benefits their own interests to the detriment of those of the issuer.

In addition, in the absence of a standard definition of “retail,” NAIPFA is concerned that underwriters who are ill-equipped to sell to bona fide Retail Investors will claim that they are able to conduct a “retail order period” in order to obtain business from an issuer only to

⁴ *Id.* (“the benefits of the proposed rule change should accrue to those issuers who have decided to conduct retail order periods by providing greater assurance that bonds will in fact be marketed to those “retail” investors that issuers have determined should have the opportunity to compete to buy their bonds in the primary market.”)



thereafter attempt to sway the issuer with respect to its definition of “retail” so as to bring the issuer’s definition in line with that of the underwriter’s business practices. Further, in the context of submitting a proposal or providing a sales pitch, so long as the issuer does not indicate what its definition of “retail” is, an underwriter can state that it can conduct a “retail order period” without fear of violating MSRB Rule G-17 regardless of its ability to sell securities to bona fide Retail Investors because its statement, in the absence of a definition of “retail,” cannot be said to have been inaccurate when it was made.

The end result of the foregoing is that underwriters who do not have bona fide Retail Investor distribution capabilities may successfully draw business away from those firms who do have such capabilities, leaving bona fide Retail Investors without an opportunity to invest in the issuer’s securities. This will in turn negatively impact the interests of issuers, taxpayers and the public through its potential to result in less favorable interest rates. Furthermore, this result is contrary to the MSRB’s assertion that “retail investors” will have greater access to such bonds. In fact, due to the lack of a standardized definition of the term “retail”, there is a significant likelihood that bona fide Retail Investors’ access to bonds sold in the primary market will be greatly diminished.

NAIPFA appreciates that there are divergent interests at stake with respect to the definition of “retail.” However, even though there may be disagreement as to whether, for example, mutual funds should be included within “retail order periods,” there should be no disagreement as to what constitutes a retail investor. In this regard, even some market participants, including mutual funds, have argued that they should be included within “retail order periods” because they serve the interests of bona fide Retail Investors and are in essence acting as de facto bona fide Retail Investors. Thus, NAIPFA remains convinced that a uniform or model definition of “retail” can be created and that only through the creation of such a definition can the interests of issuers, investors and the public be served.

Conclusion

As NAIFPA has stated previously, these proposed amendments are unnecessary without the corresponding development of a definition of the term “retail”; the current rules are sufficient to curtail abusive practices; there is simply a lack of enforcement of these rules. Therefore, it is our hope that in light of the foregoing the SEC will reject these proposed amendments until such time as a uniform or model definition of the term “retail” is put forth by the MSRB.

We remain available to address any questions the Commission or the MSRB may have relative to these comments.

Sincerely,



Jeanine Rodgers Caruso, CIPFA
President, National Association of Independent Public Finance Advisors



cc: The Honorable Mary Jo White, Chairman
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
Liban Jama, Counsel to Commissioner Aguilar
Lynnette Kelly, Executive Director, Municipal Securities Rulemaking Board



EXHIBIT A



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November 2, 2012

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Suite 600
Alexandria, VA 22314

Re: MSRB Notice 2012-50

Dear Mr. Smith:

The National Association of Independent Public Finance Advisors (“NAIPFA”) appreciates the opportunity to provide comments on Municipal Securities Rulemaking Board (“MSRB”) Notice 2012-50 (the “Notice”) and, in particular, the proposed amendments to MSRB Rule G-11. NAIPFA’s comments are provided in the spirit that the rule being established will ensure that issuers can receive and rely upon unbiased advice and that issuers remain in control of their debt issuance process.

In the MSRB’s initial release, MSRB Notice 2012-13, the MSRB expressed two primary concerns in developing its proposed amendments to Rules G-8, G-11, and G-32, which are: (1) adherence, or lack thereof, by underwriters to issuer retail order period specifications and requests; and (2) broker, dealer, and municipal securities dealer utilization of the retail order period to achieve yields that may be “below market”.

