
Wealthy N.Y. Town Sued by SEC Over Loan Aid for Restaurateur.

- **Restaurant owner lavished officials with cash, food, trips**
- **SEC says officials concealed financial risks from bondholders**

The city of Oyster Bay, New York, and its former supervisor were sued by the Securities and Exchange Commission for failing to disclose that the municipality guaranteed loans for a local restaurant owner who allegedly lavished officials with cash, trips and other bribes.

The Long Island city defrauded bondholders by failing to reveal that it co-signed for $20 million of loans for the unidentified businessman, according to the SEC. The agency said Tuesday that the obligations should have been disclosed to investors, given that the loans could have eaten up nearly a fifth of its annual budget.

“Oyster Bay and its most senior elected official concealed from its municipal investors that the town had gone to great lengths and taken on financial risk in an unusual decision to assist a vendor,” Sanjay Wadhwa, senior associate director of the SEC’s New York office, said in a statement. “Investors were deprived of information they needed to understand the town’s true financial condition.”

In return for the loan guarantees, the SEC said the businessman provided city officials with free meals, cash and other gifts, including overseas trips to Italy, India, South Korea and Mexico.

The former Oyster Bay supervisor, John Venditto, pleaded not guilty after he was charged last year by federal prosecutors in a related corruption case along with the Nassau County Executive Edward Mangano and his wife, Linda, according to the New York Times. Venditto was named in a superseding indictment Tuesday that included charges of securities fraud, as well as bribery and obstruction of justice.

Marc Agnifilo, an attorney with Brafman & Associates who is representing Venditto, said his client denies the charges. “It doesn’t really change the complexion of the case at all,” Agnifilo said. “I don’t see any new facts of any note.”

Jonathan Pickhardt of Quinn Emanuel Urquhart & Sullivan, the defense attorney for the town listed on the SEC’s statement, did not immediately respond to an emailed request for comment and a phone message left with his assistant.

Debt issued by Oyster Bay, a collection of villages with some 300,000 residents and one-time home to President Theodore Roosevelt, had an AAA rating at the time of the guarantees, according to the SEC. That rating has since tumbled, with S&P Global Ratings dropping it to junk last year because of a history of running budget deficits.

Bloomberg

By Rebecca Spalding

November 21, 2017, 11:35 AM PST Updated on November 21, 2017, 12:37 PM PST

MSRB Release on Offering Practices Draws Frosty Reception From Some.

PHOENIX – Dealers and municipal advisors don't believe that the Municipal Securities Rulemaking Board's rules on primary offering practices require much of an overhaul and are concerned the MSRB may be proposing to exceed its authority, they told the board this week.

Various market participants voiced these thoughts in comments responding to the MSRB's September concept release seeking market input on numerous aspects of primary offering practices.

Concept releases are often precursors to proposed rules or rule changes. Market groups had initially said they were uncertain what the MSRB's goals might be. The concept release potentially affects Rules G-11 on primary offering practices and G-32 on disclosures in connection with primary offerings.

The dealers and muni advisors bound by the MSRB's rules told the board the proposals contained in the release aren't necessary or perhaps even within the board's authority. The board asked, for example, whether it should amend G-11 to require members of syndicates to make a bona fide public offering of the bonds allocated to them at the public offering price. Syndicate members sometimes agree to this in documents signed before the sale, but do not always follow through on it. Leslie Norwood, a managing director, associate general counsel and co-head of municipal securities at the Securities Industry and Financial Markets Association, wrote that underwriters must abide by their agreements but that the MSRB should not create a new requirement.

"SIFMA strongly believes that the issuer has the right to determine whether it wants its new issue to be sold in a bona fide public offering or by some other means," Norwood wrote, noting that SIFMA is concerned that such a rule would require "line drawing" to account for instances where a bonafide public offering would be inappropriate, such as in a private placement or limited offering.

"Any such line-drawing raises the considerable risk of regulations driving market decisions rather than the intentions of the party or free market forces," Norwood wrote.

MAs took issue with the MSRB's question of whether it should require the submission of preliminary official statements to EMMA, which some issuers already submit voluntarily.

"We believe that the MSRB lacks the statutory authority to create such a rule for either municipal advisors or broker/dealers and that such a requirement would violate the Securities Exchange Act" of 1934, wrote National Association of Municipal Advisors executive director Susan Gaffney. Section 15B(d) of that law specifically denies the board the power to require that, Gaffney argued.

The National Federation of Municipal Analysts, however, said it supports requiring issuers to post the POS. The NFMA also threw its support behind another one of the concept release's proposals: requiring underwriters in an advance refunding deal to disclose within a shorter timeframe, and to all market participants at the same time, the CUSIPs refunded and the percentages.

"We believe the most effective and least costly solution to ensure that all investors have equal access to refunded CUSIP information is the disclosure of all credit and security information to EMMA at the same time, as soon as practicable," wrote NFMA chair Julie Egan and the group's industry practices & procedures chair Lisa Washburn.

SIFMA generally also said it doesn't see a need for a new MSRB requirement for the senior syndicate manager to inform all other syndicate members simultaneously when a bond purchase agreement is executed, and explicitly state that, in negotiated sales, retail or institutional priority orders must be allocated up to the amount of priority set by the issuer before being allocated to lower priority orders.

Robert Doty, the president and proprietor of muni bond consulting company AGFS told the board that it should amend G-32 to require a dealer that sells any offered municipal securities to a customer to disclose all of its compensation in a negotiated offering that is dependent upon the completion of either specific stages in an offering or the entire offering. Doty noted that undisclosed compensation based on specific stages of the transaction were key pieces of a 2016 Securities and Exchange Commission enforcement action against the Rhode Island Economic Development Corporation and Wells Fargo (WFC), in which the commission alleged a conflict of interest that should have been disclosed to bond investors.

The MSRB can choose to ask for additional market comments, propose rules or rule changes for further comment, file proposals with the SEC, or take no further action.

BY SOURCEMEDIA | MUNICIPAL | 11/16/17 07:15 PM EST

By Kyle Glazier

MSRB's Request for Comment on Retrospective Review of Primary Offering Practices.

The MSRB has released for comment its concept proposal on MSRB rules on primary offering practices. The BDA's letter suggests that existing MSRB rules adequately protect primary offering practices and the existing regulatory framework is sufficient, thus eliminating the need for new rules to govern primary offering practices. Public comments on the proposal are due Monday, November 13th.

BDA's comment letter can be found here.

Draft Letter Summary:

Rule G-11 Primary Offering Practices

- **Bona Fide Public Offering:** Argues against the need for the definition of, and a specific rule requiring, a bona fide public offering in all municipal securities offerings
- **Submission of Preliminary Official Statements to EMMA:** Urges the MSRB not to adopt a rule, with the exception of competitive bid offerings, requiring the posting of preliminary official statement to EMMA
- **Free-to-Trade Wire:** Urges the MSRB require all senior syndicate managers to send a free-t--trade wire, in addition to ensuring the timing to trade freely is as transparent as possible

Rule G-32 Disclosures in Connection with Primary Offerings

- **Disclosure of CUSIPs:** Urges MSRB require the senior syndicate manager or sole manger to disclose the CUSIPs refunded and the percentages thereof within a short period following the pricing of the refunding bonds, if available
- **Official Statements:** Recommends MSRB amend Rule G-32(c) to extend the requirement to make the official statement available to the senior managing underwriter or sole underwriter to non-dealer municipal advisors

Proposed Rule Summary:

MSRB's request seeks insight on evolving primary offering practices and whether current rules continue to operate effectively or whether changes to MSRB Rule G-11, on primary offering practices, and Rule G-32, on disclosures in connection with primary offering practices.

Concerning Rule G-11 on Primary Offering Practices

- Require underwriters to make a bona fide public offering
- Standardize the process for issuing a free-to-trade wire
- Require senior syndicate managers to provide more information to issuers
- Align the payment of group net sales credits with the payment of net designated sales credits
- Require retail (or institutional, as applicable) priority orders in negotiated sales to be allocated in full before allocating to lower priority orders, unless the syndicate manager has received permission from the issuer to allocate to lower priority orders

Concerning Rule G-32 on Disclosures in Connection with Primary Offering Practices

- Require underwriters in a refunding to disclose, within a shorter timeframe, to all market participants at the same time, the CUSIPs refunded and the percentages thereof
- Require the underwriter or municipal advisor to submit the preliminary official statement (POS) to EMMA, if one is availableRequire non-dealer municipal advisors that prepare certain official statements to make the official statement available to the underwriter after the issuer approves it for distribution
- Auto-populate into Form G-32 certain information that is submitted to DTCC's New Issue Information Dissemination Service (NIIDS) but is not currently required to be provided on Form G-32
- Request additional information on Form G-32 that is not currently provided to NIIDS

Bond Dealers of America

November 17, 2017

SIFMA Response to MSRB Concept Release on Primary Offering Practices.

SIFMA provided comments to the Municipal Securities Rulemaking Board (MSRB) on a recently released concept proposal to solicit input from market participants on MSRB rules on primary offering practices. The concept proposal seeks input on evolving primary offering practices and whether the current rules continue to operate effectively or whether changes to MSRB Rule G-11, on primary offering practices, and Rule G-32, on disclosures in connection with primary offerings, may be warranted.

Read the Comment Letter.

See also: Regulatory Notice

SEC Finds Widespread Compliance Failures Among Municipal Advisors.

Risk Alert details 'frequently observed deficiencies' in the areas of registration, books and records, and supervision

The Securities and Exchange Commission's exam division has released a report showing widespread compliance failures among municipal advisors.

In a Nov. 7 risk alert on observations from municipal exams, the agency's Office of Compliance Inspections and Examinations said it had conducted more than 110 exams of municipal advisors and evaluated their compliance with registration, statutory fiduciary standard of care, fair dealing, recordkeeping and supervision.

Examiners most frequently observed "deficiencies in the areas of registration, books and records, and supervision," the alert states, with some firms being referred to the enforcement division.

The report's key takeaway: "Municipal advisors should take steps to educate themselves regarding their compliance obligations," the SEC warned.

Lynnette Kelly, director of the Municipal Securities Rulemaking Board, which is overseen by the SEC, told ThinkAdvisor in an email message that MSRB "encourages the municipal advisory community to carefully consider the SEC's examination feedback."

"A robust compliance and enforcement regime is critical to ensuring the integrity of the municipal securities market," she said, adding that the MSRB has established "a strategic goal to provide compliance assistance to regulated entities."

Municipal advisors and municipal securities dealers, she continued, "will be seeing a significant increase in MSRB outreach events, educational opportunities and the release of various forms of compliance aids, all with the goal of facilitating compliance with MSRB rules."

Municipal advisors became subject to SEC registration and jurisdiction pursuant to the Dodd-Frank Act of 2010.

The risk alert "is the warning shot across the bow for municipal advisors," according to Cipperman Compliance Services. OCIE publishes examination findings and recommendations "as a foreshadowing of impending enforcement actions."

ThinkAdvisor

by Melanie Waddell

MSRB Seeks Input on Compliance Support.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) is seeking public comment on its approach to enhancing compliance support, a [long-term strategic priority] for the organization. The MSRB's [request for comment] invites regulated entities, other market stakeholders and the public to share their perspectives on how the MSRB can most effectively support understanding of its rules.

"The MSRB deeply values the varied perspectives of regulated entities and other stakeholders who work together to preserve the integrity of the municipal securities market," said MSRB Executive Director Lynnette Kelly. "Public input on our compliance support initiative is another way to help us prioritize and focus our efforts on the areas where additional compliance support would be most effective for the overall fairness and efficiency of the market."

The MSRB recently established a Compliance Advisory Group to provide additional input to the Board of Directors on its compliance priorities, centralized its growing library of compliance resources into an online Compliance Center and published information on the types of compliance assistance provided by the MSRB.

Today's request for comment seeks to further leverage the experience and perspectives of regulated entities and other stakeholders as the MSRB prioritizes, develops and delivers additional compliance support in the coming months. Comments should be submitted to the MSRB by December 22, 2017.

"Our commitment to obtaining stakeholder input will continue throughout the year as we communicate about existing regulatory requirements, host and participate in industry events, and provide compliance tools and educational webinars," Kelly said.

Date: November 16, 2017

Contact: Jennifer A. Galloway, Chief Communications Officer
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GASB: Understanding Costs and Benefits: Fiduciary Activities.

Read the GASB article.

MSRB Publishes Information on its Compliance and Market Leadership Activities.

Washington, DC – In support of its long-term strategic goals, the Municipal Securities Rulemaking Board (MSRB) plans to provide additional resources and tools for municipal securities dealers and municipal advisors to facilitate compliance with MSRB rules. In addition, the MSRB will continue to provide reports and commentary that promote dialogue about market practices, products or trends that can have an impact on the integrity of the municipal securities market. The MSRB today released two publications to clarify its approach to compliance and market leadership activities.

"As a self-regulatory organization, it is important that we effectively communicate the MSRB's intent with respect to regulatory and market issues," said MSRB Executive Director Lynnette Kelly. "Our compliance activities are focused squarely on MSRB regulations and will be informed by stakeholder engagement. We have formed an external advisory group and will be continuing to seek input from municipal securities dealers and municipal advisors to ensure that our resources and tools reflect that input."

The MSRB's compliance support activities will include issuing interpretive guidance to clarify the application of an MSRB rule or creating a sample template, fact sheet or other compliance resource to serve as a reference for regulated entities. The MSRB also publishes annual compliance advisories to highlight considerations for municipal securities dealers and municipal advisors when assessing the effectiveness of their supervisory systems and compliance processes. Read more about the types of compliance information.

Consistent with the MSRB's obligation to protect investors, issuers and the public interest, the MSRB publishes— when the Board of Directors believes appropriate—market advisories, reports or other commentary to bring attention to issues in the municipal securities market that may have an impact on market integrity and fairness. The MSRB also contributes data and expertise to inform policy discussions on topics related to the municipal securities market. Read more about the MSRB's market leadership activities.

"It is the MSRB's responsibility to flag troubling market practices we believe are potentially harmful to investors or municipal entities, even if they fall outside of our rulemaking authority," Kelly said. "Our market leadership activities do not propose rulemaking but rather raise awareness of issues that could be detrimental to the integrity of the market and further encourage dialogue among market participants. We have been doing this for some time, one example being our advocacy for increased disclosure by municipal securities issuers of bank loans."

The MSRB will clearly label and identify new compliance and market leadership publications to communicate the intent of these publications and help the market participants make best use of the information.

Date: November 9, 2017

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MSRB to Streamline Series 52 Exam.

On November 8, the MSRB announced plans to revise the Municipal Securities Representative Examination, or Series 52, into a "specialized knowledge exam." This change comes ahead of the Financial Industry Regulatory Authority's (FINRA) Securities Industry Essentials (SIE) exam, which will be released on October 1, 2018. The changes are intended to "streamline duplicative testing" and "reduce testing redundancies."

MSRB Regulatory Notice

GASB Proposes Clarifications to Guidance on Majority Equity Interests.

Norwalk, CT, November 9, 2017—The Governmental Accounting Standards Board (GASB) today proposed guidance that would clarify the accounting and financial reporting for a state or local government's majority equity interest in an organization that remains legally separate after acquisition.

A public hospital acquiring a rehabilitation center that remains legally separate from the hospital after acquisition is an example of the kind of situation the proposed guidance addresses.

Under guidance proposed in the Exposure Draft, *Accounting and Financial Reporting for Majority Equity Interests*, a government's majority equity interest in a legally separate organization would be reported as an investment if that equity interest meets the GASB's definition of an investment. Except in certain specific circumstances, a majority equity interest that meets the definition of an investment would be measured using the equity method.

For all other majority equity interests in a legally separate entity—those that do not meet the definition of an investment—a government would report the legally separate entity as a component unit.

The document also proposes guidance for remeasuring assets and liabilities of an acquired entity that remains legally separate to be consistent with existing standards that apply to acquisitions that do not remain legally separate.

The Exposure Draft is available on the GASB website, www.gasb.org. Stakeholders are encouraged to review the proposal and provide comments by January 12, 2018.

NFMA Comment Letter on MSRB Regulatory Notice 2017-19.

The National Federation of Municipal Analysts responded to the MSRB's Regulatory Notice 2017-19, Request for Comment on a Concept Proposal Regarding Amendments to Primary Offering Practices of Brokers, Dealers and Municipal Securities Dealers, on November 9, 2017.

To read the NFMA comment, click here.

Markup Rule Deadline May Be Hard To Meet.

Municipal market participants may not be ready in time to implement a pending markup disclosure rule on which regulators place huge importance.

Amendments to Municipal Securities Rulemaking Board Rules G-15 on confirmation and G-30 on prices and commissions, which are to take effect on May 14, 2018, will require dealers to disclose their markups and markdowns on certain transactions in the confirmations they send retail customers — a sea change for the municipal market. MSRB executive director Lynnette Kelly has called the rule changes "a game changer." Both the MSRB and Financial Industry Regulatory Authority have put significant effort into providing firms with education about the rule changes.

But as the clock ticks down toward the compliance date, many in the industry worry they will not be able to put in place changes that will allow their automated systems to comply with the new requirements.

Under the rule changes, markup disclosures will have to be given as a total dollar amount and a percentage of the prevailing market price.

The amendments establish a “waterfall” of factors for determining the PMP. Dealers initially are to look at their contemporaneous trades of the same muni with other dealers or customers to establish a presumption of prevailing market price. If that data is unavailable, they must make a series of other successive considerations. They can look at contemporaneous trades of the muni in interdealer trades, then trades of the muni between other dealers and institutional investors, then trades on alternative trading systems or other electronic platforms.

Further down the waterfall, firms can look at contemporaneous trades of similar securities. The MSRB included a list of “non-exclusive factors” like credit quality, size of the issue, and comparable yield that can be used to determine if securities are similar. The bottom of the waterfall allows dealers to use prices or yields derived from economic models.

While complicated, most dealers think that they can comply with the rule changes, whether internally or through a third-party vendor. But what many are far less sure about is whether they will be prepared, by May 14, to automate the process from transaction to delivering the customer a confirmation with a properly-disclosed markup or markdown. A number of dealer representatives made that point while speaking at an MSRB roundtable earlier this month.

