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## SEC's Disclosure Concern Haines: Auction-Rate Information Inadequate

By Lynn Hume

CHICAGO — The Securities and Exchange Commission is concerned that broker-dealers running auction-rate securities programs have not been adequately disclosing to investors information about how the programs work, **Martha Mahan Haines**, chief of the SEC's Office of Municipal Securities, told bond lawyers meeting here Friday.

"The bottom line is that there appear to be some practices that occur in actuality that are not being fully reflected in the program documents," Haines said during a session on underwriters' counsel at the National Association of Bond Lawyers' 30th Annual Bond Attorneys' Workshop here.

The program documents make an auction-rate securities program "appear to be a very pure Dutch-auction process" when in fact the SEC has learned that "it's more of a process that's managed" by the broker-dealers running the auctions, she said.

"That's not necessarily to say that managed is bad," Haines said. The problem is that it's simply not disclosed to investors.

Haines pointed out that typically in auction-rate securities programs, the dealers are trying to serve both the investors, who want as high interest rates as possible, and the issuers, who want as low interest rates as possible.

"That's kind of a nice tension," she



*"There appear to be some practices that occur in actuality that are not being fully reflected in the program documents," says the SEC's Martha Mahan Haines.*

said. And typically, a dealer is not trying to manage the auction to reap any monetary gain for itself.

Haines' remarks come as the SEC's enforcement lawyers have been investigating the dealers' disclosures in this area and have been trying to negotiate a global settlement with them over faulty disclosure practices.

Haines, who stressed she was speaking personally and not for the

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# Disclosure for Auction-Rate Programs Lacking, Haines Says

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SEC, did not mention the commission's probe or settlement discussions at the NABL meeting

Instead she made her remarks in the context of what underwriters' counsel should be asking their clients about these programs for disclosure purposes so they can make sure the programs are accurately described to investors.

The SEC has learned that some broker-dealers intervene in the auction process either by bidding for their own accounts, or suggesting that investors change their bids, she told underwriters' counsel at the session.

There are at least three situations in which a dealer might intervene, she said. They might want to ensure that all of the securities are purchased to prevent an auction from failing. They might want to influence the clearing rate — the lowest rate at which all of the bonds in the auction can be sold — if they believe that the bids they've received do not really reflect the market. They also might want to prevent an "all hold" auction, in which the interest rate would be set very low because none of the investors wanted to sell their bonds.

In addition, there are some practices that the SEC believes has occurred that dealers must stop, such as failing to adhere to deadlines, she said.

Another concern, she said, is "price talk," in which dealers give indications of what they think the clearing rate might be and then keep adjusting their indications, in effect signaling that they are not receiving enough bids.

There are more concerns when a single dealer is handling the auction and is pivoting to all of the bids and to what the

clearing rate should be, she said.

"You need to sit down with the investment banker and discuss the nitty-gritty of how these auctions are occurring" to make sure they are accurately described to investors, she said to the audience of underwriters' counsel.

Meanwhile, Mark Zehner, the SEC's regional municipal securities counsel in Philadelphia, cautioned bond lawyers in an enforcement session late Thursday against unwittingly being used as a con-

their pensions systems.

"I have heard many say that San Diego will do for pension disclosure what Orange County, Calif., did for derivative disclosure and I agree with that," she said.

Kelly also described the latest SEC enforcement actions in the municipal market and what they mean for muni market participants.

The cases she cited included commission enforcement actions against un-

abilities regarding the accuracy of the disclosure."

The cases also show that "antifraud liability extends to documents other than official statements — it includes information provided to investors and the rating agencies; certificates delivered at closing regarding the accuracy of disclosure; information provided to another party that is subsequently used in that party's disclosure; and information provided in periodic post-closing reports designed to reach the markets," she said.

"What that means for us is that we must step back and think about the overall story that we are telling, not just update the last deal or similar transaction," Kelly said. "We have learned that communication between issuer officials and staff, and communication among members of a working group, are essential in providing complete disclosure. So are internal controls and procedures."

"We need to think big picture and give accurate details," she said. "We know that political or other non-legal pressures can have disclosure consequences. We need to see the forest as well as the trees."

"To get it right, we may need to push for more time, more information, more interactions" in transactions, Kelly said. "But at the end of the day we owe it to our clients, ourselves, and the industry." □

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**"I have heard many say that San Diego will do for pension disclosure what Orange County, Calif., did for derivative disclosure and I agree with that," says Mary Jo Kelly, a partner at Nixon Peabody.**

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sultant for a broker-dealer.

Zehner pointed to a corruption case in Philadelphia in which U.S. attorneys found that broker-dealer employees were submitting false invoices on behalf of a bond lawyer to essentially pay him off for giving them access to the city's former treasurer, who selected underwriters for bond deals.

"Lawyers can be used and abused if they're not careful," he said.

In a speech on current developments in the securities law area on Thursday, Mary Jo Kelly, a partner at Nixon Peabody LLP in Washington, D.C., and former SEC muni official, said that San Diego's well-publicized pension and bond-related disclosure problems have led other governmental issuers to provide more information to investors about

derwriter Dolphin & Bradbury in Pennsylvania, Mount Sinai Medical Center of Florida and two of its former executives, and the Utah Educational Savings Plan Trust and its former director.

"So what can we glean from these cases?" Kelly asked. "We know that issuers remain primarily liable for their disclosure documents. We know that issuer officials who approve disclosure documents have responsibilities and li-