To address these concerns, the MSRB has proposed defining the terms “retail order period”, “going away order”, and “selling group”, and specifying additional underwriter obligations when a retail order period is conducted. The MSRB, however, has declined to define the term “retail”.

NAIPFA is concerned that these amendments will cause issuers to place an undue amount of trust and reliance on advice provided by their underwriter. In turn, issuers will likely perceive this advice to have been provided with their best interest in mind. In such a situation, underwriters will cause issuers to design a retail order period that best meets the underwriter’s business model and selling ability since underwriters cannot be expected to provide advice to an



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issuer that would be detrimental to the underwriter's interests. As a result, issuers' interests will not be served, and neither will the interests of retail customers¹, or the public interest.

In this regard, please consider the following comments in response to the Notice:

Dealer Advice to Issuers Regarding Definition of "Retail"

By providing advice to issuers with respect to the definition of retail, underwriters risk being deemed Municipal Advisors and creating an unmanageable conflict of interest. Further, and by way of background, not all underwriting firms have the business model or structure to conduct an effective *bona fide* retail order period.²

As such, allowing underwriters to give advice to issuers regarding the retail order period, including advice with respect to the definition of the term "retail", will effectively grant underwriters the ability to gain an undue level of influence over the issuer's decision making in a manner which may ultimately have a negative impact on the issuer's True Interest Cost. This is of particular concern when the underwriter lacks the capacity, capability or desire to conduct an effective *bona fide* retail order period consistent with the issuer's stated desires. NAIPFA believes that this illustrates what the MSRB has described as an unmanageable conflict of interest and which will cause an underwriter to be deemed a Municipal Advisor for purposes of MSRB Rules G-17 and G-23.

Further, a broker-dealer cannot be permitted to provide advice regarding the definition of the term "retail" within its capacity as an underwriter in the absence of a standard definition of the term retail, even where the broker-dealer believes that the issuer's definition is not appropriate to serve the issuer's interest. This is because even though a particular underwriter may find the issuer's definition to be inappropriate, this analysis is subjective; what may seem inappropriate to one underwriter with little retail capacity, capability or desire, may be appropriate to an underwriter with a great deal of desire and capability. As a result, a less capable/willing underwriter may unduly influence the issuer and negatively impact the issuer's financial position solely to improve its own remuneration as well as that of its investors who may or may not be retail customers.

¹ For purposes of this comment letter, the term "retail customer" is synonymous with the MSRB Glossary definition of the term "retail customer", which is defined as: "Any customer other than an institutional customer. Retail customers generally include individual investors and small organizations."

² For purposes of this comment letter, the term "*bona fide* retail order period" is to mean an order period whereby securities are offered solely to retail customers.



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Rather than allowing underwriters to provide advice to issuers regarding the definition of “retail”, potentially creating an unmanageable conflict of interest violative of MSRB Rules G-17 and G-23, the MSRB should instead require underwriters to disclose their lack of capacity to the issuer at the time the underwriter first becomes aware of the issuer’s retail order period desires. Once acknowledged in writing by the issuer, the underwriter may then engage in an arm’s length negotiation with the issuer to determine a retail order period consistent with the underwriter’s retail capabilities and the issuer’s desires. However, such arm’s length negotiations will only be possible if a standard definition of “retail” is put forth and underwriters are required to accurately disclose their ability, or lack thereof, to comply with the issuer’s desires relating thereto.

Proposed Amendments’ Effect on Issuers, Retail Customers, the Public Interest, and Market Fairness and Efficiency

The MSRB’s proposal would have a negative impact on retail customers and a negative impact on municipal issuers. With respect to retail customers, NAIPFA anticipates that in the short-term they are likely to experience a bump in yields; however, over the long-term NAIPFA is concerned that retail customers will likely be squeezed out of the municipal market place.

