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Request for Comment

Comment Deadline

August 6, 2018

Category

Fair Practice

Affected Rules

[Rule G-17](#)

Request for Comment: Retrospective Review of 2012 Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities

Overview

As part of its ongoing review of its rules and published interpretations, the Municipal Securities Rulemaking Board (MSRB) is requesting comment on interpretive guidance it issued in 2012 on the application of MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities, to underwriters of municipal securities (“2012 Guidance”).¹ The 2012 Guidance established duties underwriters owe to issuers pursuant to their fair-dealing obligation. As part of its regulatory mission, the MSRB periodically revisits its rules and their interpretations over time to help ensure that they continue to achieve their intended purposes and reflect the current state of the municipal securities market. After receiving informal feedback from various market participants concerning the effectiveness and operation of the 2012 Guidance in practice, the MSRB now formally seeks comment from all interested parties on the benefits and burdens of, and possible alternatives to, the 2012 Guidance and the potential need for changes. The comments will assist the MSRB in determining whether and, if so, how to amend the 2012 Guidance and thereby modify underwriters’ duties to issuers pursuant to their fair-dealing obligation. The primary purpose of any potential amendments would be to improve market practices and address any unnecessary burdens on market participants.

Comments should be submitted no later than August 6, 2018, and may be submitted in electronic or paper form. [Comments may be submitted](#)

¹ The 2012 Guidance is incorporated into the MSRB Rule Book under Rule G-17. [Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities](#) (Aug. 2, 2012).



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[electronically by clicking here](#). Comments submitted in paper form should be sent to Ronald W. Smith, Corporate Secretary, Municipal Securities Rulemaking Board, 1300 I Street NW, Suite 1000, Washington, DC 20005. All comments will be available for public inspection on the MSRB's website.²

Questions about this notice should be directed to Michael L. Post, General Counsel, or Carl E. Tugberk, Assistant General Counsel, at 202-838-1500.

Background

Rule G-17 requires that, in the conduct of municipal securities activities, brokers, dealers and municipal securities dealers (collectively, “dealers”) must deal fairly with all persons and must not engage in any deceptive, dishonest or unfair practice. The MSRB has long held that this requirement extends to dealings with issuers in connection with the underwriting of their municipal securities.³ In 2011, the MSRB sought to provide greater clarity to dealers’ fair-dealing obligation to issuers when acting as an underwriter and proposed to publish interpretive guidance on a number of issues, including representations, required disclosures and conflicts of interest.⁴ Later that year, the MSRB filed a proposed rule change with the SEC to adopt the 2012 Guidance,⁵ which, after notice and comment, the SEC ultimately approved, and the 2012 Guidance became effective on August 2, 2012.⁶ The MSRB subsequently published a Regulatory Notice intended to assist dealers in revising their written supervisory procedures concerning their fair-practice obligations under Rule G-17 and to clarify certain aspects of the 2012 Guidance.⁷ Finally, in March 2013, to further support compliance, the MSRB answered frequently-asked questions to address operational matters pertaining to the 2012 Guidance.⁸

² Comments generally are posted on the MSRB’s website without change. For example, personal identifying information such as name, address, telephone number or email address will not be edited from submissions. Therefore, commenters should only submit information that they wish to make available publicly.

³ See [Reminder Notice on Fair Practice Duties to Issuers of Municipal Securities](#), MSRB Notice 2009-54 (Sept. 29, 2009) (“[T]he rule requires dealers to deal fairly with issuers in connection with all aspects of the underwriting of their municipal securities, including representations regarding investors made by the dealer.”); [Rule G-17 Interpretive Letter – Purchase of new issue from issuer](#) (Dec. 1, 1997) (“Whether or not an underwriter has dealt fairly with an issuer is dependent upon the facts and circumstances of an underwriting and cannot be addressed simply by virtue of the price of the issue.”).

⁴ [MSRB Notice 2011-12](#) (Feb. 14, 2011).

⁵ See Securities Exchange Act of 1934 (“Exchange Act”) Rel. No. 65263 (Sept. 6, 2011), 76 FR 55989 (Sept. 9, 2011) (SR-MSRB-2011-09).

⁶ See Exchange Act Rel. No. 66927 (May 4, 2012), 77 FR 27509 (May 10, 2012) (SR-MSRB-2011-09); [MSRB Notice 2012-25](#) (May 7, 2012).

⁷ See [MSRB Notice 2012-38](#) (July 18, 2012).

⁸ See [MSRB Notice 2013-08](#) (Mar. 25, 2013).