“The clock is ticking on this year, and we don’t have a solution in hand to automate the waterfall,” Daren Colaiacovo, a director of retail trading at RBC Capital Markets said at the roundtable. “It’s something we’re taking very seriously.”

Colaiacovo said that while several vendors are offering PMP calculation solutions for markup rule compliance, he is not aware that any firm has their solution in hand and is set to go.

Kristin Maher, head of fixed income services at Wells Fargo, said Wells has tested solutions with several vendors but is still working out how to automate their trades for compliance.

“How are we going to do this with a reasonable amount of resources dedicated to this?” she asked.

Dealer groups are reflecting the concerns of individual firms. They are pressing the MSRB and the Securities and Exchange Commission to extend the compliance date, possibly by several months.

“I think the industry is still getting ready,” said Bond Dealers of America chief executive officer Mike Nicholas. “I think there’s still a long way to go in terms of getting ready for this.”

BDA has stressed the complexities of automating the waterfall process in past comments to the MSRB and SEC. Nicholas is concerned that the information firms end up providing on confirmations could wind up confusing customers.

“The last thing BDA members want is to create misleading information for retail investors,” Nicholas said.

Securities Industry and Financial Markets Association managing director and co-head of municipal securities Michael Decker said SIFMA is having discussions about these concerns with individual firms and with the regulators.

“The markup and PMP rules are complex,” Decker said. “In order to automate compliance, which is absolutely necessary for many firms, dealers will need to use sophisticated systems. Some firms are concerned that they will not have enough time to fully integrate and test their compliance systems by the deadline, especially if they’re going to depend on third-party vendors whose timelines are out of dealers’ control. SIFMA wants to ensure that the customer experience with the new confirm disclosure is a smooth as possible and we are actively discussing the obstacles to full readiness with our members and regulators.”

Vendors say they are confident in their products, but that the real challenge is in integrating their systems with the systems of individual dealer firms to ensure a smooth automated process from start to finish.

Tony Miscimarra, a managing director at BondWave, said he is “guardedly” certain his firm’s product is set to go because it has done thousands of trial runs with data provided by clients and potential clients. But only a tiny slice of the industry is even in the integration process yet, he said.

“Even those that are on the curve or even ahead of the curve now have to face implementation challenges,” Miscimarra said.

TMC Bonds CEO Thomas Vales said that because TMC runs an alternative trading platform, the infrastructure for providing a PMP solution is basically already in place, but Vales also expressed that integration is a heavy lift.

“Everyone is focused on what they need to do at hand, and then the last piece is going to be trying to integrate it with everyone else,” Vales said.

Miscimarra said an extension granted by regulators wouldn’t surprise him, but warned that firms can’t simply punt the problem down the road if they get one.

“That would be a big mistake,” he said.

The Bond Buyer

By Kyle Glazier

November 07 2017, 3:08pm EST

Hold-to-Maturity CUSIP Exemption Tweaked in New Filing.

PHOENIX – The Municipal Securities Rulemaking Board has filed with the Securities and Exchange Commission an amendment to its proposal to require dealers and muni advisors to obtain CUSIP numbers in private placement deals, tweaking an exemption to reflect typical muni bond structures.

The change to the proposal, which was filed Wednesday after being telegraphed as coming in the briefing on the board’s quarterly meeting late last month, is directly responsive to the concerns of some market participants.

The broader proposal amends the MSRB’s Rule G-34 on CUSIP numbers to make clear that dealers must acquire CUSIPS when orchestrating private placements. CUSIP numbers are six and nine sets of numbers and letters that identify an issuer and each maturity of a municipal issuance. The MSRB said when it proposed the Rule G-34 change that it has always considered it a requirement for dealers to acquire CUSIPS when acting as placement agents. The rule change would clarify that, but dealers have contended that such a requirement would be new.

The proposal also would require that non-dealer municipal advisors be subject to the CUSIP requirement for new issue securities that are sold in a competitive offering.

Among the issues raised by comment letters to the MSRB and SEC was an exception to the requirement that said CUSIP numbers are not needed for direct purchases by banks, their non-dealer control affiliates and consortiums, where the dealer or municipal advisor reasonably believes the purchaser’s intent is to hold the securities to maturity. Issuers and dealers alike had raised concerns that investors would be hesitant to certify that they planned to hold “to maturity,” since muni bonds often have much earlier call dates.

Under the revision filed with the SEC, titled Amendment No. 1, that exception now reads that a dealer or MA “may elect not to apply for assignment of a CUSIP number or numbers if the underwriter or municipal advisor reasonably believes (e.g., by obtaining a written representation) that the present intent of the purchasing entity or entities is to hold the municipal securities to maturity or earlier redemption or mandatory tender.”

The MSRB’s filing also creates an exception for direct purchases by municipal entities that are not established for the purpose of secondary market trading, such as state revolving funds and bond banks. The Securities Industry and Financial Markets Association responded favorably to the MSRB’s changes, though still believes the MSRB should have eliminated references to a time frame for the intergovernmental exemption.

“SIFMA is pleased the MSRB has submitted Amendment No. 1 to its proposed rule change to MSRB Rule G-34,” said Leslie Norwood, a managing director, associate general counsel, and co-head of municipal securities at the dealer group. “The expansion of the exception, which now includes certain intergovernmental purchases of securities, clarifies that these securities that are never intended to be traded in the secondary market do not need to incur the expense of obtaining a CUSIP number. We also appreciate the clarifying language with respect to the intent of the purchasing entity, although we believe the MSRB should have also eliminated the time frame with respect to the purchaser’s intent.”

The MSRB also announced today that it is revising its Series 52 exam for municipal securities representatives into a specialized knowledge exam in advance of the Oct. 1, 2018 release of the Financial Industry Regulatory Authority’s Securities Industry Essentials examination.

“The MSRB worked collaboratively with FINRA during development of the SIE examination to streamline duplicative testing of general knowledge that has traditionally been covered across several representative-level examinations,” the MSRB said in a notice. “The MSRB supports the goal to reduce testing redundancies for securities industry professionals and expand opportunities for prospective securities professionals. To that end, the MSRB anticipates filing a proposed rule change with the SEC in early 2018 to require the SIE as a prerequisite to registration as a Municipal Securities Representative, Municipal Securities Sales Limited Representative and Limited Representative-Investment Company and Variable Contracts Product Representative.”

By Kyle Glazier

SOURCEMEDIA | MUNICIPAL | 11/08/17 07:22 PM EST

MSRB Files Amendment to Proposal on Obtaining CUSIP Numbers.

The Municipal Securities Rulemaking Board (MSRB) filed with the Securities and Exchange Commission (SEC) on November 8 an amendment to its proposed changes to MSRB Rule G-34, on obtaining CUSIP numbers. The amendment modifies the principles-based exception for certain sales of municipal securities.

"SIFMA is pleased the MSRB has submitted Amendment No. 1 to its proposed rule change to MSRB Rule G-34. The expansion of the exception, which now includes certain intergovernmental purchases of securities– clarifies that these securities that are never intended to be traded in the secondary market do not need to incur the expense of obtaining a CUSIP number," said Leslie Norwood, a managing director and co-head of SIFMA's municipal division. "We also appreciate the clarifying language with respect to the intent of the purchasing entity, although we believe the MSRB should have also eliminated the time frame with respect to the purchaser's intent."

MSRB Filing

SIFMA Letter to SEC (Oct. 2017)

MSRB Provides New FAQ for Municipal Advisors on Continuing Education Requirements.

The Municipal Securities Rulemaking Board (MSRB) is providing a new compliance resource for municipal advisors about continuing education program requirements established by MSRB Rule G-3, on professional qualifications.

These answers to frequently asked questions (FAQs) address questions raised by participants during the MSRB's October 12, 2017 webinar, which is available on-demand here.

The FAQs and additional compliance resources for all regulated entities are available in the MSRB's online Compliance Center.

MSRB Releases New Data on Inter-Dealer Electronic Trading of Municipal Bonds.

Washington, DC – New data from the Municipal Securities Rulemaking Board (MSRB) reflect steady and robust use of alternative trading systems (ATSs) by municipal security dealers. The MSRB, which collects municipal securities pricing and other data, released statistics today showing that over the last year, an average of approximately 59 percent of trades between dealers—and 29 percent of par volume traded—were executed on an ATS.

About 90 percent of ATS trades were conducted on transactions of $100,000 or less, an amount that is typically a proxy for retail-sized transaction. When looking at all retail-sized trades in the municipal market, about 25 percent were conducted on ATSs. The data are based on mandatory information reported to the MSRB by municipal securities dealers and are the first official statistics on electronic trading of municipal bonds. [Read the MSRB's Fact Sheet on Inter-Dealer Municipal Trading.]

"Our data provide the market's first view of the extent to which ATSs are used in the muni market," said John Bagley, Chief Market Structure Officer at the MSRB. "These platforms, which disseminate quotes and expand access to bond inventories, can help improve liquidity and market efficiency. They can also help dealers obtain the best pricing for investors."

Municipal securities are traded in an over-the-counter dealer market and not on a central exchange. Dealers, acting as intermediaries for investors, trade in one of three ways: on ATSs, through broker's brokers and directly with each other. Data reported to the MSRB show that approximately:

- 59 percent of inter-dealer trades are executed on an ATS
- 34 percent of inter-dealer municipal trades are conducted directly between dealers
- 7 percent of inter-dealer trades occur through a broker's broker, also known as a voice broker

Cumulatively, municipal inter-dealer trades accounted for 39 percent of all trades and 20 percent of all par traded in the market over the prior 12 months. The remaining are purchases and sales between dealers and customers.

Unlike electronic brokerage platforms available to individual investors, an ATS can be used only by dealers and institutional investors. ATSs provide electronic access to available municipal securities, price transparency and support liquidity.

"Federal Reserve data show that dealer inventories of municipal securities declined about 50 percent over the last decade," Bagley said. "ATSs and broker's brokers can provide a way for dealers to access bids and offers from a wide range of market participants."

The MSRB began collecting information to identify which municipal bond transactions occur on an ATS in July 2016 to determine the extent to which they are used in the market. Historically, dealers have identified in their reported trades when they use a broker's broker. Today, ATS trades, along with broker's brokers trades, are flagged publicly on the MSRB's Electronic Municipal Market Access (EMMA®) website, enhancing transparency about the use of digital municipal bond trading. The MSRB will continue to publish data on inter-dealer trading and ATS trades in the municipal market on an annual basis.

The MSRB regularly publishes municipal market statistics, including market-wide trading activity on a quarterly basis, and an annual Fact Book available here. The MSRB's market statistics on the EMMA website cover trading activity of municipal securities, new municipal issuance and continuing disclosure submissions.

Date: November 9, 2017

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MSRB Announces Members of Compliance Advisory Group.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) today announced the members of its Compliance Advisory Group, which will provide expertise and input to the MSRB Board of Directors to help inform the organization's long-term strategic goal to facilitate industry understanding of and compliance with MSRB rules.

"With the foundational rules for municipal advisors now in place and a landmark new investor protection rule taking effect next year, the MSRB is increasing our commitment to assisting regulated entities with understanding their rules of conduct and developing effective compliance procedures," said Board Chair Lucy Hooper.

"We are bringing together a well-respected group of compliance-oriented senior executives from diverse regulated firms whose insights will help us prioritize the areas where the industry may benefit from further guidance or tools that support compliance."

Members of the Compliance Advisory Group are:

- Steven Apfelbacher, President, Ehlers & Associates
- Curt de Crinis, Managing Director, C.M. de Crinis & Co., Inc.
- Robert Fippinger, Retired
- Joey Frebes, Senior Vice President, KeyBanc Capital Markets
- Jennifer Hash, Compliance Manager, Zions Bank Capital Markets/Zions Public Finance, Inc.
- Steve Heaney, Director of Public Finance, Stifel, Nicolaus & Company, Inc.
- Ben Juergens, Executive Director in the Legal and Compliance Division, Morgan Stanley
- Leo Karwejna, Managing Director & Chief Compliance Officer, PFM
- Tionna Pooler, President, Independent Public Advisors, LLC

The Compliance Advisory Group will meet periodically throughout Fiscal Year 2018 to discuss potential regulatory topics that may warrant additional compliance assistance, such as enhanced outreach and engagement, new guidance and resources, and improved digital communications for regulated entities.

Date: October 31, 2017

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MSRB Publishes Vision and Principles for Evolving EMMA.

Washington, DC – As part of a long-term strategic focus to further evolve the Electronic Municipal Market Access (EMMA®) website, the Municipal Securities Rulemaking Board (MSRB) today published a renewed vision for EMMA that reflects its broad market utility and the ongoing information needs of all market stakeholders.

The MSRB established the EMMA website nearly a decade ago to provide retail investors with centralized, online and free access to real-time municipal securities transaction prices and disclosure documents.

"Given the broader market's strong adoption of EMMA as an industry utility, we believe a vision statement that captures the interests of not only retail investors but also municipal entities, dealers, municipal advisors, institutional investors and the public is important for future development," said

MSRB Executive Director Lynnette Kelly.

The MSRB also has developed a set of guiding principles for EMMA to inform priorities for future enhancements.

EMMA Vision Statement
Promoting transparency in the municipal securities market is part of the mission of the Municipal Securities Rulemaking Board (MSRB). Our Electronic Municipal Market Access (EMMA®) website is designed to support a transparent market and serve the evolving information and decision-making needs of market participants and the public. EMMA provides free data, disclosures and interactive tools that promote a fair and efficient municipal securities market. Enhancing the availability of pricing-related market data by creating a Central Transparency Platform (CTP) on EMMA and helping market participants comply with regulatory obligations are future-state goals.

EMMA Guiding Principles

- *Promote fair municipal security transactions and support investment and issuance decisions by making comprehensive pricing and disclosure information readily available at no cost;*
- *Facilitate efficient access to and submission of municipal market data, disclosures and information through an interface that is intuitive and dynamic;*
- *Prioritize potential enhancements based on the public interest, cost, benefit and size of target audience; and*
- *Ensure that data storage and delivery are reliable and secure without sacrificing availability.*

"By establishing these guiding principles, we can ensure our investment in EMMA advances market transparency and appropriately balances costs, benefits and the public interest," Kelly said.

In Fiscal Year 2018, the MSRB plans to make noticeable improvements that were informed by a year-long series of focus groups and input from a diverse range of market participants, including:

- Additional third-party data providers and other enhancements
- Improved presentation of information about 1 million individual securities
- Enhancements to EMMA's homepage navigation
- Streamlined login for users with both MyEMMA and MSRB Gateway accounts
- Transition to searchable database of political contribution disclosures

Date: November 1, 2017

Contact: Jennifer A. Galloway, Chief Communications Officer
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U.S. SEC Close to Forming Group to Scrutinize the Bond Market.

NEW YORK (Reuters) – The U.S. Securities and Exchange Commission has taken the first step in formally establishing an advisory committee to scrutinize the rules of the fixed income market and advise on potential reforms, according to a regulatory filing.

The Fixed Income Market Structure Advisory Committee (FIMSAC) will have a two-year mandate and will likely meet four times a year, with subcommittees potentially meeting more often, the regulator said in the filing, dated Thursday, Oct. 26.

In July, SEC Chairman Jay Clayton brought up the idea of a committee to advise the regulator on the bond market. It was his first major address after joining the agency.

Issues the committee may look at include pre-trade transparency, the complexities of the municipal bond market, and bond market liquidity, SEC Commissioner Michael Piwowar said on Thursday in prepared remarks at a market structure conference.

"There are enough issues within that topic alone to keep the committee members busy for some time," he said of the liquidity issue. "Including the impact of bond ETFs on liquidity in the underlying securities, the evolving role of the buy-side in the provision of liquidity, and the impact of regulatory and monetary policy decisions on fixed income markets," he said.

The new committee will have up to 21 voting members that will be appointed by the SEC and will represent a cross-section of the fixed income industry, the filing said. Non-voting members may also be named.

The committee can be established 15 days after the SEC filing is published in the federal registry.

The SEC has had a similar committee in place to advise it on the equity markets since February 2015> That panel, composed of industry experts and academics, has made recommendations to the regulator on a wide range of issues, including regulation of trading venues, market volatility, and broker-dealer order handling practices.

by John McCrank

October 27, 2017

[MSRB Holds Quarterly Board Meeting October 2017]

Washington, DC – The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) held its quarterly meeting October 25-26, 2017, where it discussed regulatory and market transparency initiatives aimed at protecting investors and promoting a fair and efficient municipal securities market.

The Board also met with leadership of the Securities and Exchange Commission (SEC) and the Financial Industry Regulatory Authority (FINRA), hosting SEC Chairman Jay Clayton and Office of Municipal Securities' Acting Director Rebecca Olsen, and separately, FINRA's President and CEO Robert Cook and Senior Director of Fixed Income Regulation Cynthia Friedlander. The regulators discussed oversight of the municipal securities market and coordination on cross-market initiatives.

The Board discussed several topics related to its strategic initiatives to support regulatory compliance and further evolve the MSRB's Electronic Municipal Market Access (EMMA®) website into an essential municipal market utility.

To enhance its engagement with external parties, the Board is taking two key steps. First, to ensure that the MSRB's compliance support activities leverage the experience and perspectives of regulated entities and other stakeholders, the Board approved publishing a request for comment to solicit public input on how the MSRB can best assist municipal securities dealers and municipal advisors in understanding, implementing and complying with current MSRB rules. In addition, the MSRB is establishing a compliance advisory group that will provide expertise and input to the Board to help inform the organization's long-term strategic goal to facilitate industry understanding of and compliance with MSRB rules.

"We are committed to incorporating external input from regulated entities and other market participants at every stage of our compliance support activities to ensure they are informed by the diverse perspectives and needs of all stakeholders," said MSRB Executive Director Lynnette Kelly.

The Board also discussed the MSRB's ongoing work to further evolve the EMMA website into an industry-leading platform that meets the needs of market participants and established guiding principles for future functionality and improving the overall user experience of the website.

The MSRB has been engaged in a year-long series of focus groups that included retail investors, issuers, broker-dealers, municipal advisors, dissemination agents and others to inform its approach. "Nearly 10 years after creating EMMA, we are rethinking and reexamining its future," said Kelly. "Our principles will guide decisions about that path."