The challenge for the MSRB is developing a regulatory regime that balances the competing interests of a wide group of market participants. As such, NAIPFA believes that the MSRB’s best chance of successfully balancing the equities of municipal entities, investors, broker-dealers, Municipal Advisors, and the public interest is to focus on making the market as fair and efficient as possible. Such a focus will cause: (i) retail customers to have a fair shake, while maintaining the integrity of the retail order period; (ii) municipal entities to not be saddled with arbitrary interest rate increases; and (iii) the public interest to be protected.

With respect to the development of a standard definition of the term “retail”, but for one commenter, each and every commenter, including broker-dealers, Municipal Advisors, investment advisors, mutual funds, and municipal issuer representatives, agreed that in order to encourage a fair and efficient market, the MSRB must develop a standard definition of retail.³ Developing a standard definition of the term “retail” would:

³ The following commenters recommended that the MSRB develop of a uniform definition of “retail”: (i) Wells Fargo & Company; (ii) Edward Jones & Co.; (iii) Vanguard; (iv) GFOA; (v) CFA Institute; (vi) Full Life Financial; (vii) Investment Company Institute; (viii) NAIPFA; and (ix) Richard Li. The following commenter recommended that the MSRB not develop a uniform definition of retail: SIFMA.



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- Give issuers a basic understanding of the term retail and would provide a foundation with which to deviate from. This would place issuers in a position to rely less on their underwriter for advice and would place the issuer in a stronger bargaining position with respect to their underwriter.
- Help underwriters avoid the imposition of fiduciary responsibilities, that is, so long as the underwriter continued to maintain its arm's length relationship with the issuer.
- Benefit retail customers by reducing the likelihood that issuers will be unduly influenced by their underwriter to conduct a retail order designed to benefit the underwriter's "retail" clientele.
- Ensure that whatever taxes are being paid by the public to finance municipal debt, are being paid in the most efficient manner possible by diminishing the likelihood that municipal issuers will be influenced by their underwriter to undertake a course of conduct which is inconsistent with the issuer's interests.

NAIPFA is concerned that through the MSRB's warnings regarding the rates obtained by retail customers and the potential liability facing underwriters, underwriters will increase yields paid to retail customers rather than lower the yields paid to institutional investors. This will have a positive impact on retail customers, at least in the short-term. However, it will have an equally negative impact on municipal issuers and tax payers who will bear the burden of paying higher interest costs. In addition, any financial advantages currently benefiting issuers and the public as a result of conducting retail order periods will likely be diminished as retail and institutional investors' yields will track towards equilibrium.

Ironically, however, over the long-term these amendments will likely force retail customers out of the municipal securities marketplace.⁴ As discussed above, there are underwriters who simply do not have the capability or desire to conduct an effective *bona fide* retail order period. As a result, these underwriters are likely to utilize a very expansive definition of "retail", which may include certain entities that may not be thought of as retail customers. As retail investors are squeezed out of the market, yields achieved during the retail order period will increase, resulting in a corollary increase in issuer interest payments.

⁴ Letter from Keith Newcomb, Full Life Financial LLC, MSRB Notice 2012-13 (April 13, 2012).



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The proposed amendments do not serve the public interest and will instead negatively impact it. The proposed amendments will increase issuer interest payments as a result of the higher yields achieved during the retail order period. NAIPFA believes that, unfortunately, the most likely effects of these proposed amendments are to be tax increases and cuts to public services, while *bona fide* retail customers will see their influence in the municipal market diminish.

Therefore, to effectively balance the competing interests of the various market participants with respect to the retail order period, the MSRB should look solely to improving fairness and efficiency in the market, which in this case can be achieved through the development of a standard definition of the term “retail”.

Communication of Information to Syndicate and Selling Group Members

The MSRB received comments recommending that it consider setting a specific minimum length of time for the duration of the retail order period.

The Notice states that the MSRB has declined to set any fixed time frames because this could give rise to issues in the context of offerings that must come to market quickly. The MSRB has also stated that a one-size-fits-all approach to the length of the retail order period may not address the specific needs and objectives of an issuer.

