

ICI VIEWPOINTS

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Eliminating Confusion in MSRB Rulemaking

By Tamara Salmon

The Municipal Securities Rulemaking Board (MSRB) has asked for input on how it can [improve its approach to rulemaking](#). We've [responded](#) with several recommendations for the agency, including steps that would eliminate confusion relating to the regulation of [529 college savings plans](#).

A key part of eliminating this confusion is having the MSRB draw clearer distinctions with key terms that it uses. Doing so will benefit both investors and MSRB registrants by better clarifying the regulatory obligations such registrants have to their clients—depending on whether the client is purchasing a bond or a 529 plan security. Let's take a closer look.

Distinguishing Between Primary Distributors and Underwriters

Generally speaking, two types of securities sold by municipal securities dealers are subject to the MSRB's jurisdiction:

- bonds issued by state and local governments (municipal securities), and
- 529 plan securities (municipal fund securities).

Unlike bond offerings, offerings of 529 plan securities are not conducted through underwriters or syndicates of underwriters, nor are there any underwriters involved in bringing 529 plan securities to market. In lieu of underwriters, 529 plans use primary distributors to distribute the plan's shares. Depending upon its arrangement with the 529 plan sponsor or the program manager for the 529 plan, the plan's primary distributor may be charged with either selling the plan to investors, entering into sales distribution arrangements on behalf of the plan with retail distributors that will sell the plan to investors, or both.

The problem here is that the MSRB's existing and proposed rules continue to impose duties on "underwriters" of 529 plan securities. We find continued use of this term to be confusing, particularly when the MSRB's notices use the term *primary distributor* to describe rules that, by their express language, apply to an "underwriter."

To avoid such confusion and conform the language of the notices to the rules they are describing, we strongly recommend that the MSRB do the following:

- adopt a definition of the term *primary distributor* to apply in the 529 plan context, and
- where appropriate, expressly state within the MSRB's existing and future rules whether they apply solely to bond underwriters, solely to primary distributors of 529 plan securities, or to both underwriters and primary distributors.

Distinguishing Between Municipal Securities and Municipal Fund Securities

Along these same lines, confusion also results when the MSRB fails to state clearly whether a rule or rule proposal applies solely to 529 plan securities, solely to bond offerings, or to both.

The MSRB long ago adopted a definition of *municipal fund security* to distinguish 529 plan offerings from bond offerings. Under that definition, however, a municipal fund security is a type of municipal security. Thus, as a technical matter, the term *municipal security* includes both 529 plan securities and bond offerings. Indeed, persons selling 529 plan securities are required to abide by all rules applicable to bond offerings as well as all rules applicable solely to offerings of 529 plan securities.

We strongly recommend that the MSRB do the following:

- adopt a definition of the term *municipal security* (or a similar term) that refers exclusively to bond offerings, and
- clarify within each of its current and future rules and guidance whether such rule or guidance applies solely to 529 plan securities, solely to bond offerings, or to both.

Should the MSRB elect not to revise its definitions as we recommend above, we strongly recommend that, when proposing any new rules or rule revisions, or publishing any guidance for registrants, the MSRB expressly state whether such rule or guidance is intended to apply to both types of products. To the extent that the proposal is intended to apply to both products—but would impact them differently—the MSRB notice also should expressly discuss and explain these differences.

We believe these recommendations will go a long way toward addressing the current confusion that arises when trying to determine the intended scope and impact on 529 plan offerings of the MSRB's rules governing municipal securities.

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