At its meeting, the Board discussed several ongoing rulemaking initiatives and, as a result of industry input and MSRB outreach to commenters and other market stakeholders, decided to suspend one proposal, and amend two others.

Minimum Denominations

The Board agreed to suspend rulemaking efforts on its earlier initiative to amend the MSRB rule on minimum denominations of municipal securities transactions and to instead prepare a report addressing the policy issues faced by diverse market participants. The rule generally prohibits dealers from effecting customer transactions below the minimum denominations set by the bond issuer. The MSRB sought comment twice in 2016 on whether additional exceptions would be consistent with the rule's investor protection intent and enhance liquidity for investors that hold positions below the minimum denomination. The MSRB filed a proposed rule change with the SEC in January 2017 but withdrew it in May in light of ongoing concerns expressed in public comments. To continue to evaluate the issue, the Board directed MSRB staff to meet with a diverse group of market participants, with a particular effort to include the views of issuers of municipal securities.

"Our intensive outreach and subsequent analysis helped the Board determine that, given the conflicting views around core issues, the best option for the market is to maintain the existing rule, publish our outreach findings and promote education for all deal team members about the role and effects of minimum denominations in bond documents," said MSRB Executive Director Lynnette Kelly. "The MSRB is grateful to the many groups and individuals who responded to our outreach efforts and shared their thoughtful input on the minimum denominations issue."

Obtaining CUSIP Numbers

In response to comment letters received by the SEC on proposed amendments to MSRB Rule G-34, on obtaining CUSIP numbers, the Board agreed to amend its proposal currently pending before the SEC. The amendment will modify the proposed principles-based exception for sales of municipal securities directly purchased and intended to be held by banks to more accurately reflect that the bonds may be subject to a mandatory tender or other redemption prior to maturity.

Similarly, the Board agreed to extend the principles-based exception to apply to purchases of new issue municipal securities by municipal entities that are not established for the purpose of secondary market trading, such as state revolving funds and bond banks. “The CUSIP proposal has also benefited from multiple rounds of industry and public comments,” Kelly said. “The result is an appropriately tailored rule proposal that is workable and promotes a fair and efficient municipal securities market.”

529 College Savings Plans/ABLE Programs Additional Data Elements

The third rulemaking initiative that the Board addressed at its meeting was a proposal to revise MSRB Form G-45 under MSRB Rule G-45, on reporting of information on municipal fund securities, including the collection of additional data about investment options offered in ABLE (Achieving a Better Life Experience Act) programs and 529 college savings plans. Rule G-45 supports the MSRB’s collection of reliable and consistent data about these types of “municipal fund securities” in support of its regulatory oversight. The Board discussed input received on what commenters considered to be the relatively more burdensome aspects of the proposed amendments and, in response, will modify the proposal before filing it for approval with the SEC.

Date: October 30, 2017

Contact: Jennifer A. Galloway, Chief Communications Officer
202-838-1500
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NSAA Responds to AICPA Exposure Draft.

The National State Auditors Association recently responded to the AICPA’s Professional Ethics Executive Committee’s exposure draft, *State and Local Government Entities (formerly Entities Included in State and Local Government Financial Statements)*. NSAA members generally agree with the proposed interpretation and other guidance.

The response was developed by NSAA’s Audit Standards and Reporting Committee, chaired by Randy Roberts, senior technical director with Arizona’s Office of the Auditor General.

View the complete response letter.

Tuesday, October 24, 2017

FAF: From the President's Desk.

SO, HOW ARE WE DOING?

Regular followers of the FASB, GASB, or FAF know that stakeholder outreach is woven into our DNA. Our primary mission is to serve investors and other users of financial reports, and we best fulfill that mission through extensive conversations with a diverse group of stakeholders who:

- Make investment or resource allocation decisions
- Prepare, audit, or review financial statements
- Conduct academic research into accounting theory and practice, or
- Care about accounting standards for any other reason.

The standard-setting Boards have these interactions to help identify whether the benefit of a new approach in an accounting standard justifies the costs stakeholders will incur to provide it. Naturally, these are rich—and critical—conversations, but periodically it helps to have a different kind of dialogue: do our stakeholders think we are doing our jobs well, and how can we improve?

STAKEHOLDER SURVEY

Earlier this year we had that dialogue. It took the form of a survey that we sent out to thousands of stakeholders. More than 1,600 responded, providing a rich trove of data representing the views of a strong cross-section of our stakeholder groups. To those of you reading this column who participated in the survey, thank you!

This was no idle exercise. The survey results were a major topic of conversation for both standard-setting Boards as well as the FAF Board of Trustees. We also briefed the results to the FASB and GASB technical staffs, as well as the members of our key advisory groups: the Financial Accounting Standards Advisory Council (FASAC) and Governmental Accounting Standards Advisory Council (GASAC).

Some of the feedback was encouraging. When asked the simple question, "what is your overall opinion of the FASB/GASB?" both Boards earned high scores. Notably, these results were higher than the scores earned on comparable surveys conducted in 2006. This positive trend suggests better alignment between the work that the Boards are doing and what stakeholders are seeking.

Drilling down, we wanted to learn whether stakeholders think the Boards consistently model the values we consider vital to success: Integrity, Independence, Objectivity, Transparency, Leadership, and Inclusiveness. While both Boards earned similarly good scores for all six, it was notable that Integrity stood out as materially stronger than all the other values. The Boards work hard to maintain this reputation among stakeholders, and it is gratifying to see that reflected in the survey feedback.

WHAT'S MOST IMPORTANT?

The survey put stakeholders through a rigorous series of questions designed to tease out what they value most from the FASB and GASB. From this exercise, three key needs emerged. Stakeholders want the Boards to:

- Create standards that provide useful information to investors and other users of financial reports
- Create standards that improve accounting and financial reporting for organizations
- Write standards that are clear and unambiguous.

Addressing these needs was already an important priority for the FASB and GASB, even before the stakeholder survey. Both Boards were encouraged to see that the very highest scores in the survey (across all categories of questions) came from investors and other users of financial statements. This is an important data point that suggests the Boards are fulfilling their mission for investors and other financial statement users to find standards and financial reporting useful.

Both Boards also want to deliver standards that improve accounting and financial reporting. The recent FASB agenda consultation is an example of the FASB co-collaborating with stakeholders to identify the areas of financial reporting most ripe for improvement. Likewise, GASB's ambitious early-stage work on the Financial Reporting Model addresses a unique opportunity to enhance public sector financial reporting.

Taking opportunities to make standards more simple, clear, and unambiguous is a high priority for the FASB and GASB. The FASB's recently issued standard for hedge accounting is one example of an effort to simplify standards, as is a proposed change to accounting for share-based payments to nonemployees, and several smaller projects. GASB's Financial Reporting Model project also hopes to identify targeted opportunities to simplify reporting for state and local governments.

OTHER INSIGHTS

Survey respondents also expressed interest in having the Boards increase their efforts to educate stakeholders about how to implement new standards. While a major education initiative is not on the horizon (there are many existing sources of education and training already available to the profession), the Boards have stepped up outreach efforts through Transition Resource Groups, webinars, Implementation Guides, and plain-English resources. Board members and senior staff also hit the road to speak directly to stakeholders at meetings and conferences, and reached a combined audience of 80,000 FASB and GASB stakeholders in 2016 alone.

Lastly, the survey touched on the Financial Accounting Foundation. While the FAF is less well-known to stakeholders, those who are familiar with its roles and functions give high scores for overseeing and protecting the integrity and independence of the standard-setting process.

AN INSPIRATION AND A CHALLENGE

Conducting this survey and digesting its results have been eye-opening experiences for our organization. As closely as our Boards interact with stakeholders across the country, we don't often reframe our conversation to larger questions of Board attributes and performance. The results of this survey are both an inspiration and a challenge: how can we build upon our strengths as an organization, and at the same time engage with stakeholders to improve in the ways they deem most important?

We are grateful to our stakeholders for inspiring our work and for challenging us to do even better.

I welcome your comments on this or any other topic. Please write to me at presidentsdesk@f-a-f.org.

BY TERRI POLLEY, FAF PRESIDENT AND CHIEF EXECUTIVE OFFICER

FALL 2017

FINANCIAL ACCOUNTING FOUNDATION

Amendments to the FINRA Code of Arbitration Procedure for Customer Disputes to Expand the Options Available to Customers if a Firm or Associated Person Is or Becomes Inactive.

Summary

When respondents are no longer in business, recovery of arbitration awards against them often is unavailing. Accordingly, FINRA is proposing to amend the Code of Arbitration Procedure for Customer Disputes (Code) to expand a customer's options to withdraw an arbitration claim if a firm or an associated person becomes inactive before a claim is filed or during a pending arbitration. In addition, the proposed amendments would allow customers to amend pleadings, postpone hearings and receive a refund of filing fees under these situations.

The text of the proposed amendments can be found here.

Questions concerning this Notice should be directed to:

- Kenneth L. Andrichik, Senior Vice President and Chief Counsel, Office of Dispute Resolution, at (212) 858-3915;
- Victoria Crane, Associate General Counsel, Office of General Counsel, at (202) 728-8104; or
- Mignon McLemore, Assistant Chief Counsel, Office of Dispute Resolution, at (202) 728-8151.

Comment Period Expires: December 18, 2017

MSRB Letter to SEC Investor Advocate.

MSRB issues letter to SEC Investor Advocate highlights muni market practices that may affect retail investors.

MSRB Announces Board Meeting Topics.

MSRB announces topics to be discussed at Board meeting on October 25-26, 2017.

MSRB FY18 Budget Summary.

Read about the MSRB's mission-driven goals and projected revenues and spending in the FY18 budget summary.

Explore the MSRB's New Compliance Center.

Municipal advisors and municipal securities dealers can now get easier access to rule summaries, compliance advisories and other educational material about municipal market regulations in a new online Compliance Center on MSRB.org. The Municipal Securities Rulemaking Board (MSRB) today launched a series of website enhancements to elevate the prominence and accessibility of compliance information.

The website enhancements support the MSRB's long-term strategic goal to facilitate industry understanding of and compliance with MSRB rules. The MSRB will continue to add new resources to the Compliance Center to support regulated entities' ability to comply with new and existing standards of conduct.

GASB Survey on Note Disclosure Requirements.

The Governmental Accounting Standards Board (GASB) is conducting a survey of users of state and local government financial information regarding certain note disclosure requirements. The survey is part of a GASB research effort to evaluate the effectiveness of those note disclosures. The survey, including background, objective and instructions, can be accessed here. The deadline for completing the survey is Friday, November 17, 2017.

As someone who needs financial information about state and local governments, your views are vital to the GASB's efforts to improve financial accounting and reporting. If you have any questions about this survey, please contact Pam Dolan at 203-956-3473 or pdolan@gasb.org.

Treasury Issues Priority Guidance Plan for Municipal Bonds.

WASHINGTON — The Treasury Department's priority plan for the 12 months after July 1, 2017 contains rules or guidance on private activity bonds, remedial actions, and bond reissuance.

The 2017-2018 Priority Guidance Plan, published on Friday, covers the period through June 30, 2018 and contains several muni bond regulatory projects that were on the previous 2016-1917 plan, including the public notice and approval rules for private activity bonds under TEFRA (the Tax Equity and Fiscal Responsibility Act of 1982).

The TEFRA rules were proposed on Sept. 28. Muni issuers were allowed to opt to immediately use them between the day they were proposed and their effective date, which still must be determined. Otherwise the rules will be prospectively effective when finalized. Treasury and the IRS have asked for comments on the proposed rules and requests for a public hearing to be submitted to them by Dec. 27 of this year.

The plan also includes another item on the previous 2016-2017 plan — actions that issuers can take to remediate certain tax law or rule violations for tax-advantaged bonds, which include tax-exempt, taxable direct-pay, and taxable tax-credit bonds.

Bond reissuance rules remain on the list from the previous plan. Treasury and the IRS have released several guidance documents on reissuance, which is when the terms of bond issues have been materially changed such that they are considered to be new bonds subject to the latest tax laws and rule. The agencies have been working on a project to modernize and possibly consolidate this guidance.

The plan appears to contain one new item not listed in last year's plan — guidance on private activity bonds. But it does not elaborate on the kind of guidance envisioned.

Also listed on the 2017-2018 pan is guidance on the overpayment of arbitrage that had been rebated. That guidance was in Revenue Procedure 2017-50, which was published on Aug. 25, 2017 and took effect at that time. It extended the deadline for issuers that file claims for recovery of excess arbitrage they inadvertently rebated to the federal guidance.

By Lynn Hume

SOURCEMEDIA | MUNICIPAL | 10/23/17 07:02 PM EDT

SIFMA Submits Comments to SEC on MSRB Clarification of Rule G-34(a)(i) on the Use of CUSIPs.

On October 10, SIFMA submitted comments to the Securities and Exchange Commission (SEC) in response to the Municipal Securities Rulemaking Board's (MSRB) proposed rule filing SR-MSR--2017-06, which would amend MSRB Rule G-34, on CUSIP numbers, new issue and market information.

SIFMA urged the SEC to institute disapproval proceedings regarding the Proposal in its current form, because the amendment, as filed, is unduly restrictive for market participants and lacks clarity in material respects. If approved, the rule would codify the MSRB's interpretation that municipal securities dealers are required to obtain CUSIP numbers for new issue securities sold in private placement transactions, including direct purchases. Additionally, if approved, non-dealer municipal advisors advising on competitive offerings would be required, like dealer municipal advisors under the current rule, to apply for CUSIP numbers.

"SIFMA questions the expressed rationale for the MSRB's proposed rulemaking, as the sole purpose for the original proposal to adopt Rule G-34 was merely to facilitate clearance and settlement of municipal securities; not to define the term 'underwriter'," said SIFMA managing director and associate general counsel Leslie Norwood.

SIFMA Comment Letter

MSRB Filing

Dealers, Issuers, Advisors Call for Changes to CUSIP Proposal.

PHOENIX – Municipal market participants are asking the Securities and Exchange Commission to reject at least parts of a Municipal Securities Rulemaking Board proposal to codify that dealers are required to obtain CUSIP numbers for new issue securities sold in private placement transactions.

Trade groups representing dealers, municipal advisors, issuers, banks, and individual firms weighed in on the proposal in comment letters to the SEC this week.

CUSIP numbers are used to identify securities, and one is assigned to each maturity of a municipal issuance. The MSRB said when it proposed the change to its Rule G-34 that it has always considered it a requirement for dealers to acquire CUSIPS when acting as placement agents, and is trying to clarify that.

Dealers have contended that such a requirement is new.

The MSRB is also proposing to require that non-dealer municipal advisors be subject to the CUSIP requirement for new issue securities that are sold in a competitive offering. Although the MSRB made some tweaks to the proposal during its own comment process, commenters still told the SEC that they see serious problems with it.

The Securities Industry and Financial Markets Association asked the SEC not to approve the proposal, which SIFMA believes would expand G-34 beyond its intent, since dealers acting as placement agents do not "acquire" securities as underwriters do. Dealers have always interpreted G-34 as not requiring CUSIPs if a dealer does not acquire a new issue in a transaction that is not a distribution.

"SIFMA questions the expressed rationale for the MSRB's proposed rulemaking, as the sole purpose for the original proposal to adopt Rule G-34 was merely to facilitate clearance and settlement of municipal securities; not to define the term 'underwriter,'" wrote SIFMA managing director and associate general counsel Leslie Norwood.

Norwood also told the Bond Buyer that SIFMA would like the SEC to confirm that there would be no retroactive enforcement of this rule change for transactions that already occurred.

Some commenters told the SEC that they see problems with the proposal's exception to the CUSIP requirement. Under the exception, CUSIP numbers are not needed for direct purchases by banks, their non-dealer control affiliates and consortiums, where the dealer or municipal advisor reasonably believes the purchaser's intent is to hold the securities to maturity. SIFMA, the National Association of Municipal Advisors, Government Finance Officers Association, and American Bankers Association all characterized that language as impractical. Munis may have 20- or 30-year maturities commenters pointed out, and usually feature a much earlier call provision.

"We are concerned that the investor will not express present intent to hold the securities 'until maturity' as required by the proposal, and therefore will be deterred from purchasing the security," wrote Emily Brock, director of the GFOA's Federal Liaison Center.

"The terms 'reasonably believe' and 'is likely' are very open to different interpretations and should be further clarified within the rule to allow for MAs and underwriters to use the same standard in all transactions," wrote Susan Gaffney, executive director of NAMA.

Cristeena Naser, vice president and senior counsel at the American Bankers Association's Center for Securities, Trust & Investment, told the SEC it should consider an alternate wording to the exception language that the ABA had discussed with the MSRB.

"The language ABA proffered for the exception included a representation that the municipal securities are being purchased for the purchaser's own account, with no present intent to sell or distribute the municipal securities," wrote Naser. "This language reflects the realities of direct purchase transactions and, critically, that there is no intent that the securities will enter the public market."

The GFOA said in its letter that the SEC should heed the ABA's suggestion. Both the GFOA and SIFMA also commented that the SEC should expand the exception to include purchases by local governments and not just banks.

Muni advisors told the SEC that they object to being required to obtain CUSIPs, a task they view as outside the role of an MA.

"NAMA's position is that no MAs – broker/dealer or independent – should be responsible for securing CUSIPs in competitive deals," Gaffney wrote. "Rather, the underwriter should be the party responsible for obtaining CUSIPs, as they assist with the selling and trading of securities."

Steve Apfelbacher, president of muni advisory firm Ehlers and a former MSRB board member, told the SEC that the proposal would be asking MAs to act outside their roles, potentially inviting controversy as to whether they would be operating in some cases as unlicensed broker-dealers.

"Requiring the municipal advisor to have a conversation with the purchasing entity about the intent of the purchasing entity is a conversation that crosses the line and is an underwriter activity," Apfelbacher wrote. "Once that line is crossed, why are other transaction related conversations between the purchaser and municipal advisor not allowed?"

The SEC could choose to approve the MSRB proposal as written, or it could reject it. If the SEC does not approve the proposal, the MSRB could choose to make changes to it and re-submit it.

