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MSRB Addresses Selective Disclosure: Mintz Levin

On September 13, 2017, the Municipal Securities Rulemaking Board (the "MSRB") published a market advisory on selective disclosure (the "Notice"). The stated purpose of the Notice is to "increase awareness" of selective disclosure as a "market fairness" concern. Although the Notice acknowledges that selective disclosure by issuers of, or conduit obligors on, municipal securities is not prohibited or "inherently problematic", the Notice cautions issuers and obligors in the municipal market not to selectively disclose material nonpublic information.

The Notice's bottom line is to urge that issuers of and obligors on municipal securities voluntarily disclose to the broader marketplace information that is potentially material and is being disclosed or has been disclosed to a subset of actual or potential bondholders "by a method or combination of methods that is reasonably designed to effect broad, non-exclusionary distribution of the information to the public", including, for example, by posting the relevant information on the MSRB's EMMA website.

The Notice addresses the practice of certain municipal securities issuers and obligors of making selective disclosure, which occurs when certain classes of investors (the Notice singles out investment bankers, investment advisers and institutional investors as "typical" recipients) are given access to information but other investors are not. Selective disclosure may occur when the issuer presents information relating to an issue to current or prospective investors, for example, during road shows, investor conferences and one-on-one investor calls or meetings. The Notice states that "these events are not inherently problematic, but they can become so when the information conveyed is nonpublic and material".

The Notice addresses selective disclosure in both the primary and secondary markets. As an example, the MSRB notes that investor conferences and investor calls often include question-an--answer sessions, which may place the issuer at risk of discussing nonpublic material information, such as information that is not included in the preliminary official statement. As to secondary market selective disclosure, the MSRB uses the example of when an issuer might provide new nonpublic material information, which is not required to be disclosed pursuant to Rule 15c2-12 under the Securities Exchange Act of 1934 ("Exchange Act") or any other rule, to select investors or analysts.

As an example from other markets, the Notice outlines some of the requirements of the Securities and Exchange Commission's (SEC) Regulation Fair Disclosure, more commonly known as Regulation FD, adopted in 2000 to address, in part, selective disclosure by public companies. The regulation provides that, when an issuer discloses material nonpublic information to certain persons (e.g., brokers, dealers, investment advisers and investment companies), it must publicly disclose that information. If the selective disclosure was intentional, the issuer must make the public disclosure simultaneously; if it was unintentional, the issuer must make the public disclosure promptly.

The Notice acknowledges that Regulation FD does not apply to municipal issuers (or to obligors on municipal securities that are not public issuers of non-municipal securities), as municipal issuers are exempt from regulation by the SEC (other than antifraud provisions). Similarly, while the Exchange Act provides the MSRB with broad authority to write rules governing the activities of brokers,

dealers, municipal securities dealers and municipal advisors, it does not provide the MSRB with authority to write rules governing the activities of issuers.

The Notice also acknowledges that selective disclosure, even of material nonpublic information, does not in and of itself constitute inside information for purposes of "insider trading" prohibitions, as such prohibitions generally have been construed as applicable only where the disclosure is made in breach of a duty to the issuer. However, the Notice appears to promote reducing selective disclosure by highlighting the risk that selective disclosure of nonpublic and material information might be indicative of material omissions or misstatements in offering documents or result in transactions that might be considered insider trading.

The Notice suggests that issuers and conduit obligors may wish to develop and follow guidelines for disclosure in a manner that disseminates all potentially material nonpublic information to all market participants. This is not unlike the push a few years ago by the Internal Revenue Service for issuers to establish post-issuance compliance guidelines. The Notice further suggests that issuers consider adopting, on a voluntary basis, the dissemination principles set forth in Regulation FD.

The MSRB claims that the purpose of the Notice "is not to discourage direct communications between issuers and investors and/or analysts, as road shows, investor conferences and other similar communications are legitimate market practices that are not inherently problematic." Although the Notice is measured in tone and does not communicate any new legal requirements, it may prompt some issuers to decide that it is overly burdensome to sort through what good faith nonpublic communications might be deemed "unfair" selective disclosure, and to determine that their most efficient options are to err on the side of not entertaining calls or meetings involving individual analysts or investor groups or to post all nonpublic communications (presumably including transcripts of oral discussions) on EMMA. Although some issuers have adopted model standards to address these concerns; for some issuers, especially smaller issuers that are not in the market regularly, a policy of publicly posting everything that is said may well have a chilling effect on routine conversations between issuer representatives and investors. There also may be routine and follow-up conversations between issuer representatives and investor representatives that focus on details and monitoring of generally known items that an issuer may reasonably deem not to be material, and there is no reason to discourage such interactions.

It is to be hoped that the municipal market will continue to operate in a manner that acknowledges investor protection and market integrity and that continues to disclose material information to all without an overreaction that shuts down individualized discussions.

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September 15, 2017