

Client Alert

July 2012

NEW REQUIREMENTS FOR UNDERWRITER DISCLOSURE TO ISSUERS

MSRB Notice Mandates Written “Deal Specific” Disclosure to Issuers

The Municipal Securities Rulemaking Board (“MSRB”) has released an interpretive notice (Notice 2012-25) (the “Notice”) requiring municipal underwriters to provide written, “deal specific” disclosure to state and local government issuers designed to ensure that such issuers understand the limits of an underwriter’s obligations to an issuer and the circumstances under which the underwriter has financial interests that may conflict with the interests of the issuer. **The Notice, interpreting underwriter responsibilities under MSRB Rule G-17, becomes effective on August 2, 2012, and governs the underwriting of all municipal securities pricing on or after that date.** On July 18, 2012, in MSRB Notice 2012-38 (the “Guidance”), the MSRB provided additional guidance on the implementation of the Notice, which contains written guidelines, examples, and practical considerations for underwriters to take into account in complying with the Notice.

The Guidance enumerates specific disclosure requirements in connection with the basic requirement of fair dealing. These disclosures must be made in writing, made near the beginning of the engagement and tailored to the specific situation, including the sophistication of the issuer and the nature of the transaction. Municipal issuers will be asked to acknowledge receipt of that disclosure.

Specific requirements governing disclosures and related conduct set forth in the Notice and the Guidance include:

- The underwriter is required to (1) clarify that it is not a fiduciary for the issuer, (2) outline its compensation and (3) affirmatively describe any actual or potential material conflicts of interest.
- All representations by the underwriter to the issuer must be truthful and accurate and not misrepresent or omit material facts.
- The underwriter’s duty of fair dealing includes an implied representation that the price the underwriter pays to the issuer for its bonds is fair and reasonable.
- Underwriters that recommend complex municipal securities transactions (variable rate demand obligations, swaps, etc.) are required to disclose all material financial risks, characteristics, incentives and conflicts of interest related to such complex municipal products. This requirement reflects regulatory concerns that in recent years investment bankers have sometimes promoted complex financing structures not fully understood by their municipal clients.
- An underwriter must have a reasonable basis for representations it makes to municipal issuers in connection with the preparation by the municipal issuer of its disclosure documents. (An example of this type of representation would be cash flows.)
- The underwriter is obligated to honor agreements for retail order periods and to take measures to ensure that retail orders are bona fide.

Additional Information

The Notice and Guidance can be found at the following link:

<http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-17.aspx>.

The Securities Industries and Financial Markets Association (“SIFMA”) has prepared materials on the required disclosures, including a model letter with options and comments (available at www.sifma.org). In all cases, any letter or other disclosure communication to an issuer should reflect the specific facts and circumstances of the transaction being undertaken.

Hunton & Williams stands ready to assist underwriters in preparing the required disclosure and issuers in evaluating the disclosure they receive. For more information, please contact any of the persons listed below.

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