By Kyle Glazier

BY SOURCEMEDIA | MUNICIPAL | 10/12/17 07:25 PM EDT

MSRB Seeks to Collect Additional Fee Information About ABLE Programs and 529 College Savings Plans.

The Municipal Securities Rulemaking Board (MSRB) today filed with the Securities and Exchange Commission (SEC) a proposed rule change to amend MSRB Form G-45 under MSRB Rule G-45, on reporting of information on municipal fund securities. The MSRB seeks to collect additional information about the transactional fees primarily assessed by programs established under the Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (ABLE), as well as any variance in account maintenance fee based on the residency of the account owner.

The proposed rule change would require underwriters to ABLE programs as well as underwriters to 529 college savings plans to submit additional fee information, as applicable, beginning with the reporting period ending June 30, 2018. The reporting period ending June 30, 2018 is the first reporting period that underwriters to ABLE programs are required to submit data to the MSRB on Form G-45.

View the filing.

Commentary: Questions Remain as Bond Market Prepares for Markup Disclosure Rule.

As broker-dealers prepare for bond markup rules slated to take effect by May 2018, questions remain about the implications for the fixed income industry as well as how broker-dealers will report trading disclosures to customers.

While few would argue the benefits of having a more transparent, easy-to-use mechanism in place to provide more information to the marketplace, broker-dealers are now tasked with devising a systemic, robust way of determining prices for securities, including values for hard-to-price, illiquid bonds. Yet, guidance from the Financial Industry Regulatory Authority and Municipal Securities Rulemaking Board has been vague, especially with respect to illiquid bonds.

The regulations approved by the Securities and Exchange Commission require dealers to disclose markups and markdowns on fixed income transactions for securities held for no longer than a day.

This disclosure, which is calculated from the bond's prevailing market price and expressed as a total dollar amount and percentage amount, is the culmination of a decades-long attempt to bring more transparency to a market where trades are largely conducted via telephone and prices are somewhat nebulous.

The new rules are designed to narrow the mark-up differential between what retail and institutional investors pay for similar trades. Regulators have long supported this oversight, claiming that retail fixed income customers almost never compare prices between dealers. In contrast to other types of securities, no central marketplace for bond quotes currently exists. As a result, rule makers argue that customers are in the dark regarding the often wide disparities between quotes provided by various broker-dealers. In fact, retail investors sometimes pay more than 2% in markup, while institutional investors only pay about 0.05%. While much of the higher markup for smaller retail trades factors in spreading the high cost of sourcing bonds over less principal, proponents of the regulations claim there is room to narrow the gap between retail and institutional trades.

While retail investors should certainly benefit from increased transparency, not everyone is sanguine about the prospects for these new regulations. Critics argue that investors already have access to price information through the FINRA and MSRB websites, and that markups are a fair way to generate income, just as traditional retail stores selling consumer goods have done for years.

In addition to adhering to the new regulations and navigating the challenge of implementing these new systems, broker-dealers are faced with a number of significant questions. Can markups be done manually? If fully automated, can they accurately tabulate prices for illiquid bonds?

Broker-dealers will now have to disclose markups on all trades for which they have an offsetting transaction that day, including those that do not fall under the category of riskless principal transactions. Transactions that fall outside of the "riskless principal" categorization occur when firms enter into trades that are undertaken as principal but then receive a client order for the same bond during the same day. In this scenario, firms are now required to disclose the markup, however there is often not an interdealer print from which to source the market price. As a result, the firm must resort to waterfall analysis – analyzing "comparable" bonds to determine the market price. This step is difficult to automate, and can provide unreliable data.

Waterfall analysis begins with an examination of trades in a specific bond. For illiquid bonds, data from other trades may not exist, and in this case broker-dealers are directed to use the pricing of "comparable" bonds in their analysis. This presents a significant challenge, as finding "comparable" bonds is much more of an art than a science, and again this process is difficult to automate.

Even more questions about the markup disclosure rule remain. Could these regulations meant to help retail investors cause some firms to stop servicing them because of the increased cost of compliance? How will commission be affected? Will broker-dealers be forced into a basis point model? How can these new systems be implemented within the next 12 months?

While questions certainly remain, markup disclosure rules are sure to change how retail investors and broker-dealers alike participate in the fixed-income market.

The Bond Buyer

By Mark Davies

October 16 2017, 11:38am EDT

Mark Davies is co-founder and chief executive office S3, which provides customized analytics tools *that provide transparency into those factors impacting best execution.*

FAST Act Modernization and Simplification of Regulation S-K.

FAST Act Modernization and Simplification of Regulation S-K.

MSRB Provides Continuing Education Planning Tool for Municipal Advisors.

To assist municipal advisor firms in complying with continuing education (CE) requirements, the Municipal Securities Rulemaking Board (MSRB) is providing a sample needs analysis checklist and training plan template. The fillable checklist and template is intended to help municipal advisor firms evaluate and prioritize their firm's specific training needs and develop a plan for delivering appropriate training. View the *Developing a CE Needs Analysis and Written Training Plan* document here.

CE requirements for municipal advisor firms are outlined in MSRB Rule G-3 and effective January 1, 2018. The MSRB will host an educational webinar about the CE requirements on **Thursday, October 12, 2017 at 3:00 p.m. Eastern Time.** Register now.

The MSRB plans to provide additional webinars and resources throughout the year as part of its long-term goal to facilitate understanding of and compliance with MSRB rules.

MSRB Releases New MuniEdPro® Courses on Best Execution and Gift-Giving.

The Municipal Securities Rulemaking Board (MSRB) today made available two new online courses for municipal market participants, adding courses covering MSRB rules on best execution and gift-giving to the MuniEdPro® catalog.

One course, **Gifts, Gratuities, Non-Cash Compensation and Expenses of Issuance: MSRB Rule G-20**, uses common scenarios to illustrate compliance with limitations and exclusions on the value of gifts and gratuities that regulated entities and their associated persons can give to officials of a bond issuer. The course also addresses restrictions related to expenses of issuance.

At the end of the course, the learner will be able to:

- Explain the requirements of Rule G-20;
- Understand exclusions from the $100 limit per year, per person; and
- Describe the recordkeeping requirements under MSRB Rule G-8 that apply to dealers and municipal advisors under Rule G-20.

The other course, **Best Execution of Transactions in Municipal Securities: MSRB Rule G-18**, demonstrates how municipal securities dealers handle and execute customer transactions in municipal securities, and how to ascertain the best market by applying reasonable diligence and evaluating market conditions.

At the end of the course the learner will be able to:

- Describe fundamental best-execution obligations under Rule G-18;
- Identify considerations for determining best execution;
- Navigate scenarios that challenge the learner to apply a process to achieve best-execution; and
- Understand transaction obligations to Sophisticated Municipal Market Professionals (SMMPs).

Dealer and municipal advisor firms: enhance your firm's compliance program by offering your municipal finance professionals access to all MuniEdPro® courses at the discounted rate of $100 per person. The discounted rate, which is available from October 1 to December 31, 2017, is a $270 value per person, saving firms over 60 percent on the course catalog.

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BDA's 2016-17 Federal Regulatory and Legislative Priorities and Accomplishments.

The following issue list highlights the BDA regulatory and legislative priorities over the past twelve months and the noted accomplishments achieved through direct Hill and regulator lobbying and by utilizing the BDA membership through meetings in Washington, DC and at BDA roundtables and conferences throughout the year. Thanks to your time and efforts, the BDA continues to expand our presence and impact and thus adds more value than ever to all member firms. Please don't hesitate to contact me with any questions or comments.

Tax Reform and the Municipal Bond Tax-Exemption

After steady focus by the BDA over 8+ years, and while various tax reform proposals have been released by Congressional leaders and the administration, the tax-exemption remains out of scope and off the table – for now. Through direct federal advocacy with state and local government organizations, issuer groups and middle-market broker dealers, the BDA-led Municipal Bonds for America (MBFA) Coalition continues to be the leading voice in Washington to protect the tax-exemption for municipal bonds. The BDA and MBFA coalition will continue to ensure that the tax-exemption remains intact during the legislative process in tax reform this fall and into 2018.

FINRA Rule 4210

BDA was successful in getting FINRA and SEC to file a last-minute amendment to the rule in June 2016 that significantly expanded the "gross open position" exception from $2.5 million to $10 million. BDA had advocated for a more expansive gross open position limit throughout the rulemaking and the $10 million level does expand the universe of counterparties and trades where the transfer of margin will typically not apply. In May 2016, BDA submitted amendment language at the SEC's request that would have exempted all transactions, including transactions over $10 million, if those trades settled on the next good settlement date. While, this advocacy didn't result in the exact change BDA wanted, getting the $10 million exemption limit is a result of direct BDA advocacy at the SEC, especially. BDA had two fly-ins at the SEC to discuss this rule with Trading and Markets and the accomplishment is the higher "gross open position limit". More recently, BDA was supportive of a delayed effective date and lobbied FINRA directly for the delay, which is a significant and valuable delay for BDA member firms who would have been challenged severely by a December

2017 effective date.

Retail Confirmation Disclosure Rules

As a result of direct engagement, including two joint meetings with MSRB and FINRA and a direct BDA Board Meeting with Robert Cook and Bob Colby at FINRA, Robert Cook specifically sought a BDA amendment recommendation for improving the rule. This proposed amendment was then subsequently sent to SEC for a discussion with Trading and Markets. The accomplishment is in the value of direct engagement in a member-engaged process that delivered a serious policy proposal to the regulators at their request.

MSRB Rule G-15 Minimum Denomination Rule

As a result of direct lobbying efforts of the BDA, the MSRB withdrew a proposed rule to amend MSRB Rule G-15 for minimum denominations (Proposed and withdrawn MSRB Rule G-49). The withdrawal of the rule took place after a BDA conversation with MSRB Counsel Mike Post that was supported by Dan Deaton from Nixon Peabody. During that call, BDA highlighted that the rule proposal and the existing G-15 framework was harming the marketplace, especially retail investors. After withdrawing the rule, the MSRB sought additional input from the BDA on conference call with BDA members. The accomplishment is that BDA advocacy resulted in the rule being withdrawn. BDA educated MSRB and they appear committed to updating G-15 in a way that would focus the minimum denomination rule on issuances with minimum authorized denominations of $100,000 and above, removing a significant burden on the retail municipal market.

DOL Fiduciary Duty

While the rule and exemptions are extremely burdensome, BDA and dealer firms were successful in getting significant changes included in the final rule. Initially the Best Interest Contract Exemption (BIC) and the Principal Trading Exemption excluded a series of assets including municipal bonds, UITs, CDs, and mortgage securities. While municipal bonds are still excluded from the Principal Trading Exemption (PTE), the other assets are not, and the list of assets that can be recommended to retirement investors under the Best Interest Contract Exemption is now unlimited.

Review and Withdrawal of IRS Political Subdivision Rule

The IRS political subdivision rule was proposed in 2016. BDA opposed the proposal. Due to market participant feedback the rule was not approved during the Obama Presidency. The Trump Administration review IRS rule proposals in 2016 and identified the political subdivision rule as a particularly burdensome rule. BDA and MBFA wrote to the IRS confirming that the rule was burdensome, unnecessary, and would harm economic growth. Currently, the proposal is identified as a rule that should be rescinded and this is very likely to occur in the fall of 2017. IRS repeatedly identified the comments of market participants as a reason why it identified this rule as particularly burdensome.

MSRB States Intent to not File Bank Loan Disclosure Concept Release

Although BDA is a proponent of bank loan disclosure, it opposed the MSRB’s concept release on bank loan disclosure. That proposal would have required MAs to be the party responsible for making the disclosure. BDA said it would be preferable to have an amendment to 15c2-12 which would make certain bank loans subject to material event notices. The MSRB stated that due to the comments it received it would not turn the concept release into a rule filing.

SEC Proposes Amendment to 15c2-12 for Bank Loan Disclosure

BDA supports the disclosure of bank loans and the most effective way to require the disclosure of bank loans would be for the SEC to amend 15c2-12. In 2017, SEC released a proposed rule to amend 15c2-12 to require the disclosure of bank loans. This proposal is a BDA accomplishment. While the rule is not yet final, BDA has engaged in direct advocacy with the SEC prior to and after the rule proposal on the subject of bank loans.

High Quality Liquid Asset (HQLA) Legislation/Regulation

Working in tandem with state, local, and issuer groups BDA has supported the introduction and re-introduction in the House and Senate and passage through the House of legislation to define municipal bonds as HQLA in the new banking liquidity rule. Additionally, BDA has urged federal banking regulators to amend the rule to allow municipal securities to be defined as Level 2A assets. Legislation to define municipal securities as HQLA (either as 2A or 2B) has bipartisan support and is discussed as a bill with a real chance to pass into law during this current session of Congress.

Potential

SEC Fixed Income Market Structure Committee

In August, BDA recommended four candidates (Craig Noble, Brad Winges, Horace Carter, Mike Marz) for the SEC's Fixed Income Market Structure Advisory Committee. Since that time, we have contacted each SEC Commissioner and the Office of Municipal Securities.

Municipal Bonds for America (MBFA)

In 2016, the MBFA Coalition went through extensive transformation structurally to enhance its advocacy efforts in Washington and beyond. The Coalition instituted formal bylaws, which helped to improve how the coalition operates and functions. Additionally, the Executive Committee was refreshed with new and impassioned leaders, while maintaining the incoming president of the U.S. Conference of Mayors, Steve Benjamin as our Executive Chair. These actions have proved to be valuable as the Coalition continues to receive record turnout and Congressional participation through its Muni Bonds 101 seminars on Capitol Hill, meets with staff members of influence at the White House, and continues to develop and maintain its relationship with members of Congress to preserve the tax-exempt status of municipal bonds. The MBFA completed a data project in 2016 that focuses on key members of Congress on the House Ways & Means and Senate Finance Committees, which demonstrates "by the numbers," the benefits of the municipal tax-exemption in the respective district or state of the member. The MBFA also led an effort in February 2017 that saw 385 organizations and individuals sign an advocacy letter, representing nearly all 50 states, to House and Senate leaders urging them to retain the current law status of municipal bonds as they begin deliberation on comprehensive tax reform.

Op-Eds

The BDA and MBFA continue to advocate for the value of municipal bonds and the importance they add to American society through various forms, including op-eds. For example: In September 2017, BDA Board Chair Tom Dannenberg was featured in Crain's Chicago Business, commenting on the disbanded White House Advisory Council on Infrastructure and touting the essential role of municipal bonds in financing our nations growth, which drives our economy. Also, in September 2017, MBFA Executive Chair Steve Benjamin, mayor of Columbia, SC, was featured in an article in The Hill that focused on how those faced with the devastation left behind by Hurricanes Harvey and

Irma can look to the traditional bond market to rebuild stronger, smarter, and more resilient communities. In November 2016, BDA CEO Mike Nicholas contributed to an op-ed in The Hill, which highlighted the importance of tax-exempt bonds as a viable solution for project finance and was written in response to the piece, "Bonds are Taxes," that argued local governments have the capacity to pay for needed projects out of current tax revenues.

Bond Dealers of America

October 2, 2017

[NFMA Summary: GASB 87, New Governmental Lease Accounting Standards.]()

The National Federation of Municipal Analysts has a committee to review releases and new standards from the Governmental Accounting Standards Board. They have prepared a summary of changes related to GASB 87, New Governmental Lease Accounting Standards.

To download this summary, [click here]().

[House OKs Bill To Equalize Muni Bonds In Liquidity Rules.]()

Law360, Washington (October 3, 2017, 6:41 PM EDT) — The U.S. House of Representatives passed a bipartisan bill Tuesday that would spread a Federal Reserve rule on the treatment of municipal securities across the financial industry.

Rep. Luke Messer's Municipal Finance Support Act of 2017, which passed on a voice vote Tuesday, would mandate that banks treat otherwise qualified municipal debt as part of their calculations of high-qualified liquid assets under the liquidity coverage rule. That corrects what Messer, R-Ind., called an unintended effect of the liquidity coverage rule that raised borrowing costs for municipalities and put domestic municipal securities against similar foreign municipal securities.

"Frankly, they messed up," Messer said, referring to a prohibition on the treatment of municipal securities as high quality liquid assets.

Messer and others said the legislation is needed to correct a problem with the calculation of the liquidity coverage ratio, a measure of assets that can be easily converted into cash should a financial institution face a sudden cash crunch.

The original liquidity coverage ratio rules by the Fed and other agencies did not allow banks to include municipal securities in their measures of high-quality liquid assets over concerns that those securities would not be as easily sold as corporate debt, Treasury securities or other assets that were included.

After an outcry from municipalities, legislators and others, the Fed revisited the issue in 2016. Its final rule allowed all the banks it regulates with $50 billion or more in assets, plus any nonbank firms designated as systemically important financial institutions, to include debt issued by local governments in their calculations.

The Federal Reserve's final rule is similar to Messer's bill, but the Office for the Comptroller of the

Currency and the Federal Deposit Insurance Corporation did not issue updates to their 2014 rule since the Fed changed its high-qualified liquid asset calculations. The bill passed by the House Tuesday would require the regulating agencies to treat all municipal securities that would otherwise meet the rule's HQLA qualifications the same as other financial instruments.

Rep. Bill Huizenga, R-Mich., and others said the continued exclusion of municipal securities from the liquidity coverage calculation would hurt municipalities because their otherwise high-quality securities would be less attractive to financial institutions.

"Excluding municipal securities from treatment as HQLAs will result in higher borrowing costs for municipalities in times of financial strain for state and local governments," Huizenga said.

Rep. Maxine Waters, D-Calif., one of the Democratic backers of the bill, noted that not every town across the country would benefit from the change, but "for those who do, I think it is important for us to recognize that when we have the opportunity to come together to make borrowing easier for municipalities."

Waters noted that the bill would correct a regulatory split for municipal securities, where the governing law would change depending on the institution.

Messer's bill, which had Republican and Democratic backing, would also require that the Federal Reserve, the FDIC and the comptroller of the currency all issue new regulations to handle the change.

Under the new rule, qualifying municipal securities would have to be treated as at least Level 2B liquid assets, which corresponds to as much of a 50 percent "haircut" on the asset's face value in the calculation.

