



**National Association of Independent
Public Finance Advisors**

P.O. Box 304
Montgomery, Illinois 60538.0304
630.896.1292 • 209.633.6265 Fax
www.naipfa.com

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