However, NAIPFA acknowledges that developing a fixed time frame(s) may present challenges. However, NAIPFA finds the MSRB’s rationale for not developing a fixed time frame troubling. As part of the rationale for developing these amendments, the MSRB expressed concerns that issuers’ desires with respect to retail order periods were not being fulfilled. Conversely, the MSRB’s rationale for not developing a fixed time frame for retail order periods appears to acknowledge that in certain instances an underwriter may appropriately disregard the issuer’s desires for a retail order period based upon the need to “come to market quickly”.

Ultimately, the issuer retains control over the issuance process, regardless of the existence of a fixed retail order period time frame. As such, if the market were rapidly shifting and the determination is made to go to market more quickly, the issuer retains the ability to waive either a particular facet(s) of the retail order period (e.g., length of time) or the entire period. NAIPFA believes that any amendments should reflect the issuer’s control over the issuance process and should require underwriters who wish to deviate from the issuers desires to obtain a written acknowledgment from the issuer prior to doing so that must reflect the specific deviations that will occur as well as a quantifiable basis for such a deviation(s).



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NAIPFA believes that the establishment of a minimum timeframe with regard to the duration of the retail order period will have a net positive impact on the market as it ensures that issuers will be afforded an order period of at least a certain duration. As such, NAIPFA requests that the MSRB consider establishing such a timeframe in order to create a more fair and efficient market that will allow the MSRB to effectively balance the competing interests of the various market participants that will be impacted by these amendments.

Sincerely,

Jeanine Rodgers Caruso, CIPFA
President, National Association of Independent Public Finance Advisors

cc: The Honorable Mary L. Schapiro, Chairman
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
Liban Jama, Counsel to Commissioner Aguilar
Lynnette Kelly, Executive Director, Municipal Securities Rulemaking Board

EXHIBIT B



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April 13, 2012

Ronald W. Smith
Corporate Secretary
Municipal Securities Rulemaking Board
1900 Duke Street
Suite 600
Alexandria, VA 22314

Re: MSRB Notice 2012-13

The National Association of Independent Public Finance Advisors (“NAIPFA”) appreciates the opportunity to provide comments on Municipal Securities Rulemaking Board (“MSRB”) Notice 2012-13 (the “Notice”) and, in particular, the proposed amendments to MSRB Rule G-11 (“G-11” or the “Rule”). NAIPFA’s comments are provided in the spirit that the rule being established will ensure that issuers can rely on receiving unbiased advice and that the issuer remains in control of their debt issuance process.

NAIPFA believes that the MSRB’s proposed addition of section (k) to Rule G-11 (“Section K”) will be beneficial to issuers. However, NAIPFA is concerned that the proposed amendments to G-11(a) will not be beneficial to issuers and, in fact, may result in issuers having to make higher interest payments. NAIPFA, however, would welcome an amendment that puts in place a uniform definition of the term “retail”. In addition, given the current language contained within G-11(f), NAIPFA questions the rationale behind the proposed amendments and believes that the MSRB’s concerns will not be alleviated through either the imposition of more regulations or arbitrary alteration of the current rule. Instead, the MSRB’s concerns would be better addressed through more rigorous enforcement of the current rule.

I. Proposed Addition of G-11(k)

NAIPFA fully supports the addition of Section K. It is NAIPFA’s understanding that this proposed change will likely result in increased market transparency and will allow issuers to better assess the effectiveness of their underwriter both in terms of the underwriter’s ability to sell the issuer’s securities as well as the underwriter’s adherence to the issuer’s desires.

In addition, NAIPFA believes that the proposed addition of Section K may help curtail the detrimental practice known as “flipping” through the additional disclosure obligations outlined in section G-11(k)(iii). In this regard, NAIPFA would like to reiterate its prior comments and state that it is supportive of virtually any rule curtailing the practice of “flipping”, as the use of this practice is generally an indication that the issuer has received less than fair market value for their securities.