A similar bill is being considered by the U.S. Senate Banking Committee.

By Michael Macagnone

–Additional reporting by Evan Weinberger. Editing by Jill Coffey.

SEC Continues Public Finance Enforcement Agenda Two Recent Cases Filed: Orrick

Just in the last weeks of August, the Public Finance Abuse Unit of the Enforcement Division of the Securities and Exchange Commission (SEC) announced settlements of securities fraud actions involving a city, an underwriter, a municipal advisor and four individuals. The first case concerned inaccurate descriptions by a city of its prior compliance with continuing disclosure undertakings. This was the second instance of SEC enforcement following closure of the voluntary reporting program known as the Municipalities Continuing Disclosure Cooperation Initiative (MCDC).**[i]** The other case was brought against a financial advisory firm for violation of the Dodd-Frank Act obligation that municipal advisors owe a fiduciary duty to their municipal clients. This is one of the first cases to explore the meaning of fiduciary duty for municipal advisors.**[ii]**

I. Beaumont, CA Finance Authority and O'Connor & Company Securities, Inc. and Anthony Michael Wetherbee (August 23, 2017)

Beaumont, CA (a small city between Los Angeles and Palm Springs) created a joint powers authority (the Beaumont Financing Authority, or BFA) to issue bonds on behalf of a Community Facilities District (CFD) to fund infrastructure for housing developments. The CFD signed numerous Continuing Disclosure Agreements (CDAs) in connection with the BFA's bonds requiring annual reports on many aspects of the developments such as tax delinquencies, description of facilities financed, fund balances, etc. During a period from 1995 to 2015, Alan Kapanicas was Beaumont's City Manager and Executive Director of the BFA, and was responsible for overseeing all of the bond issuances and CDA reporting.

Between 2012 and 2013, five bond issuances by the BFA were solely underwritten by a small firm, O'Connor & Company Securities, Inc. (O'Connor). According to the SEC, each of the Official Statements (OS's) in these five issues contained a misstatement about the CFD's compliance with its CDAs. The OS's reported one late filing of an annual report, and stated that except for this occurrence, the CFD had not failed to meet its continuing disclosure obligations. The SEC stated that, in fact, the OS's failed to disclose many other late filings, up to 117 days, and that every annual report was missing one or more elements of information required by the CDA.

Had the BFA and the underwriter reported these instances under MCDC, they would have been subject to certain pre-arranged sanctions. Now, the sanctions were more severe:

1. Beaumont Financing Authority entered a cease and desist order, neither admitting nor denying the SEC's charges, in an administrative proceeding based on violations of Section 17(a)(2) and (3) of the Securities Act of 1933 (a charge based on negligent, rather than purposely intentional, action to make a material misstatement of facts to investors). There was no monetary penalty, although compliance with the settlement terms will cost the City some money. The BFA is required to establish policies and procedures and training for securities law and CDA compliance, and for accounting and record-keeping for bond proceeds. BFA is also required to bring all existing CDA filings up to date if not in compliance. These sanctions are similar to but a little more detailed than those applied in the 71 MCDC issuer settlements. A new requirement for BFA (which previously applied to underwriters under MCDC but not issuers) is to engage an independent consultant to provide a review and recommendations to the BFA on the matters subject to new policies and procedures. BFA must comply with such independent consultant's recommendations, subject to appeal to the SEC. As with the MCDC settlements, BFA must disclose this settlement in its OS's for five years.

This action reinforces the importance for all issuers to make sure that they have policies and procedures in place to comply with their continuing disclosure agreements.

2. Alan Kapanicas was sued in Federal District Court based on the facts described above, alleging violations of Sections 17(a)(2) and (3). The SEC only released the Complaint in the action, but its press release indicated that, without admitting or denying the charges, Kapanicas agreed to the entry of permanent injunctions against violating Sections 17(a)(2) and (3) and against participating in any offering of municipal securities. He also agreed to pay a civil fine of $37,500.

This post-MCDC action is significant in that no individual officials were included in any of the 71 issuer settlements. This is consistent with recent SEC policy in which individual officials are included in virtually every new enforcement action involving issuers, and who are usually required to pay some civil fine. Also, as noted above, the sanctions against the issuer entity were somewhat more severe and costly than the issuer would have faced if it had reported under MCDC.

3. O'Connor and its lead underwriter, Anthony Wetherbee, settled administrative proceedings brought under Sections 17(a)(2) and (3), several MSRB Rules, and a section of the 1934 Act which

prohibits licensed dealers from violating MSRB Rules. Without admitting or denying the SEC's charges, which were based on failure of adequate diligence in determining if the BFA's description of its CDA compliance was accurate, the following sanctions were imposed:

A. O'Connor is required to engage an independent consultant to review its policies and procedures, and comply with its recommendations. This is similar to the MCDC settlements. O'Connor agreed to a cease and desist order, was censured and was required to pay a civil fine of $150,000, which is larger than it would have paid under MCDC.

B. Weatherbee agreed to cease and desist from violating Section 17(a)(2) or (3), and is barred for 6 months from association with any municipal dealer, any investment company, or participating in any issuance of penny stocks. He also has to pay a civil fine of $15,000. None of the 72 underwriter settlements in MCDC included any individuals.

II. Municipal Financial Services, Inc.; Rick A. Smith; and Jon G. Wolff (August 24, 2017)

The SEC brought an administrative action against Municipal Financial Services, Inc. (MFS), a registered municipal advisor (MA) based in Oklahoma, and two of its principals, Smith and Wolff. MFS was hired by an unidentified city in 2011 (City) to act as its MA and to be responsible for preparing the City's OS's for bond offerings, reviewing and commenting on all legal documents for bond issuances, and for assisting the City in compliance with its CDAs.

The City had three bond issues from 2005, 2008 and 2012 which all required annual reports to be filed within 180 days of the end of its fiscal year. In a 2013 bond issue, the City's bond counsel (a sole practitioner now retired) wrote a CDA providing for a 360 day deadline to file its CDAs, and which purported to amend the three prior CDAs to move to a 360-day reporting deadline.

The SEC alleged that MFS violated its fiduciary duty to the City by failing to advise the City that moving to the new 360-day reporting deadline violated the provisions of the 2005, 2008 and 2012 CDAs and that it did not advise the City until three years later to notify bondholders of those prior issues that the CDA deadline had been changed. These actions (carried out by Smith and Wolff) violated Section 15B(c)(1) of the 1934 Act which requires MAs to act in a fiduciary capacity with their clients, and to use reasonable care to avoid misleading clients.**[iii]**

MFS was censured, agreed to cease and desist from further violations of Section 15B(c)(1), and paid a civil fine of $50,000. MFS was also ordered to establish written policies and procedures and periodic training on the fiduciary obligations owed to municipal clients. Smith and Wolff each agreed to pay a civil fine of $8,000.

There are a couple of interesting points in this case. One is that the SEC pointed out that based on advice given in a 1995 letter to the National Association of Bond Lawyers, it is very difficult for an issuer to unilaterally amend a CDA. The SEC strongly implied (although it did not say expressly) that this City's retroactive amendment of its 2005, 2008 and 2012 CDAs was improper, substantively as well as procedurally, since the City's bond counsel did not follow the provisions in those CDAs to make an amendment. Essentially, MFS was sanctioned for failing to tell the City that it could not make such amendments.

Another point to note is that this case was based on the fact that MFS's failure to properly advise the City was serious because investors in the three older bond issues were harmed by not getting their CDAs in the time frame originally promised to them. One commentator raised the question of whether the SEC was trying to do another "round-about" regulation by suggesting that an MA owed a duty to investors, but others point out that since in this case MFS had an express contractual duty to the City to help it with CDA compliance, the outcome was not surprising.

by Roger Davis, Robert Feyer, and Alison Radecki

September 27, 2017

Orrick, Herrington & Sutcliffe LLP

[i] Under MCDC, issuers and underwriters were given the opportunity to voluntarily report to the SEC instances in which the issuer erroneously stated in an Official Statement that it had materially complied with all of its obligations under continuing disclosure agreements for the past five years. The SEC offered a pre-arranged suite of sanctions, relatively mild, for those who participated in the program, but promised harsher penalties for those who did not. Ultimately the SEC settled with 72 underwriting firms and 71 issuers under the MCDC program.

[ii] For more background on the SEC's municipal enforcement activities, please access the recent Orrick – Bond Buyer Webinar.

[iii] This action was based solely on the statutory provision enacted by the Dodd-Frank Act. Subsequent to the time covered by this action, the Municipal Securities Rulemaking Board enacted Rule G-42 which spells out in more detail the duties and responsibilities of municipal advisors to their clients.

Changes to MSRB Fees for Municipal Advisors.

In support of our ongoing efforts to more fairly and equitably assess fees among regulated entities, the Municipal Securities Rulemaking Board (MSRB) today filed with the Securities and Exchange Commission (SEC) amendments to MSRB Rule A-11, on assessments for municipal advisor professionals, to increase the annual municipal advisor professional fee to $500 from $300.

The municipal advisor professional fee will be assessed based on the number of associated persons for whom the firm has filed a Form MA-I with the SEC as of January 31 of each year and who are qualified as a municipal advisor representative in accordance with MSRB Rule G-3. The first invoice at the new fee level will be sent to firms in April 2018 for payment by April 30, 2018.

In 2015, the MSRB conducted a holistic review of the organization's funding sources, which is informing efforts to more equitably assess fees among regulated entities. When the first changes stemming from that review were approved in 2015, we did not increase the municipal advisor professional fee to allow municipal advisors time to adapt to regulation post Dodd-Frank. We noted at the time that we would revisit the amount of the fee, considering the substantial costs associated with developing and maintaining a regulatory regime for municipal advisors.

We believe the fee assessment of $500 per municipal advisor professional is an important step toward supporting the organization's long-term financial sustainability and ability to fulfill its Congressionally mandated mission to protect the integrity of the $3.8 trillion municipal securities market. Going forward, we will continue to periodically reevaluate all fees to strive to fairly and equitably allocate fees across the entities that fall under the organization's regulatory mandate.

View the regulatory notice.

View the rule filing.

SIFMA Seeks Volcker Rule Exemption for Tender Option Bonds.

SIFMA called for the exemption of tender option bonds from Volcker rule restrictions in a comment letter to the Office of the Comptroller of the Currency on revisions to the post-crisis financial regulation. "Treating these TOBs and other similar financing vehicles as covered funds is inconsistent with the statute and ultimately results in higher financing costs for US businesses," SIFMA wrote.

Read SIFMA's comment letter.

MSRB: Issuers Shouldn't Choose Underwriter's Counsel.

PHOENIX – Issuers should not be the ones selecting underwriter's counsel in bond transactions because the practice, while common, gives rise to serious conflict of interest concerns, the Municipal Securities Rulemaking Board said Thursday.

The MSRB noted that the practice of issuers either selecting or influencing the selection of underwriter's counsel for a transaction remains widespread, despite long-held concerns previously raised by the board. The MSRB was worried about the issue as far back as 1997. In 1998, it issued a notice stating that there were "demonstrated problems regarding the practice" and that underwriters must feel free to select their own lawyers in transactions.

"This practice gives rise to actual or potential conflicts of interest in the counsel's representation of the underwriter, and calls into question counsel's ability to carry out its responsibilities with the necessary degree of independence from the issuer, to act with undivided loyalty and to be free from conflicting allegiances in providing legal counsel to the underwriter," the MSRB said in the advisory notice it released Thursday. "Issuer designation of counsel also may compromise an underwriter's ability to retain counsel that has the requisite expertise and experience with the federal securities laws, and the resources needed to assist the underwriter in fulfilling its due diligence responsibilities."

The Government Finance Officers Association's current best practices on underwriter selection do not address whether issuers should avoid designating the underwriter's counsel, but note that issuers and their municipal advisors inherently sit on the opposite side of the deal table from underwriters.

"The MSRB is responding to the continuation of this practice with this market advisory to restate its concerns that investors may be harmed in a variety of ways in any offering process that does not properly utilize the review, guidance and counseling of an independent, competent and appropriately critical underwriter's counsel," the advisory concluded.

"To minimize conflicts of interest and to reduce any influence by an issuer that may call into question the qualifications or independence of the underwriter's counsel, the MSRB suggests that an issuer refrain from involving itself in the underwriter's selection of counsel or that an issuer's involvement in such process be minimal and limited to concerns regarding competency, conflicts of interest and the avoidance of excessive costs."

By Kyle Glazier

SOURCEMEDIA | MUNICIPAL | 07/27/17 07:08 PM EDT

Lawyers Critical of MSRB Guidance.

CARLSBAD,CALIF. – The Municipal Securities Rulemaking Board should be focusing its time and resources on being more efficient, rather than commenting on issues over which it has no authority, lawyers said Monday.

Their comments came during a panel discussion on market disclosure and pricing transparency at The Bond Buyer's California Public Finance Conference.

The panel discussion turned to recent MSRB activities and the board's associate general counsel Margaret "Peggy" Blake was among the speakers.

Her fellow panelists took some issue with the MSRB's recent issuance of a notice aimed at issuers, urging them not to selectively disclose information only to certain investors. While the MSRB does have a federal mandate to protect issuers, it has no authority to regulate their activities.

The notice, published on Sept. 13, warned that issuers face the potential for fraud charges if known material information is omitted from required public disclosures. Information generally has been deemed to be material under case law if there is a substantial likelihood that it would be considered important by a reasonable investor making an investment decision.

Dave Sanchez, a senior counsel at Norton Rose Fulbright, said he applauded the MSRB for its efforts to evaluate the efficiency of its current rulebook, a project the board began this year after finally finishing a lengthy list of federally-mandated rulemaking.

But Sanchez added that the board shouldn't be collecting fees from regulated broker-dealers and municipal advisors and then spending time and money talking about issuer behavior rather than undertaking the comprehensive review of its rules that the board has underway.

"If you have a kitchen renovation in progress, you shouldn't be out mowing the neighbor's yard," Sanchez said.

Leslie Norwood, a managing director, associate general counsel, and co-head of municipal securities at the Securities Industry and Financial Markets Association reacted to that statement with an "Amen."

The directive coming down from the Trump administration emphasizes evaluating current rules for ways to make them more efficient, she said, adding, SIFMA supports those efforts.
"We applaud any push toward efficiency," said Norwood.

Bill Oliver, the industry and media liaison for the National Federation of Municipal Analysts, expressed a less forceful opinion of the MSRB notice. But he noted that warning issuers against disclosure can have negative impacts.

"Anytime you tell people they should be careful about what they tell investors, it always leads to less information," he said.

Blake said that the MSRB's notice was merely guidance and in no way prescriptive, and had actually been well-received.

"Believe it or not, we have gotten a lot of positive feedback," she said.

Panelists also discussed other disclosure issues, including the SEC's proposal to amend its Rule 15c2-12 in a way that would require issuers to file material event notices to EMMA when they incur a material financial obligation such as a bank loan, as well as when debt becomes subject to certain provisions such as one that calls for an acceleration of payments.

Norwood reiterated dealer concerns that such information is sometimes difficult for underwriters to find, leaving them potentially liable if they underwrite bonds with shoddy disclosure.
Oliver said such information clearly needs to be disclosed.

By Kyle Glazier

BY SOURCEMEDIA | MUNICIPAL | 09/27/17 07:06 PM EDT

FINRA Proposed Rule Change - Section 13 of Schedule A.

Proposed Rule Change to Amend Section 13 of Schedule A to the FINRA By-Laws Relating to the Review Charges for Communications Filed with or Submitted to FINRA

Financial Industry Regulatory Authority, Inc. ("FINRA") is filing with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change to amend Section 13 of Schedule A to the FINRA By-Laws ("Section 13") governing the review charges for communications filed with or submitted to FINRA's Advertising Regulation Department (the "Department") to account for upcoming technological changes that will allow websites to be filed in native format.

Text of Proposed Rule Change.

The Path Forward on HQLA.

PHOENIX- Legislation defining readily tradeable, investment-grade municipal securities as high quality liquid assets under federal banking rules may have a window to move forward fairly soon, according to market groups watching developments on Capitol Hill.

The Municipal Finance Support Act of 2017, H.R. 1624, sponsored by Rep. Luke Messer, R-Ind., was reported out of the House Committee on Financial Services Sept. 12 after receiving unanimous support in late July.

The bill is a response to rules adopted by the Federal Reserve Board, Office of the Comptroller of the Currency, and Federal Deposit Insurance Corp. in 2014. These rules require banks with at least $250 billion of total assets or consolidated on-balance sheet foreign exposures of at least $10 billion to have a high enough liquidity coverage ratio – the amount of HQLA to total net cash outflows – to deal with periods of financial stress.

The regulators did not include munis as HQLA under the rule because they felt the securities were not liquid enough.

The Fed later amended its rules to include some munis as HQLA but muni market participants said the amendments were still too restrictive and, in any case, would mean little if the other banking regulators did not ease their rules as well.

Messer's bill has been amended to require the regulators to treat munis that are investment grade and actively traded in the secondary market as level 2B HQLA, the same level as mortgage backed securities, down from its original requirement that they be treated as level 2A securities on the same level as sovereign debt.

This change reconciles it with a Senate bill, S. 828, sponsored by Sen Mike Rounds, R-S.D. The House approved legislation making some munis 2A assets last year, but it never advanced in the Senate.

"The House is expected to act on the bill soon," the National Association of State Treasurers said in a legislative update posted for members Sept. 17. "The House bill as reported out of committee now conforms with the Senate 2B legislation, which increases the likelihood that the bill could be signed into law."

The NAST update said that S. 828, currently awaiting action by the Senate Banking Committee, is considered likely to come up when the committee next takes action on several financial services-related bills.

"A unanimous vote in support could clear the way for the bill to be 'hotlined,' a Senate procedure that would allow for expedited consideration and passage," the NAST update said.

The question now remains when and if the House will act on the bill now that it is awaiting floor action. It could be considered as a stand-alone bill, or it could end up being attached to a larger bill, such as tax reform legislation.

Emily Brock, director of the Government Finance Officers Association's federal liaison center, said her sense is that lawmakers might be inclined to deal with bipartisan legislation like Messer's bill before the anticipated difficulty of a tax reform showdown. Brock said that when GFOA last met with legislators on this issue, the energy was very positive.
"This is a light lift," she said.