The 2012 Guidance was adopted to promote fair dealing by underwriters with issuers, in part, by requiring disclosures to issuers related to underwriters' relationships with them and the nature and risks of the transactions recommended by the underwriters. For example, the 2012 Guidance requires underwriters to disclose their role in the issuance of municipal securities, actual and potential material conflicts of interest concerning the issuance, whether their underwriting compensation will be contingent on closing the transaction, other conflicts related to payments to or from third parties, profit-sharing with investors, credit default swaps and incentives for recommending complex financing structures. Recently, the MSRB has received informal feedback from some market participants regarding their experience with these requirements and the effectiveness of the required disclosures.

Some market participants have, among other things, conveyed the following information and views:

- Dealers provide overly boilerplate disclosures to issuers when underwriting their municipal securities, which (in the opinion of such commenters) devalues the utility of those disclosures;
- Multiple underwriters for the same transaction will provide the exact same disclosures to the issuer, which commenters believe can inundate the issuer with duplicative information; and
- Underwriters serving frequent issuers must provide successive disclosures to their client, which are identical to disclosures that they recently already provided.

Some commenters have expressed that the combination of the duplication and the large volume of disclosures can create an overly burdensome review process, during which issuers may overlook key details related to their relationship with the underwriters and/or the transactions at issue. Moreover, some commenters also have expressed the view that the 2012 Guidance clearly should permit more tailored disclosures than the commenters believe are required currently.

Since it has been several years since the adoption of the 2012 Guidance and in view of the informal feedback received from various market participants, the MSRB believes a retrospective review of the 2012 Guidance is warranted to determine how effective the 2012 Guidance has been and whether amendments to the 2012 Guidance should be considered.

Request for Comment

The MSRB seeks public comment on the following questions, as well as on any other topic relevant to the 2012 Guidance or this request. The MSRB particularly welcomes statistical, empirical and other data from commenters that may support their views and/or support or refute the views, assumptions or issues raised in this request for comment.

- 1) What is the typical process, as implemented as a practical matter, for a dealer to provide the disclosures to issuers as required by the 2012 Guidance?
- 2) The 2012 Guidance allows for syndicate managers to make the disclosures concerning the role of the underwriter and the underwriter's compensation on behalf of other syndicate members, as long as the other syndicate members make the other conflicts disclosures that are particular to them.
 - a. How often do syndicates utilize this option for making the disclosures? If it has been infrequent, please explain why.
 - b. To the extent it has been used, has this option been effective? If not, how could it be improved?
 - c. Does the senior manager or any other dealer explain the disclosures to the issuer client or are they simply provided without any further discussion?
- 2) Do dealers typically provide disclosures to both conduit issuers and conduit borrowers?
- 3) Has the 2012 Guidance, particularly relating to required disclosures, achieved its intended purpose of promoting fair dealing by underwriters with issuers? If no, what are the problems?
 - a. Are the disclosures too boilerplate and/or too voluminous? If so, what are the consequences?
 - b. Are issuers overly burdened?
 - c. Are any problems with the 2012 Guidance the same or different for issuers of different sizes?

- d. Are the disclosures required to be provided at appropriate points in time in the course of the transaction?
 - e. Is the issuer's acknowledgment of receipt of the disclosures necessary and meaningful?
- 4) Should the MSRB amend the 2012 Guidance? If so, what are alternative approaches that could better achieve the intended purpose?
- a. Should the requirements be reduced or otherwise modified for different classes of issuers?
 - i. If so, how should those classes be defined?
 1. Based on size?
 2. Based on frequency in the market?
 3. Relative to whether the issuer has an independent registered municipal advisor that is advising the issuer on the transaction?
 4. Based on the presence of dedicated issuer staff for debt management?
 - ii. If so, how should the requirements be modified? Should issuers of any particularly defined class be able to opt out of receiving the disclosures?
 - b. Should all issuers be able to opt out of receiving the disclosures?
 - c. Should the frequency of making the disclosures to issuers be reduced? If so, how (*e.g.*, once per year unless there are material changes to any of the information provided and/or other new information requiring additional disclosure)?
 - d. Could or should EMMA be a tool to improve the utility of disclosures and the process for providing them to issuers (*e.g.*, use EMMA to display more general disclosures but continue to require client- and deal-specific disclosures be provided directly to issuers by the dealers)?

- e. Has the level of detail provided by the MSRB in the disclosure requirements been useful in promoting compliance?
 - i. If so, would greater prescription for any of the requirements be beneficial?
 - ii. If not, should that prescription be modified? If so, how?
 - f. Have the sample disclosures provided by the MSRB in Exhibit A to [MSRB Notice 2013-08](#) been useful in facilitating compliance, and to what extent has the sample been adopted? Should it be revised?
- 5) What have been the costs or burdens, direct, indirect or inadvertent, of complying with the 2012 Guidance? Are there data or other evidence, including studies or research, that support commenters' cost or burden estimates?
- 6) Aside from the disclosure requirements, are there any other requirements addressed in the 2012 Guidance that should be modified or removed or new requirements that should be added?

June 5, 2018