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II. Proposed Amendments to G-11(a) & (f)

NAIPFA understands that the inclusion of a definition of the term “retail order period” is necessary to facilitate the other proposed changes to G-11. However, NAIPFA has serious concerns regarding the requirement under G-11(a)(vii) that obligates an issuer to define the term “retail”, and NAIPFA is unclear as to how this proposed amendment will achieve the MSRB’s stated goals. Further, NAIPFA is also concerned that proposed Rule G-11(a)(vii) could ultimately be harmful to issuers. In addition, NAIPFA believes that current rule G-11(f) is sufficient to achieve the MSRB’s stated goals if proper enforcement efforts are put forth.

A) Issuers will be unable or unwilling to define the term “retail”

NAIPFA believes that issuers and, in particular, small infrequent and less sophisticated issuers may not have the knowledge or ability to define the term “retail” for the purpose of defining the “retail order period”, and those who do wish to develop a definition may not have the expertise to do so effectively. This lack of knowledge, ability or desire on the part of issuers may cause them to turn to whoever is assisting them with the issuance process, be it their municipal advisor or their underwriter. In such a scenario, the role of the municipal advisor is clear; the municipal advisor will be obligated to provide the issuer with advice that is in the issuer’s best interest with regard to the retail order period. However, what is less clear is the role of the underwriter in such a scenario. For example, if the issuer is unable to develop a definition of “retail” or develops a definition of “retail” that is not appropriate, is the underwriter under any obligation to advise the issuer with regard to these matters? Regardless, if the underwriter does advise the issuer on these matters, does the underwriter have any duties to the issuer regarding the advice they provide to the issuer with respect to the issuer’s definition of “retail”? In other words, does an underwriter have any obligations to the issuer to disclose that the advice that it is providing with regard to the definition of “retail” may not be consistent with the issuer’s best interest?

NAIPFA believes that such a scenario places the underwriter and the issuer in an untenable situation. On the one hand, the underwriter must engage in fair dealing and cannot mislead the issuer by providing the issuer with advice that is overtly harmful to the issuer’s interests while simultaneously balancing the interests of its investors. On the other hand, the issuer will be relying upon the advice that it receives from its underwriter and will invariably believe that the advice being provided is in their best interest, since it is unlikely that an issuer would willingly seek advice from an entity when it knows that the advice provided is likely to be not in their best interest.

Under the foregoing scenario NAIPFA is concerned that if an issuer is not provided any affirmative underwriter disclosures regarding the advice it receives relating to the definition of the term “retail”, underwriters could easily cross the line into becoming fiduciaries to the issuer as a result of the issuer’s undue reliance on this advice. Alternatively, in the event that



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underwriters do not obtain fiduciary duties, the issuer will likely be harmed by the advice they receive from the underwriter because the advice they receive from the underwriter cannot be in their best interest due to the underwriter's duty to balance the interests of their investors. For example, if it is in the issuer's best interest to conduct a three day retail order period because this will generate the lowest interest rates for the issuer, the issuer could be harmed by an underwriter whose clientele is comprised primarily of institutional investors and who recommends a one day retail order period because the interests of the underwriter's institutional investor clients will not be properly balanced if a three day order period is utilized.

In such a scenario, NAIPFA believes that it is imperative for the issuer to be apprised of these facts prior to accepting the advice of their underwriter. Such disclosures would allow the issuer to make a thoughtful determination as to (a) whether their underwriter is going to be able to effectively sell their securities, and (b) whether the issuer should adopt its *own* definition of retail in light of these disclosures.

Among the concerns put forth by the MSRB as the rationale for these proposed amendments was that market participants have expressed concern that broker-dealers have been using the "retail order periods to achieve yields that may be below market." NAIPFA is concerned that the lack of affirmative disclosure requirements contained within the proposed amendments will not alleviate this concern and may in fact exacerbate the problem; underwriters will now be relied upon even more than in the past by issuers, as issuers will now be forced to perform a task that they will either be unable or unwilling to accomplish without the direct assistance of another individual, which in many cases will be their underwriter. Issuer's will place an undue amount of trust in their underwriter as a result of this rule, underwriters will not be able to provide advice that is in the issuer's best interest, and the rates/yields that will be achieved will likely be higher than market as a result.