The House's agenda is ultimately determined by House Speaker Paul Ryan, R-Wisc., and other Republican leaders.

The Bond Buyer

By Kyle Glazier

09/18/17

BDA Comment Letter to the DOL: Supporting an Extended Transition Period

The DOL published a proposed rule to extend the transition period for the Department of Labor

Fiduciary Duty Rule. The proposal would delay the applicability dates for the Best Interest Contract Exemption and the Principal Trading Exemption until July 1, 2019.

BDA Comment Letter

BDA submitted a comment letter on Friday, September 15th. The letter can be read here. The letter references and echoes the letter BDA sent to the DOL on August 7th. Both letters support an extended transition period.

BDA urges the DOL to continue its review per the directive of the February 2017 Presidential Memorandum and to coordinate with the SEC on a harmonized best interest standard of care for all retail investment accounts.

Bond Dealers of America

September 18, 2017

MSRB Announces Results of Qualifying Examination for Municipal Advisors.

Washington, DC – More than 3,000 individuals at 505 municipal advisor firms across the country are now qualified to provide advisory services to state and local governments and other clients following implementation of the first mandatory qualifying examination for municipal advisor professionals, the Municipal Securities Rulemaking Board (MSRB) announced today.

"Municipal advisors play an important role in the municipal securities market as trusted experts whose advice can have a profound impact on the financial health of state governments, local communities and other municipal entities," said MSRB Executive Director Lynnette Kelly. "The MSRB's exam is designed to ensure that only those individuals who can demonstrate their knowledge of regulatory standards of conduct and current market practices can hold themselves out as municipal advisor professionals."

Effective September 12, 2017, the MSRB's Municipal Advisor Representative Qualification Examination (Series 50 exam) is a required baseline test of competency for professionals who provide advice on the issuance of municipal securities or use of municipal financial products.

Continue reading.

Date: September 21, 2017

Contact: Jennifer A. Galloway, Chief Communications Officer
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Commentary: Key Takeaways from the SEC's Post-MCDC, Beaumont Cease and Desist Order.

While many would prefer the SEC's MCDC Initiative be a distant memory, on August 23, the SEC's

Chief of the Enforcement Division's Public Finance Abuse Unit reminded issuers and underwriters alike that "[i]ssuers and underwriters will continue to be held accountable when they fail to provide investors with an accurate picture of past compliance with continuing disclosure obligations." SEC Press Release, Muni Bond Issuer and Underwriter Charged With Disclosure Failure, 8/23/2017.

In an Order Instituting Cease and Desist Proceedings, Making Findings and Imposing Sanctions and a Cease and Desist Order ("Order"), the SEC followed through on its commitment to focus on market participants that had not voluntarily self-reported under the MCDC initiative. The SEC's press release highlighted that the Municipal Finance Authority in Beaumont, California ("Beaumont"), its then-executive director and the underwriting firm behind certain offerings had settled charges that Beaumont had made false statements about compliance with continuing disclosure obligations and the underwriter failed to conduct reasonable diligence.

This Order (and the O'Connor Order demonstrate that the SEC is not done focusing on disclosure by issuers and diligence by underwriters and that the penalties for parties that did not voluntarily self-report under MCDC will be more severe.

In its Legal Discussion, the Order set forth the legal basis for holding the issuer accountable and, as emphasized below, noted that "negligence is sufficient to establish violations." The Order provided, in part: Section 17(a)(2) of the Securities Act makes it unlawful "in the offer or sale of any securities … directly or indirectly … to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." 15 U.S.C. § 77q(a)(2). Section 17(a)(3) of the Securities Act makes it unlawful "in the offer or sale of any securities … directly or indirectly … to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. § 77q(a)(3). Negligence is sufficient to establish violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act. See Aaron v. SEC, 446 U.S. 680, 696-97 (1980). A misrepresentation or omission is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. See Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988). Order at para. 17. Emphasis Supplied.

The SEC held the issuer, the City Manager and the underwriter accountable and, in each instance, imposed "undertakings" well beyond what was required of those that submitted and settled with the SEC under its MCDC initiative.

For issuers and their officials, there are several takeaways from these Orders that are beyond what was required by those that voluntarily submitted and were subject to Orders under the MCDC initiative:

- Imposition of undertakings that require, amongst other things, the retention of an independent consultant and to follow the recommendations of the consultant.
- An individual being held accountable — $37,500 fine and barred from participating in any future muni bond offerings (as cited in the SEC Press Release).

There is another message that shouldn't be overlooked. Accountability seemingly begins and ends with the issuer and underwriter even where, as in Beaumont, a dissemination agent was engaged by the issuer. A review of outstanding Official Statements shows Beaumont engaged a dissemination agent. While the Order does not discuss the role of the dissemination agent, it does highlight missed and late filings, the failure of the district to properly disclose the same and the fact that the Executive Director was responsible for reviewing and approving the content of the OS.

While many dissemination agents do a fine job filing on behalf of the obligated party, the mere fact that an obligated party uses a dissemination agent does not absolve it from having policies, procedures and practices to ensure obligations are met and, where not met, properly discussed. Over-reliance on a dissemination agent can be fraught with risk. The parties cannot simply point to a dissemination agent as being responsible to fulfill its legally required obligations.

What's an issuer and obligated party to do? As highlighted in our May 25, 2017 commentary and below, the MCDC Issuer Cease and Desist Orders ("MCDC Orders") and the GFOA's August 24, 2016 Alert to Members ("GFOA Alert") provide excellent starting points. In addition, the engagement of an *independent third party* to review CDA obligations and actual filings can be a critical part of your policies, procedures and practices. Having the party responsible for making the filings (be they an employee of the obligated party or a dissemination agent) conduct such a review puts that party in the awkward position of self-reporting their own failures where a filing is late or missed and, as some have opined, might be considered a conflict of interest.

The MCDC Orders, in part, require issuers to:

- Comply with existing continuing disclosure undertakings, including updating past delinquent filings and;
- Establish policies and procedures and periodic training regarding continuing disclosure obligations within 180 days.

The GFOA Alert provided "essential practices" that, combined with the SEC Orders, can serve as best practices for Issuers. It provides, in part:

- Understanding and discussing the issuer's policies and procedures on disclosure.
- Knowing who within the issuer is filing what, when and where.
- Knowing what the issuer has promised to do in its continuing disclosure agreement.
- Being aware of what the issuer has posted on EMMA.
- Recognize that each official statement must include a statement about whether the issuer failed to materially comply with previous commitments within the past five years.

As issuers and obligated parties digest the Beaumont Order in conjunction with the MCDC Orders and their obligations under 17(a)(2), it is prudent they contemplate a Disclosure Management policy and practice to ensure an understanding of filing obligations, an understanding of what has or has not been filed properly and a process to be alerted of current filing obligations. Any Disclosure Management policy and practice should include an independent review to confirm filings are done properly.

The Bond Buyer

by Gregg Bienstock

September 05 2017, 2:11pm EDT

Gregg Bienstock is chief executive officer and co-founder of Lumesis Inc.

MSRB Solicits Input on Retrospective Review of Primary Offering Practices.

Washington, DC – As part of its ongoing commitment to reviewing existing rules in light of an evolving municipal marketplace, the Municipal Securities Rulemaking Board (MSRB) today published a concept proposal to solicit input from market participants on MSRB rules on primary offering practices.

“Issuing a concept proposal is an important way for the MSRB to collect information that helps us understand the varied perspectives of municipal market participants and determine whether there are in fact issues to be addressed, either by advancing a rule proposal or considering alternative approaches such as providing guidance,” said MSRB Executive Director Lynnette Kelly.

Today’s concept proposal seeks insight on evolving primary offering practices and whether the current rules continue to operate effectively or whether changes to MSRB Rule G-11, on primary offering practices, and Rule G-32, on disclosures in connection with primary offerings, may be warranted.

“After a series of very helpful informal discussions with a diverse range of market participants, the MSRB came away with several questions that we want to put to the market more generally,” Kelly said. “Our goal is to learn what, if any, regulatory proposals, guidance or educational resources may be beneficial to enhance the fairness and transparency of the primary offering process for municipal bond investors, issuers and syndicate members.”

Comments on the MSRB’s concept proposal should be submitted no later than November 13, 2017. View the concept proposal.

Date: September 14, 2017

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NFMA Comment: GASB Proposed Statement No. 3-30, Certain Disclosures Related to Debt, Including Direct Borrowings and Direct Placements.

The National Federation of Municipal Advisors has responded to the Governmental Accounting Standards Board’s Invitation to Comment: Proposed Statement No. 3-30, Certain Disclosures Related to Debt, Including Direct Borrowings and Direct Placements.

To read the letter, click here.

Bond Dealers of America Advocacy: 3rd Qtr – 2017

Read the BDA Advocacy Priorities.

September 5, 2017

MCDC Architect Chan Makes Muni Enforcement Predictions.

PHOENIX – The Securities and Exchange Commission and Department of Justice are primed to prosecute high-ranking public officials, bond lawyers, and other non-traditional targets of municipal bond enforcement cases, according to a former SEC enforcement division lawyer.

That is the prediction of Peter Chan, a lawyer in the Chicago office of Morgan Lewis who spent some 20 years with the SEC, including as chief muni enforcer in the commission's Chicago regional office.

Chan was the architect of the SEC's Municipalities Continuing Disclosure Cooperation initiative, which incentivized issuers and dealers to self-report instances in which issuers made misleading statements about their past compliance with continuing disclosure agreements.

In a lengthy interview with The Bond Buyer, Chan said he believes there has been no slowing of momentum for muni enforcement since MCDC's end and that regulators may become even more aggressive going forward.

"I think it is quite safe to say that there continues to be consensus and momentum on SEC enforcement of the municipal securities market," Chan said.

While some market participants had wondered if the commission's attitude might shift with the departure of former chair Mary Jo White, known as an aggressive criminal prosecutor, Chan said that it appears new SEC chair Jay Clayton is on board with the enforcement division's agenda and with projects like the MCDC initiative.

"Reading the tea leaves, he does not have any problem with the initiative," Chan said.

Republicans like Clayton have been historically receptive to the idea of holding individuals accountable, Chan said, which is in line with what the SEC has been trying to shift towards for several years in either charging firm or issuer officials or explaining why it declined to do so.

"If entities commit fraud that means individuals commit fraud," Chan said. "There will be a focus on that."

The SEC has sharpened the tools it uses to hold individuals to account. The commission can charge individuals for "causing" others to violate securities laws, and it can also use the doctrine of "control person liability," which the SEC deployed to charge the mayor of Allen Park, Mich. in November 2014. Control person liability comes from section 20(a) of the Securities Exchange Act of 1934 and provides that an individual may be liable for the securities law violations of persons over whom they exercise control.

"The Public Finance Abuse Unit can use that to go up the chain," Chan said. "Not only will they focus on individuals, they will look into how far up they can go. They're not going to want to go after just a low tier bureaucrat."

The SEC has charged a number of public officials over the years, but that has rarely extended to the upper floors of city hall.

The commission will not seek to charge an individual that way every time, Chan said, but will always be asking the question of whether it should be and taking a "holistic" view of every case.

"They basically ask a very holistic question: who are the people who contributed to the disclosure problems?"

Chan said he has observed an increasing willingness of the SEC to go after “gatekeepers” such as auditors in other markets, and expects that trend to carry over to the muni market. The SEC last year charged a New York-based audit firm and one of its senior partners in connection with municipal bond offerings by the town of Ramapo, N.Y. Bond lawyers might increasingly become targets of prosecution in some instances, too, Chan warned.

Last month, when the SEC charged Oklahoma-based municipal advisor Municipal Finance Services with breaching its fiduciary duty, the order mentioned that one offending continuing disclosure document was produced by bond a bond lawyer “who is now retired and no longer practicing law.” Chan said that could be read as a justification from the SEC as to why it was not pursuing charges against the lawyer, though it could have been contemplating them.

“I thought that was a bit of a hint,” Chan said. The SEC also charged the founder and president of the firm as well as its vice president.

When it comes to battling public corruption, the DOJ might be looking to increasingly take a page out of the SEC’s playbook, Chan added. While courts have ruled that traditional criminal public corruption charges require evidence of a quid pro quo, the securities laws, which can also be the basis of criminal charges, do not.

Prosecutors merely have to show that an official withheld a material fact, including a conflict of interest. Prosecutors could make the case that an official should have disclosed a gift from, or financial relationship with, a party to a bond transaction, Chan said.

“The DOJ is going to get pretty interested in using federal securities law to go after public corruption,” Chan said.

As for his own creation, the now-complete MCDC, Chan said he believes the SEC is likely to view it as a “resetting of the table.” The program created a major market dialogue and forced issuers to confront their past errors, and the SEC will likely expect that their message was received, Chan said.

“I don’t think the SEC will be very receptive to issuers claiming a lack of sophistication,” he said, adding that disclosure violations taking place after the MCDC’s 2014 reporting period are likely going to see harsh sanctions.

The MCDC may be a major intelligence tool for the enforcement division going forward, because so many deals were reported. The SEC has computer analytical tools to allow it to sift through that data and find things it might not otherwise have discovered, he said. The commission has used big data analytics in other markets and the public finance unit has those tools now as well.

“The are likely applying that same type of big data analytics to the treasure trove of data they received,” Chan said.

The Bond Buyer

By Kyle Glazier

Published September 08 2017, 1□37pm EDT

SIFMA Submits Comments to SEC on Proposed New MSRB Fee for Dealers Underwriting 529 Plans.

On August 25, SIFMA submitted comments to the Securities and Exchange Commission (SEC) on the Municipal Securities Rulemaking Board's (MSRB) proposed rule change to assess an underwriting fee on dealers that are underwriters of 529 college savings plans. SIFMA and its members strongly urged the SEC to institute disapproval proceedings regarding the filing in its current form, and does not believe the proposed fees as currently structured are appropriate, as they would stifle competition.

SIFMA Comment Letter

Commentary: Don't Be Selective About Disclosure.

A fair and efficient municipal marketplace depends on a shared commitment of all participants to disclose information fairly, equitably and in the public domain.

Bond issuers, for their part, support market integrity by disclosing certain important information to investors throughout the life of a bond. This information helps investors and others make informed decisions. Selective disclosure—an often-unintentional sharing of material, nonpublic information to a select group of investors—creates an information imbalance, giving certain market stakeholders access to more information than others.

As the regulatory agency responsible for preserving market integrity, the Municipal Securities Rulemaking Board encourages issuers to make important current information available to all. Our Electronic Municipal Market Access (EMMA®) website is the official nationwide repository for free public access to material information about municipal securities. It provides the means for full and fair municipal bond disclosure, and a simple means for issuers to address any inadvertent selective disclosure.

Federal regulations prohibit selective disclosure by public companies. Regulation FD —for "Fair Disclosure"—prohibits public companies from making intentionally selective disclosures and requires prompt public disclosure following any inadvertent selective disclosure. Issuers of municipal bonds are not subject to any similar regulations but can support market integrity by ensuring that all market stakeholders receive the same information at the same time. Adding a voluntary filing on EMMA is a simple step to ensure that information that may have been shared in a private setting is promptly available to the public at large.

Selective disclosure often occurs unintentionally. Municipal officials who stick around at the end of a town hall meeting with a few constituents and casually mention additional information about bond projects not raised during the public meeting could be inadvertently making selective disclosure. It also can happen when issuers or members of their deal team host roadshows, investor conferences and one-on-one investor calls or meetings. These events themselves are not inherently problematic, but they can become so if the information shared is material to all bondholders and not made public.

Selective disclosure in the municipal market can be more troubling in instances of credit distress, when some stakeholders' interests may be at odds.

Take, for example, Puerto Rico, which is confronting an ongoing debt crisis with many competing interests at stake. In August 2014, the Puerto Rico Power Authority (PREPA) pledged to provide monthly cash reports, vendor agreements, budgets, and other information to owners and insurers controlling over 60 percent of its outstanding revenue bond debt. In exchange, the participating creditors that received confidential information were required to sign confidentiality agreements and waived their rights to sue PREPA for a period of time. Other stakeholders were not part of this arrangement, putting them at an information disadvantage.

The MSRB recommends that municipal bond issuers carefully manage their response to both intentional and accidental instances of selective disclosure. Issuers may open themselves up to federal fraud charges if they make material omissions or misstatements in their public disclosures. If something was material enough to mention in private, it may well have merited public disclosure.

Some market observers may fear that increasing regulatory attention on selective disclosure could cause issuers to choose to limit their contact with bondholders and ultimately provide less information to the marketplace. Fortunately, the experience of the corporate market under Regulation FD shows that corporations have become more transparent in the wake of greater regulatory focus on selective disclosure rather than less. Academic studies have tracked an increase in the frequency of companies providing earnings forecasts and continuing to hold conference calls, on an open basis, that were previously closed.

The MSRB provides resources to facilitate timely and complete disclosure of material information to bondholders by issuers on its EMMA website. Among the free tools available on EMMA are an email reminder service for recurring financial disclosures, customized issuer homepages to collect and display all disclosures from an issuer in a single page, and a dedicated submission process for voluntary disclosure of information about bank loans and other debt.

The MSRB also offers direct assistance to state and local government issuers to advance their knowledge on disclosure best practices through in-person educational events, webinars and an online education center.

When it comes to municipal market disclosure, it’s better to be inclusive than selective.

The Bond Buyer

By Lynnette Kelly

Published September 13 2017, 9:50am EDT

Lynnette Kelly is executive director of the Municipal Securities Rulemaking Board.

MSRB Publishes Market Advisory on Selective Disclosure.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) today published a market advisory to increase awareness among issuers of the importance of disclosing material information fairly, equitably and in the public domain. The practice of “selective disclosure” creates an information imbalance that favors a limited group of bondholders, which may include analysts for investment banking firms, investment advisers or institutional investors, who are given access to material information that others do not have.

“Issuers of municipal securities and their financial professionals share a responsibility to protect the integrity of the municipal market by making full and fair disclosures to all investors," said MSRB Executive Director Lynnette Kelly. "When selective disclosure occurs – often inadvertently – certain investors can be disadvantaged. The MSRB is a resource for issuers and their financial professionals seeking to implement practices to ensure that all investors and stakeholders have equal access to the same material information from the issuer in a timely manner."

