Sifma's Model Bond Purchase Agreement to Protect Underwriters

Wire: BLOOMBERG News (BN) Date: 2008-09-22 16:26:10
By Michael Quint

Sept. 22 (Bloomberg) -- Municipal bond underwriters may disavow responsibility for advice given issuers in bond sales or talks leading to the transactions, according to a model bond purchase agreement prepared by an industry group representing securities firms.

The document prepared by the New York-based Securities Industry and Financial Markets Association isn't mandatory and can be modified, though the group hopes it will be widely adopted, said Leslie Norwood, associate general counsel. Many borrowers in the $2.6 trillion municipal market rely on the advice of bankers before and during a bond sale, and don't hire independent financial advisers.

The purchase of bonds ``is an arm's length commercial transaction'' in which ``each underwriter is acting solely as a principal and not as an agent or a fiduciary of the issuer'' in the bond sale ``or the process leading thereto,'' the draft agreement says.

Underwriters are banks or securities firms that purchase the bonds from issuers and resell them to investors.

The issue of banks' responsibility for advice given to borrowers is a key part of a recent lawsuit filed by New Hampshire against UBS AG, which was both underwriter and adviser to the state's Higher Education Loan Corp.

The New Hampshire action claims the bank ``surreptitiously and in violation of its fiduciary duty'' failed to inform the authority about problems in the auction-rate market in the months leading up to its collapse in February and the bank's plans to withdraw.

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``Even though some prior bond purchase agreements may not have clearly stated the different role of issuers and underwriters, we believe this has been the industry standard,'' Norwood said in an interview Sept. 19. She declined to say if the model agreement would provide legal protection to underwriters.

Some financial advisers and issuers back the document's language because it reminds borrowers that underwriters are working for themselves. The draft agreement says an issuer ``has consulted with its own legal and financial advisers to the extent it deemed appropriate'' for a bond sale.

``The agreement says explicitly that underwriter and issuers have different interests and don't sit on the same side of the table,'' said Robert Anderson, executive director of the New Jersey Educational Facilities Authority, and a member of the Government Finance Officers Association's debt finance committee that reviewed the draft as it was prepared.

``I like it because it reminds issuers that independent financial advisers act in a fiduciary capacity, and underwriters don't,'' said Joy Howard, principal at WM Financial, a St. Louis-based adviser to local governments.

Howard and Anderson said they hadn't seen bond agreements with language stating that underwriters have no fiduciary responsibility for advice given to municipal issuers.