B) The Current Rule is Sufficient But For Lack of Enforcement

The MSRB has premised its proposed amendments, at least in part, upon concerns raised by market participants. These concerns range from a "disregard by brokers, dealers, and municipal securities dealers of terms and conditions required by issuers for retail order periods" to the failure by syndicate managers to "disseminate timely notice of issuer terms and conditions regarding retail order periods to all dealers", to broker-dealers use the retail order period to "achieve yields that may be below market." In response to these concerns, the MSRB has (a) increased underwriter disclosure obligations with regard to sales data, which NAIPFA supports, and (b) put forth a definition of the term "retail order period" that requires issuers to define the term "retail". By and large, however, the amendments to the rule will not alleviate the MSRB concerns.



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NAIPFA believes that neither increasing trade data disclosures nor forcing issuers to define the term “retail” will cause broker-dealers to not disregard an issuer’s terms and conditions, nor will such measures cause some broker-dealers to conduct more effective retail order periods.

Conversely, NAIPFA believes that more scrutiny and enforcement actions under the current rule would curtail these practices. Currently, Rule G-11(f) reads as follows:

Communications Relating to Issuer Syndicate Requirements, Priority Provisions and Order Period. Prior to the first offer of any securities by a syndicate, the senior syndicate manager shall furnish in writing to the other members of the syndicate (i) a written statement of all terms and conditions required by the issuer, (ii) the priority provisions, (iii) the procedure, if any, by which such priority provisions may be changed, (iv) if the senior syndicate manager or managers are to be permitted on a case-by-case basis to allocate securities in a manner other than in accordance with the priority provisions, the fact that they are to be permitted to do so, and (v) if there is to be an order period, whether orders may be confirmed prior to the end of the order period. Any change in the priority provisions shall be promptly furnished in writing by the senior syndicate manager to the other members of the syndicate. Syndicate members shall promptly furnish in writing the information described in this section to others, upon request. If the senior syndicate manager, rather than the issuer, prepares the written statement of all terms and conditions required by the issuer, such statement shall be provided to the issuer.

The proposed changes to G-11(f) will be inconsequential to this provision’s effectiveness. The proposed changes will not accomplish the MSRB’s stated rationale for amending the current rule. NAIPFA believes that if the MSRB’s stated purpose is to be achieved, the only way to accomplish this objective is through increased enforcement of the current rule. Yet, the Notice fails in this regard.

C) Proposed Rule G-11(a)(vii) Shifts the Burden to the Issuer

As noted above, the MSRB’s stated purpose is to, in part, ensure that broker-dealers are not taking advantage of the issuer by way of the retail order period and to cause broker-dealers to comply with an issuer’s stated desires. As noted above, however, the current rule would accomplish this stated purpose if proper enforcement were to take place. Conversely, the proposed amendments to the Rule will not address the MSRB’s stated purpose and will instead merely act as a mechanism for shifting the responsibility of the retail order period’s effectiveness onto the issuer.

Under the current rule, if a retail order period were to occur, the issuer has two options, do nothing or provide directives to the underwriter. If the issuer chooses to do nothing, the underwriter will conduct the retail order period however it sees fit. In the event that the retail order period is ineffective or does not achieve the desired rates for the issuer, the issuer can hold the underwriter accountable for its failure. The current approach gives issuers the choice of



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whether to take responsibility for the retail order period. If the issuer does not have specific desires relating to the retail order period, the issuer can sit back and do nothing, whereas an issuer who seeks to control of the retail order period has the ability to do so. Thus, an issuer who provides directives to the underwriter is less likely to be able to hold an underwriter accountable in the event a retail order period does not go as planned.

