



**National Association of Independent
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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