Question-and-answer sessions during investor conference calls and invitation-only meetings with analysts are common scenarios in which selective disclosure could arise, according to the MSRB advisory. "These types of events are not inherently problematic," says Kelly. "However, issuers should make it a practice to consider whether material nonpublic information was shared in these circumstances and take steps to make that information public promptly after the event," Kelly said.

Selective disclosure, while not unique to the municipal market, is specifically prohibited in the corporate market under Securities and Exchange Commission Regulation Fair Disclosure (FD). Municipal issuers are not subject to Regulation FD, but the MSRB's advisory cautions about the potential for federal fraud liability if, for example, known material information is omitted from required public disclosures. Further, if an investor were to make a trade based on improperly disclosed material nonpublic information, that could constitute insider trading.

The MSRB joins other municipal market participants in drawing attention to the practice of selective disclosure, including the Securities and Exchange Commission's Office of Municipal Securities, the National Federation of Municipal Analysts and the Government Finance Officers Association.

Read the MSRB's market advisory.

Date: September 13, 2017

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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.

Mintz Levin

By Charles Carey

September 15, 2017

MSRB Issues Advisory on Selective Disclosure of Material Information: Day Pitney

The Municipal Securities Rulemaking Board (MSRB) published an advisory on September 13 highlighting to municipal issuers, dealers and municipal advisors the importance of disclosing material information "fairly, equitably and in the public domain." The MSRB is concerned that "selective disclosure" creates an information imbalance favoring a limited group of bondholders, such as investment banking firms, investment advisors or institutional investors, who are given access to material information that others do not have. Selective disclosure can occur:

- during investor road shows, conferences and one-on-one investor calls or meetings;
- in the course of bank private placements of municipal issues;
- when there is a question/answer session, because the issuer might discuss information that is not included in a preliminary official statement;
- in the secondary market when the original disclosure documents were accurate and complete but new, nonpublic material information is provided by the issuer but not required to be disclosed pursuant to Rule 15c-2-12.

The MSRB advises that issuers make it a practice to consider whether material nonpublic information has been shared and to take steps to ensure any such information is made available to the general public promptly.

Selective disclosure, while not unique to the municipal market, is specifically prohibited in the corporate market under Securities and Exchange Commission Regulation Fair Disclosure (FD). Municipal issuers are not subject to Regulation FD, but the MSRB's advisory cautions about the potential for federal fraud liability if, for example, known material information is omitted from required public disclosures. Further, if an investor were to make a trade based on improperly disclosed material nonpublic information, that could constitute insider trading.

The MSRB stressed that along with issuers, dealers (acting as underwriters) and municipal advisors may incur liability for selective disclosure under anti-fraud provisions and MSRB Rule G-17, which requires that dealers and municipal advisors deal fairly with all persons and prohibits them from engaging in any deceptive, dishonest or unfair practice.

The MSRB noted that it is a common practice in the case of road shows and investor conferences for an attorney to review the oral script and distributed materials to be certain all the information is included in the disclosure documents available to the general market.

For your convenience, the advisory can be found here.

by Judith A. Blank, Namita Tripathi Shah, and Glenn G. Rybacki

September 14, 2017

Day Pitney

Commentary: Duty of Care Enforcement for Municipal Advisors.

The Securities and Exchange Commission this month announced a significant enforcement action against an Oklahoma municipal advisor, Municipal Finance Services, Inc., and two officers of the firm, including its founder and president.

The action, announced on Aug. 24, offers helpful guidance for municipal advisors regarding the fiduciary duty of care. Prior municipal advisor enforcement has focused on disclosure to issuer clients of advisors' conflicts of interest, an important duty of loyalty element. As a whole, these actions reflect the SEC's constructive concerns for issuer protection pursuant to Dodd-Frank.

The SEC summarized: "Fiduciaries must act in the utmost good faith and use reasonable care to avoid misleading clients." Issuers will benefit from advisor competence and affirmative provision of informed advice.

The MFSOK action also illustrates how advisors' professional obligations to issuers can be expected to benefit investors when advisors assist issuers with disclosure. The SEC stated in its 1988 release proposing the Commission's interpretation regarding underwriter investigatory responsibilities that financial advisors "hav[ing] access to issuer data and participat[ing] in drafting the disclosure documents" in competitive sales "will have a comparable obligation [to the investigatory responsibilities of underwriters] under the antifraud provisions to inquire into the completeness and accuracy of disclosure presented during the bidding process."

Some advisors disagreed strongly, but the MFSOK action shows that the Commission is persisting, appropriately using the municipal advisors' fiduciary duty as a vehicle. Since 1988, the SEC also has undertaken disclosure enforcement against financial advisors in negotiated offerings.

MSRB Rule G-42 was not in effect at the time of the MFSOK events beginning in 2011. So, the action is based on the statute. Nevertheless, several important Rule G-42 themes appear in the SEC's release.

At the outset, it is important to consider MFSOK's contracted scope of services with a City. The SEC's release states that, pursuant to a 2011 agreement, MFSOK "was responsible for preparing the City's official statements, … reviewing and commenting on all legal documents" related to bond issuance, and "assisting the City in complying with its continuing disclosure agreements."

The City had entered into continuing disclosure agreements in 2005, 2008 and 2012 requiring audited financial statement filings within 180 days after fiscal year end. In accordance with SEC no-action guidance, the 2005 and 2008 CDAs could be amended only "with (1) bondholder consent; or (2) an opinion of bond counsel that the amendment would not materially impair the interests of bondholders."

The amendment and bond counsel opinion were required to be filed with repositories. The 2012 CDA omitted amendment by bondholder consent, looking to bond counsel or paying agent determinations. Each CDA required filing of an event notice upon a modification of bondholder rights.

MFSOK assisted the City with competitive sales in 2012 and 2013. In 2013, MFSOK's officers reviewed and commented on a CDA draft. The 2013 CDA, which was "prepared by bond counsel," "purported to" amend the three prior CDAs to extend the City's filing date to 360 days. The Commission concluded that the amendment was adverse to investors because it "had the effect of delaying significantly the date by which investors in the 2005, 2008 and 2012 bonds had access to the City's annual reports." The Commission observed that "some investors in the earlier bonds engaged in transactions without the benefit of the updated financial information … that had been promised … ."

MFSOK's officers had never seen such an amendment and had concerns. Yet, they "did not conduct further investigation and did not seek further information from bond counsel or otherwise attempt to determine whether the amendment complied with the terms of the City's three prior CDAs." The preparation of the 2013 amendment by bond counsel did not equate with the required bond counsel opinion.

Importantly, MFSOK's officers did not communicate their concerns to the City. They "failed to advise their client of the prerequisites for amendments … and failed to ensure that their client was in compliance." Instead, MFSOK "recommended" that the City sell the 2013 bonds to an underwriter in a competitive sale using an official statement that summarized the 2013 CDA. The City executed the 2013 amendment, "relying in part on MFSOK's advice."

Although MFSOK had begun in 2011 to assist the City "with the submission of annual reports on EMMA," MFSOK did not advise the City until 2016 to file the 2013 CDA amendments, with the result that investors holding the prior bonds "were not informed of the new 360-day deadline" for three years.

All Respondents were ordered to cease and desist violations; MFSOK was censured; MFSOK was ordered to pay a $50,000 civil penalty; each of its two officers were ordered to pay $8,000 civil penalties; and MFSOK entered into undertakings to establish written policies and procedures and periodic training "regarding the fiduciary duty" and to appoint an official responsible for ensuring compliance with the policies and procedures and maintenance of records regarding training.

The MFSOK action provides significant food for thought for advisors. It applies the advisors' fiduciary duty of care strictly, but fairly, requiring due care in the provision of advice, the provision of informed advice, and the conduct of due diligence as a basis for recommendations to issuers. MFSOK's investigatory responsibilities to assist the City in making disclosure provides important investor protections.

Of course, every action depends upon specific circumstances. Advisors' responsibilities to issuers depend upon contractual scopes of services. Still, the MFSOK action provides an excellent template. One may expect that, as future actions apply MSRB Rule G-42, with its granular elaboration of advisors' duties, issuers, investors and the market as a whole will benefit from substantially increased professionalism.

The Bond Buyer

By Robert Doty

Published August 30 2017, 12:56pm EDT

MSRB Seeks to Clarify and Extend Requirements for Obtaining CUSIP Numbers.

The Municipal Securities Rulemaking Board (MSRB) today filed with the Securities and Exchange Commission (SEC) proposed amendments to MSRB Rule G-34, on obtaining CUSIP numbers, which aim to clarify existing requirements and improve market consistency. If approved, the rule would codify the MSRB's longstanding interpretation that municipal securities dealers are required to obtain CUSIP numbers for new issue securities sold in private placement transactions, including direct purchases. Additionally, if approved, non-dealer municipal advisors advising on competitive offerings would be required, like dealer municipal advisors under the current rule, to apply for CUSIP numbers.

The proposed amendments take into consideration feedback received from the industry and public in response to two requests for comment in March 2017 and June 2017. The MSRB's proposal includes a principles-based exception from the requirement to obtain CUSIP numbers for direct purchases of municipal securities by banks – as well as their non-dealer control affiliates – that are intended to be held to maturity.

The SEC will publish the MSRB's proposal in the Federal Register and invite additional public comment. The MSRB reviews and responds to these comments as part of its participatory rulemaking process.

View the filing.

T+2 Settlement Cycle Goes Into Effect Tuesday.

Financial firms will take advantage of the long Labor Day weekend to update their systems for Tuesday's start of the T+2 settlement cycle, which will require transactions to be settled two days instead of three days after a trade is executed. "The project is changing the market structure that touches every market participant whether they are buy side, sell side, service providers, utilities, big firms, small firms or custodians," says Tom Price, a managing director at SIFMA.

Learn more at SIFMA's Shortened Settlement Cycle Resource Center.

MSRB Reminds Municipal Market Participants that the Two-Day Settlement

Cycle Becomes Effective September 5, 2017.

In support of the industry-wide effort to shorten the settlement cycle for all securities transactions, the Municipal Securities Rulemaking Board (MSRB) amended its rules to define regular-way settlement for municipal securities transactions as occurring on a two-day settlement cycle ("T+2"). The MSRB is reminding municipal securities dealers that these amendments will become effective September 5, 2017, which corresponds with the broader industry transition to T+2. The MSRB began its early support of this industry initiative by proposing amendments to its uniform practice rules, MSRB Rules G-12 and G-15, in March 2016.

Read the regulatory notice announcing the transition date.

View the order granting approval of the MSRB's rule amendments.

GASB Financial Reporting Model: Project Update

Work continues on the GASB's project reexamining the financial reporting model. In the last update, I told you about all the outreach we'd conducted following the issuance of the Board's first document for public comment, the Invitation to Comment (ITC), *Financial Reporting Model Improvements—Governmental Funds*.

The ITC focused on the following issues:

- Recognition approaches (measurement focus and basis of accounting)
- Format of the governmental funds statement of resource flows
- Specific terminology
- Reconciliation to the government-wide statements, and
- For certain recognition approaches, a statement of cash flows.

Now, the GASB staff is analyzing the stakeholder feedback we received through over 100 comment letters and almost 100 participants in public hearings and user forums. Once that analysis has been completed and the information is synthesized for review, it will be presented to the members of the Financial Reporting Model Reexamination Task Force and discussed at a task force meeting in September. Beginning in October, the Board will redeliberate issues raised in the ITC with the benefit of stakeholder input, including task force feedback.

The results of these redeliberations will be presented in a second document for public comment, a Preliminary Views, that also will address a number of additional issues. These issues are expected to include:

1. *Government-Wide Statement of Activities*—The Board will consider alternative formats to improve the usefulness of the statement of activities.
2. *Proprietary Fund Financial Statements*—The Board will consider reporting alternatives related to the existing requirement to separately present operating and nonoperating revenues and expenses.
3. *Budgetary Comparisons*—The Board will consider the appropriate method of communication (as a basic financial statement or required supplementary information) for budgetary comparison information and which budget variances, if any, should be required to be presented.
4. *Permanent Funds*—The Board will consider alternatives for reporting information about permanent funds.

If you have ideas about other ways you or other stakeholders might be interested in learning about the work the Board is doing to improve the financial reporting model, we'd love to hear from you!

GASB On the Horizon: Capitalization of Interest Cost.

The GASB currently is deliberating a project that reexamines the idea that the cost of borrowing during a construction period should be included in the cost of the capital asset.

The project is taking another look at the accounting and financial reporting requirements for capitalization of interest cost, with the goal of enhancing the relevance of capital asset information and potentially simplifying related reporting. The Board is reviewing the current guidance in light of the definitions of financial statement elements established in the GASB's conceptual framework.

A key question the Board is exploring is whether interest cost is a period expense relative to borrowing or is a necessary cost of the capital asset. Based primarily on the GASB's definition of an asset, the Board has tentatively decided to propose eliminating the requirement to capitalize interest cost. This proposal, if adopted after due process, would be adopted on a prospective basis.

What's next: After the conclusion of project deliberations over the summer and fall months, the Board is expected to vote on an Exposure Draft before the end of the year.

More information about the Capitalization of Interest Cost project.

U.S. Muni Bond Issuers Should Break Out Bank Loans - Rulemaker.

NEW YORK, Aug 23 (Reuters) – Municipal bond issuers should have to report their direct bank loans separately from other kinds of debt on their financial statements, according to the head of the group that sets disclosure standards for U.S. state and local governments.

That requirement would help "separate those disclosures and give the reader a perspective," David Vaudt, chairman of the Governmental Accounting Standards Board (GASB), told Reuters in an interview on Wednesday.

GASB in June proposed changes to the way states and cities report direct loans and private bond placements. By reporting such information separately in financial notes, readers can more easily identify and evaluate the controversial forms of borrowing that can pose risks to bondholders and credit ratings.

Investors in the $3.8 trillion municipal bond market have become increasingly concerned as the use of direct loans and private bond placements has grown in recent years.

Such direct debt is not always disclosed. When it is, the terms can be cumbersome for investors and taxpayers to discover.

Direct debt could also contain terms that potentially put a bank at the front of the line for repayment, ahead of bondholders.

Issuers use direct debt because the loans can be faster to accomplish than traditional public bond offerings, which usually require long, costly bond documents laden with financial disclosures. Sometimes, direct debt provides cheaper financing and fast liquidity.

But if a state or city violates the terms of a direct loan, it is easier for a single entity, like a bank, to call the loan or pursue some other remedy, Vaudt said.

“It’s much more difficult to go to all the bondholders and get some type of action taken,” he said.

The state of Arkansas disputed the idea that direct debt should be separated from public bond offerings on financial statements.

“Some may argue that direct placement bonds may have different terms but this could be true of any debt, regardless of the means by which the debt was incurred,” the state wrote in comments about the suggested rules. “The means of incurring debt does not alter the basic construction of the obligation.”

The deadline for comments is Sept. 15.

Reuters

by Hilary Russ

(Reporting by Hilary Russ in New York; Editing by Meredith Mazzilli)

Muni Bond Issuer and Underwriter Charged With Disclosure Failures.

The Securities and Exchange Commission today announced that a municipal financing authority in Beaumont, California, and its then-executive director have agreed to settle charges that they made false statements about prior compliance with continuing disclosure obligations in five bond offerings.

Also settling charges are the underwriting firm behind those offerings and its co-founder for failing to conduct reasonable due diligence on the continuing disclosure representations.

The SEC’s Enforcement Division uncovered the violations as part of a review of municipal issuers and underwriters that did not voluntarily self-report under the agency’s Municipalities Continuing Disclosure Cooperation (MCDC) Initiative. The Beaumont Financing Authority and the underwriter, O’Connor & Company Securities Inc., would have been eligible for more lenient remedies had they self-reported during the MCDC Initiative.

According to the SEC’s order, the Beaumont Financing Authority had issued approximately $260 million in municipal bonds in 24 separate offerings from 2003 to 2013 for the development of public infrastructure. For each of those offerings, a community facilities district established by Beaumont agreed to provide investors with annual continuing disclosures, including important financial information and operating data. From at least 2004 to April 2013, the district regularly failed to provide investors with the promised information. The Beaumont Financing Authority failed to disclose this poor record of compliance when it conducted the 2012 and 2013 offerings totaling more than $32 million. As a result, the bonds appeared more attractive and investors were misled about the likelihood that the district would comply with its continuing disclosure obligations in the future.

“Investors in municipal bonds depend on timely and complete continuing disclosure from municipal issuers,” said LeeAnn Ghazil Gaunt, Chief of the SEC Enforcement Division’s Public Finance Abuse Unit. “Issuers and underwriters will continue to be held accountable when they fail to provide investors with an accurate picture of past compliance with continuing disclosure obligations.”

In a complaint filed in the Eastern Division of the U.S. District Court for the Central District of California, the SEC charged Beaumont’s then-city manager Alan Kapanicas, who also served as the Beaumont Financing Authority’s executive director. According to the complaint, he approved and signed the misleading offering documents. Kapanicas agreed to settle the charges without admitting or denying the allegations, and pay a $37,500 penalty. He also agreed to be barred from participating in any future municipal bond offerings.

In consenting to an SEC order without admitting or denying the findings, the Beaumont Financing Authority agreed to retain an independent consultant to review its policies and procedures. It also is required to establish appropriate and comprehensive policies, procedures, and training for employees as well as designate a compliance officer in order to ensure compliance with continuing disclosure agreements.

O’Connor & Company Securities Inc. and its co-founder and former primary investment banker Anthony Wetherbee agreed to settle the charges against them without admitting or denying the SEC’s findings. O’Connor & Company Securities Inc. will pay a $150,000 penalty and retain an independent compliance consultant to review its policies and procedures. Wetherbee will pay a $15,000 penalty and serve a suspension from the securities industry for six months.

The SEC’s investigation was conducted by Steven Varholik and Jason H. Lee of the Public Finance Abuse Unit with assistance from Deputy Chief Mark R. Zehner, Jonathan Wilcox, and Creighton L. Papier. The investigation was supervised by Monique C. Winkler.