Conversely, under proposed Rule G-11, issuers will be forced to define the term “retail” and thus will be forced to take responsibility for the outcome of the retail order period. Both large frequent issuers, and small unsophisticated and infrequent issuers will be saddled with obligations relating to the retail order period that they may not fully appreciate and, as discussed above, may cause decisions to be made by the issuer with regard to the retail order period that may not be in their best interest. NAIPFA is concerned that such an approach is contrary to the MSRB’s mandate of protecting the interests of municipal issuers and could in fact be harmful to their interests. NAIPFA cannot see how requiring unsophisticated infrequent issuers who do not generally understand the municipal marketplace to define the term “retail” will be beneficial to their interests. The most likely outcome of the proposed amendments is not going to be the achievement of the MSRB’s stated objectives, but will instead be an increased reliance by municipal issuers on underwriters who will likely be unable to provide advice that is in the issuer’s best interest.

What is more, NAIPFA believes that the G-11(a)(vii) mandate may actually cause issuers to pay higher interest rates. For example, if an issuer defines the term “retail” as being all individuals located within the limits of the municipality, it is extremely unlikely that an underwriter would be able to achieve that result. Thereafter, the underwriter would have to inform the issuer of the unsuccessful retail order period. But, rather than stating that the retail order period was ineffective as a result of the issuer’s definition of “retail”, the underwriter will likely state that the rates/yields utilized were insufficient to generate enough interest in the issuer’s securities. The underwriter would likely then inform the issuer that it will have to increase the issuer’s rates/yields in order to get the issue sold, potentially at levels above what would be considered fair market value, although not necessarily unreasonable in light of the circumstances.

Currently, under the proposed amendments underwriters will be under no obligation to inform the issuer that their definition is inconsistent with industry norms or that it may negatively impact the rates that they ultimately receive for their securities. NAIPFA is concerned that this may result in the artificial inflation of the issuer’s interest rates as a result of a failed retail order period conducted in accordance with the issuer’s instructions, a result that is not in the issuer’s best interest.



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D) The MSRB Should Adopt a Uniform Definition of Retail

The definition of “retail” is widely understood among non-issuer market participants. The MSRB itself understands that the term “retail” generally means something other than “institutional” and generally includes “individual investors and small organizations”.¹ Based upon this general understanding of the term “retail”, NAIPFA can find no rational basis for requiring issuers to develop their own definition.

Instead, NAIPFA believes that proposed Rule G-11 should simply be amended to include the generally accepted definition of the term “retail” for purposes of defining the “retail order period” along with the inclusion of a provision that allows issuers to change the definition, voluntarily, if they so desire. NAIPFA believes that a uniform definition of retail, amendable by the issuer, coupled with the current dictates of G-11(f) as well as increased enforcement efforts, will achieve the MSRB’s stated goal of curtailing broker-dealer disregard for issuer mandated terms and conditions. Further, this approach will prevent a shifting of the burden of the retail order period’s effectiveness onto an issuer unless the issuer desires to carry that burden.

Conclusion

NAIPFA hopes these comments provide insight into our concerns with regard to MSRB Notice 2012-13. We believe a large number of issuers are infrequent and/or small issuers. NAIPFA remains very concerned that these issuers will not be adequately protected in light of the apparent lack of enforcement of the current rule and the apparent shifting of burdens the proposed rule will achieve. NAIPFA is also concerned that the proposed rule will result in issuers continuing to place an undue amount of trust in underwriters as a result of the advice that is being provided to them, which will likely be perceived by the issuer as having been provided with their best interest in mind. Conversely, the suggested amendments detailed in these comments would provide the needed additional protection to municipal entities, and would accomplish the MSRB’s stated goals.

Sincerely,

Colette J. Irwin-Knott, CIPFA
President, National Association of Independent Public Finance Advisors

¹ See “Retail Customer” and “Retail Sale”, Glossary of Municipal Securities Terms, Second Edition (January 2004), http://msrb.org/msrb1/glossary/glossary_db.asp?sel=r (last visited April 4, 2012).



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The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
Liban Jama, Counsel to Commissioner Aguilar
Lynnette Kelly, Executive Director, Municipal Securities Rulemaking Board