

THE BOND BUYER

THE DAILY NEWSPAPER OF PUBLIC FINANCE

NABL Talks Auction Rate Deals

Panelists: Can Issuers Bid on Own Bonds?

Bond Buyer | Friday, February 22, 2008

By [Andrew Ackerman](#)

SAN FRANCISCO - Amid continuing turmoil in the auction-rate securities market, bond attorneys who gathered here yesterday suggested ways that their issuer clients might be able to avoid the high interest costs associated with their auction-rate bonds.

The discussion at the National Association of Bond Lawyers' Tax and Securities Law Institute centered on whether issuers can enter bids for their own auction-rate securities. But the bond lawyers were concerned about whether issuer's bidding on their bonds would violate the Securities and Exchange Commission's anti-fraud rules, or any other SEC rules or guidance.

The attorneys were hoping for a clear-cut answer from Martha Mahan Haines, the SEC's municipal securities chief. But they were likely disappointed, if not surprised, by her response.

"I don't have answers for you on this one," Haines said, speaking on a disclosure panel. She added somewhat incredulously, "Are you asking whether you are able to manipulate the market price of your own securities?"

Haines said that the commission is considering internally if it can comment on its antifraud Rule 10b-5 as it applies to auction-rate securities, but cautioned that any such guidance is highly unusual.

Her comments came after Dean Pope, a partner at Hunton & Williams LLP in Richmond, said that he believes the "common sense" and "quick and proper" fix for wildly fluctuating auction rates is for his clients to buy up their own securities, provided they include full and fair disclosure of their intentions.

"We're all buffeted by analyses and winds blowing through the bond world telling us that this may be an impermissible manipulation of the market that violates securities laws," he said. "[But] I don't see anything wrong with a conduit borrower going out and saying, 'I'm going to buy all my bonds at 4%; if you want to continue to hold the bonds at 4%, that's fine. Here's what I'm doing and here's why I'm doing it.'"

The question was later amplified by J. Hobson Presley Jr. of Presley Burton & Collier LLC in Birmingham who spoke on the panel with Haines. Presley cited a hypothetical situation in which an issuer with weekly auctions published a notice the day before an auction informing the market of the stresses on its bonds and of its intention to enter a level bid of 5% on its auction-rate paper during the auction set to take place the following week.

The notice would urge buyers not to submit hold orders on the bonds unless they liked the 5% rate, and would inform existing bondholders that after the subsequent auction, they could tender their bonds and the issuer would purchase them at par.

"Under those circumstances, you've given them a week's notice that you're going to enter the market, you told them what the rate will be, and you've promised them that you will accept their tender," Presley said. "Under those circumstances, where's the problem? Is there any hope for that?"

But Haines said that she did not know.

"Those would be really good facts that, if I was advising my client, I would want to have on my side," she added. "But can I tell you that's going to do the trick? I can't."

As if the downside to legal action was not clear enough, Presley joked that he had a good view of Alcatraz from his seat on the panel, which was led by Fredric Weber, a partner at Fulbright & Jaworski LLP in Houston, and included Municipal Securities Rulemaking Board executive director Lynnette Hotchkiss as well as Mark D. Blake, deputy city attorney of San Diego.

In addition to the SEC's reticence on the issue, panelists noted another concern - a \$13 million settlement that the commission announced in May 2006 with 15 broker-dealer firms for engaging in industry-wide practices in the municipal, corporate, and preferred stock auction-rate markets that violated federal securities laws.

The SEC charged that from Jan. 1, 2003, through June 30, 2004, the firms acted negligently by following a series of undisclosed practices such as, among other things, favoring certain investors over others, or issuers over investors, and manipulating clearing rates. However, the practices cited by the SEC were not disclosed to investors and other market participants in disclosure and other documents, a key difference from what the attorneys' were proposing here yesterday, the panelists noted.

At an earlier panel on disclosure yesterday, Tom Weyl, vice president and manager of municipal research at Eaton Vance

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Management in Boston and the former chairman of the National Federation of Municipal Analysts, argued that investors are routinely blocked from seeing material documents that address the underlying quality of credits.

He said that congressional action is needed to boost muni accounting and disclosure standards, as called for by SEC chairman Christopher Cox, because there is no block of investors powerful enough to bring about improved disclosures on their own.

Institutional investors no longer dominate the market as they once did, particularly as the presence of retail and foreign investors has increased.

Haines, who also spoke on the earlier panel with Weyl, agreed that the market needs better disclosure rules but disputed Weyl's contention that there are daily violations of the securities law by market participants who are unwilling to disclose to investors the same information they give to credit rating agencies.

"There's a big gap between fraudulent disclosure and truly good disclosure," Haines said. "A lot of it is just mediocre. It's not actionable, it's not fraudulent, it's just not very good."

Frank Hoadley, Wisconsin's capital finance director and chair of the Government Finance Officers Association's committee on governmental debt management, argued that both Weyl and Haines are wrong, repeating the GFOA's position that additional federal regulation is unnecessary.

He noted, among other things, that Wisconsin has what is widely regarded as the best online disclosure site that includes voluminous details of the state's large auction-rate program. Despite top-notch disclosure, one of the state's auction-rate deals reset Tuesday with a 10% rate.

"I would point out that despite having the best disclosure site out there for auction rates, it hasn't done us any good," he said, adding that issuer education, not additional federal regulation, is what is needed to improve disclosure.

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