Aug. 23, 2017

This Week In Securities Litigation - SEC Municipal Actions

The Commission filed actions against investment advisers or their associates this week involving: compliance issues tied to political intelligence regarding government agencies like CMS; another centered on the payment of excessive fees; and a third involving unauthorized transactions.

Municipal securities were also a focus this week. A series of actions were filed centered on the failure to comply with continuous disclosure obligations. Those obligations typically require the issuer to periodically update the financial information on bonds sold to the public.

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Breach of duty: In the Matter of Municipal Finance Services, Inc., Adm. Proc. File No. 3-18139 (August 24, 2017) is a proceeding which names as Respondents the firm, a registered municipal advisor, Rick Smith, the founder of the firm, and Jon Wolff, a vice president at the firm. The firm was an adviser to the City under a written agreement. Essentially, it advised the City on offerings. In May 2013 the City issued certain bonds that included a continuing disclosure agreement. At the time the City had three outstanding bond issues, each of which also had continuous disclosure agreements. The 2013 agreement amended the disclosure obligations for the prior offerings by extending the time in which to furnish the financial information by one year and in other ways that were inconsistent with the previously issued bonds. Respondents failed to advise the City about these points and did not submit the agreements to EMMA for three years. The Order alleges violations of Exchange Act Section 15B(c)(1). To resolve the proceeding the firm will implement an undertaking which includes an obligation to adopt appropriate polices and procedures. In addition, each Respondent consented to the entry of a cease and desist order based on the Section cited in the Order. The firm was censured and will pay a penalty of $50,000. Each of the individual defendants agreed to pay a penalty of $8,000.

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Municipal securities/disclosure: SEC v. Kapanicas, Civil Action No. 5:17-cv-01704 (C.D. Cal. Filed August 23, 2017) is an action against Alan Kapanicas, the former executive director of the Beaumont Financing Authority which issued about $260 million in municipal bonds in 24 separate offerings from 2003 through 2013. For each offering the City of Beaumont, California agreed to provide investors with annual continuing disclosures. From at least 2004 through April 2013 the City failed to comply with this obligation. In offerings in 2012 and 2013 the City failed to disclose its poor financial condition. This made the bonds appear more attractive, misleading investors. The complaint alleged violations of Securities Act Sections 17(a)(2) and (3). Mr. Kapanicas resolved the action, consenting to the entry of a permanent injunction based on the Sections cited in the complaint. He also agreed to pay a penalty of $37,000. See Lit. Rel. No. 23920 (Aug. 24, 2017); *see also In the Matter of Beaumont Financing Authority*, Adm. Proc. File No. 3-18132 (August 23, 2017)(related action against the Financing Authority based on essentially the same facts; resolved with a series of undertakings and a cease and desist order based on Securities Act Sections 17(a)(2) and (3)); In the *Matter of O'Connor & Company Securities, Inc*., Adm. Proc. File No. 3-1131 (August 23 2017)(action based on same facts as above naming underwriter and a registered representative at the firm, Michael Wetherbee as Respondents; resolved with a cease and desist order based on Securities Act Sections 17(a)(2) and (3) and Exchange Act Section 15B(c)(1) and a censure of the firm which will pay a penalty of $150,000; Mr. Wetherbee is suspended from the securities industry, from serving in an supervisory capacity and from participating in a penny stock offering for six months; he will pay a penalty of $15,000).

by Thomas Gorman

August 25, 2017

Dorsey & Whitney LLP

MSRB Proposes to Refine the Municipal Fund Securities Data it Collects.

PHOENIX – The Municipal Securities Rulemaking Board is seeking comment on a draft plan to refine the data it collects regarding the investment options offered in 529 college savings plans and Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (ABLE) programs.

Both 529 plans and ABLE programs, the latter of which creates tax-advantaged savings accounts for individuals with disabilities and their families, are municipal fund securities. The MSRB regulates dealers that underwrite or sell interests in 529 plans and ABLE accounts. The MSRB first began collecting data about 529 plans in 2015 and will begin collecting data about ABLE programs in 2018 on a Form G-45 under Rule G-45 on reporting of information on municipal fund securities.

The data the MSRB collects, which is not publicly available, can be difficult to decipher under current reporting rules because different plans have different practices.

MSRB executive director Lynnette Kelly said in a release that the board is trying to be able to more accurately monitor these programs and spot potential risks and wrongful conduct.

"Essentially, our goal is to be able to more precisely compare apples to apples," Kelly said. "Fine-tuning the data we collect will allow the MSRB to make more accurate comparisons across 529 plans and ABLE programs, enhancing our ability to understand and monitor the market."

There are four main data points the MSRB is looking to either refine its collection of, or get more information from dealers about: program management fees, benchmark return percentages, performance by asset class, and investment option closing dates.

Form G-45 requires that underwriters report the amount of the program management fee assessed by the 529 plan. This fee is usually separately identifiable, but for some 529 plans this isn't the case. Instead, the program management fee is sometimes included in total fund operating expenses assessed by the underlying mutual fund in which the investment option exists. The MSRB is proposing to require dealers to report the program management fee separately on Form G-45.

Dealers are required to report the benchmark return percentage for each investment option offered by a 529 plan for specified periods. The MSRB has found that some investment options use custom or "blended" benchmarks for their performance, making it difficult to make apples-to-apples comparisons across plans. The MSRB is therefore proposing to require an underwriter to a 529 plan or an ABLE account to identify and provide annually the weighted value of each index that make up the benchmark.

G-45 requires that an underwriter report the asset classes in each investment option as of the most recent semi-annual period, but there is no mandate that they provide information about how the asset classes within an investment option are performing. The MSRB is proposing to collect that information to show how a particular asset class is performing on an annual basis.

In addition, sometimes an investment option offered in a 529 plan may be closed to new investors but allow current account owners to continue to invest in it even though it is "closed." A 529 plan may also close an investment option completely. In either case, the investment option data submitted for that investment option on Form G-45 doesn't differentiate between the two and can be contrary to analytical expectations, so that the MSRB isn't able to easily understand why. To clarify that, the board is proposing to require an underwriter to a 529 plan or an ABLE program to provide information during each semi-annual reporting period about whether an investment option was closed to new investors or closed completely.

Comments on the draft changes to Form G-45 are due by Sept. 21.

The Bond Buyer

By Kyle Glazier

08/23/17

SEC Charges Issuer, Dealer, Others in First Post-MCDC Enforcement Action.

PHOENIX – The Beaumont, Calif. Financing Authority, its former executive director, underwriter O'Connor & Company Securities Inc., and its co-founder have been charged by the Securities and Exchange Commission over false statements made about prior compliance with continuing disclosure obligations in five bond offerings.

All four entities agreed to settle the charges against them without admitting or denying the commission's findings.

This is the commission's first post-Municipalities Continuing Disclosure Cooperation initiative disclosure enforcement action.

The SEC said the parties would have been eligible for more lenient enforcement treatment under MCDC had they voluntarily reported the conduct under that program. But they did not so.

"Investors in municipal bonds depend on timely and complete continuing disclosure from municipal issuers," said LeeAnn Ghazil Gaunt, chief of the SEC enforcement division's public finance abuse unit. "Issuers and underwriters will continue to be held accountable when they fail to provide investors with an accurate picture of past compliance with continuing disclosure obligations."

The charges stem from bond issuances in 2012 and 2013. According to the SEC, BFA, located in Riverside County, had issued approximately $260 million in bonds in 24 separate offerings from 2003 to 2013 to help finance the development of infrastructure. For those offerings, City of Beaumont Community Facilities District No. 93-1, a community facilities district established by Beaumont that agreed to provide investors with continuing disclosures, including annual financial information and operating data. From at least 2004 to April 2013, the district regularly failed to provide investors with information in accordance with its continuing disclosure agreement.

"The Beaumont Financing Authority failed to disclose this poor record of compliance when it conducted the 2012 and 2013 offerings totaling more than $32 million," the SEC said. "As a result, the bonds appeared more attractive and investors were misled about the likelihood that the district would comply with its continuing disclosure obligations in the future."

The SEC charged BFA with negligence in committing securities fraud. BFA agreed to cease and desist from future securities law violations and to retain an independent consultant to review its policies and procedures. It also agreed to establish appropriate and comprehensive policies, procedures, and training for employees as well as designate a compliance officer in order to ensure compliance with continuing disclosure agreements.

Alan Kapanicas, 65, Beaumont's former city manager who also had been former executive director of BFA, agreed to pay a $37,500 penalty and be barred from participation in any future municipal bond offerings. The SEC said he "failed to exercise reasonable care" and "repeatedly either failed to read and understand the district's continuing disclosure agreements or disregarded their requirements." He was also charged with negligence in committing securities fraud.

O'Connor & Company Securities. based in Costa Mesa, Calif., agreed to pay a $150,000 penalty, for violating securities fraud laws and Municipal Securities Rulemaking Board Rules G-17 on fair dealing and G-27 on supervision. It agreed to retain an independent consultant to conduct a review of its policies and procedures as they relate to the investigation of the truthfulness and completeness of key representations contained in municipal securities offering documents.

Under the MCDC, underwriter penalties were set at $20,000 for each offering of $30 million or less containing materially false statements about continuing disclosures. Had it participated in the

MCDC, O'Connor & Company could have shaved $50,000 off its penalty.

Anthony Wetherbee, 71, the firm's co-founder and former primary investment banker, will pay a $15,000 penalty and be suspended from the securities industry for six months. He was also charged with negligence in committing securities fraud and violating the MSRB's fair dealing rule.

"Wetherbee, and through his actions, OCSI, failed to conduct adequate due diligence and, as a result, failed to form a reasonable basis for believing in the truthfulness of BFA's assertions that the district had complied with its prior CDAs contained in the BFA's 201 and 2013 official statements." the SEC said. Neither the banker nor his firm ever checked the MSRB's EMMA system to determine if the assertions were truthful and complete, the commission said.
Neither Beaumont nor O'Connor & Company could be reached for comment.

The conduct alleged by the SEC in this case is precisely what the MCDC was designed to bring attention to. Rolled out in spring 2014, the initiative promised underwriters and issuers would receive lenient settlement terms if they self-reported instances over the previous five years where issuers falsely said in offering documents that they were in compliance with their continuing disclosure agreements. In total, the initiative led to settlements with 72 issuers from 45 states and 72 underwriters representing 96% of the underwriting market. In December, the SEC announced it was finished with MCDC settlements and would turn its attentions to violators who did not report, whom the SEC considered to be at high risk for future violations.

The Bond Buyer

By Kyle Glazier

08/23/17

Regulatory Reform: BDA Submits Letter to U.S. Treasury Upcoming Report on U.S. Capital Markets and Securities Law & Regulation.

On August 22nd, Bond Dealers of America submitted a letter to the Treasury Department regarding its upcoming report on U.S. Capital Markets Regulation, which is due out in the fall of 2017. The letter is here for your review. Treasury staff specifically requested BDA's input on regulations, enforcement, and market liquidity.

BDA's letter focuses on the following issues:

- FINRA Rule 4210
- Retail Confirmation Rules
- Defining Municipal Securities as High Quality Liquid Assets (HQLA)
- U.S. Fixed Income Market Liquidity
- Regulatory Cost-Benefit Analyses
- Enforcement Improvements

The letter's sections are designed to provide Treasury Staff with a brief synopsis of the significant issues BDA member firms are confronting. If Treasury Staff requests additional information, BDA will engage member firms and deliver answers.

Treasury Report Series on Banking, Securities, and Capital Markets Regulation

In response to Executive Order 13772 (**Core Principles for Regulating the U.S. Financial System**), issued by President Trump on February 3, 2017, the U.S. Treasury will issue a series of reports on the U.S. financial regulatory system. The first report focused on the regulatory system for U.S. banks and credit unions. That report can be accessed here.

The second report, focused on U.S. capital markets regulation will be published in the fall of 2017

Implications of the Report

- The report will be the first statement with policy specifics and recommendations related to the U.S. capital markets by the Administration
- The report will be studied by Congress, especially as the Senate considers which financial regulatory reforms could garner the bipartisan support necessary to meet the 60-vote threshold

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FAF Trustees Agree to Retain GASB Scope Of Authority Policy Without Modification.

Norwalk, C T— August 22, 2017 — The Board of Trustees of the Financial Accounting Foundation today approved a report, *Three-Year Review of GASB Scope of Authority: Consultation Process Policy*, that leaves unchanged the Governmental Accounting Standards Board's (GASB) scope of authority policy.

That policy outlined a pre-agenda consultation process for the GASB and the FAF's Standard-Setting Process Oversight Committee to follow in determining whether information the GASB might consider for standard-setting activity is "financial accounting and reporting information" within the scope of the GASB's standard-setting mission. The November 2013 FAF report that introduced the policy and the related consultation process called for the FAF to review the effectiveness of the consultation process three years after implementation.

"I'm very pleased that the Trustees have affirmed the effectiveness of the consultation process, which strikes the right balance by maintaining the independence of the GASB, while ensuring appropriate oversight by the Trustees," said FAF Chairman Charles H. Noski. "We would like to express our thanks to the stakeholders who shared their thinking with us and helped us reach our conclusions."

The Trustees also agreed to review the policy again within five years.

Additional information is available on the GASB Scope of Authority page on the FAF website.

MSRB Seeks Comment on Refining Data Collected about 529 Plans and ABLE Programs.

Washington, DC – To support its oversight responsibilities, the Municipal Securities Rulemaking Board (MSRB) is seeking comment on a draft plan to refine data elements the MSRB collects relating to the investment options offered in 529 college savings plans and Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (ABLE) programs.

The MSRB aims to clarify data it collects from dealers acting as underwriters to 529 plans and data it will collect from dealers acting as underwriters to ABLE programs, and collect additional information on investment plan options.

“Essentially, our goal is to be able to more precisely compare apples to apples,” said MSRB Executive Director Lynnette Kelly. “Fine-tuning the data we collect will allow the MSRB to make more accurate comparisons across 529 plans and ABLE programs, enhancing our ability to understand and monitor the market.”

These investment vehicles are municipal fund securities. The MSRB regulates dealers that are underwriters to and dealers that sell interests in 529 plans and ABLE programs. The MSRB first began collecting data about 529 plans in 2015 and will begin collecting data about ABLE programs in 2018. Data collected on MSRB Form G-45 allows the MSRB and other regulators that are charged by statute with examining dealers to analyze and compare 529 plans and ABLE programs and monitor the market for potential risks and wrongful conduct. The data as collected by the MSRB currently is not available to the public.

Comments on the MSRB’s draft changes to Form G-45 should be submitted no later than September 21, 2017. [Read the request for comment.]

Date: August 22, 2017

Contact: Jennifer A. Galloway
202-838-1500
jgalloway@msrb.org

MSRB Amends Municipal Fund Security Advertising Requirements.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) received approval from the Securities and Exchange Commission (SEC) on Friday, August 18, 2017 to amend MSRB Rule G-21(e), on municipal fund security product advertisements by municipal securities dealers. The amendments will be effective on November 18, 2017. Read the approval notice.

“These changes ensure investors are alerted to the potential risks of investing in particular investment options of municipal fund securities,” said MSRB Executive Director Lynnette Kelly.

The approved amendments reflect changes to SEC rules governing money market fund advertisements and improve regulatory consistency of disclosure requirements for those municipal fund securities that invest in money market funds.

The approved amendments limited to Rule G-21(e) were originally introduced as part of a broader request for comment on updating and harmonizing certain provisions of the MSRB’s municipal securities dealer advertising rule and establishing similar advertising regulations for municipal advisors. The MSRB continues to consider the comments received on the other aspects of its broader proposal.

Date: August 21, 2017

Contact: Jennifer A. Galloway, Chief Communications Officer
202-838-1500

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NABL: SEC Charges Issuer, Underwriter That Did Not Report Under MCDC.

The SEC announced that a municipal financing authority in Beaumont, California, and its then-executive director, have agreed to settle charges that they made false statements about prior compliance with continuing disclosure obligations in five bond offerings. The underwriting firm behind those offerings and its co-founder settled charges for failing to conduct reasonable due diligence on the continuing disclosure representations.

The SEC press release, with links to the SEC orders and complaint, is available here.

Counting Munis as Liquid Even If Markets Are Dry.

Municipal bonds historically have been an investment that lets you sleep easy. Their low-risk reputation has been tested in the last decade by some high-profile bankruptcies, with Puerto Rico and Detroit's being the most prominent. But in recent years, big banks have been scooping up more state and local debt than ever before. Now Congress is pushing to make the sector more even attractive to banks. The magic charm would be qualifying certain municipal bonds as High-Quality Liquid Assets, or HQLA. The question is whether that label might get slapped on bonds that are certainly high quality, but may not be really, truly liquid.

1. What's so desirable about being HQLA?

In the aftermath of the 2008 financial crisis, regulators wanted to make sure that banks didn't run out of money in the next credit crunch. They began requiring them to calculate what's called a liquidity coverage ratio (LCR) to test whether they hold enough cash and easy-to-sell assets to weather a short-term liquidity shock, when borrowing might be hard and buyers might disappear for less-than-sterling assets. The most valuable assets in this calculation are ones that can be sold quickly and without discount — High-Quality Liquid Assets.

2. What is Congress trying to do?

Regulators currently have left municipals out in the cold as far as HQLA is concerned, worried that too many municipal securities would be hard to sell in a hurry. Now, the House and Senate are moving to allow banks to treat certain municipal bonds as High-Quality Liquid Assets when calculating their liquidity ratio. The House Financial Services Committee unanimously approved a bill that would treat qualifying municipal bonds as high-quality liquid assets. The original form of the bill labeled them Level 2A assets in the existing regulatory framework, though an amendment changed that to 2B. The Senate has its own version of the bill which has secured largely bipartisan support, though it's at a standstill right now as their legislative calendar is inundated with other priorities, such as tax reform.

3. What's the difference between Level 2A and Level 2B?

Assets designated as Level 2B are treated more conservatively than those labeled Level 2A as they are considered to be more of a credit risk, and therefore less high quality, and not as liquid. In calculating their liquidity ratio, banks are required to impose a larger haircut, or discount, and 2B assets can only constitute 15 percent of total HQLA holdings. The haircut level for Level 2B assets ranges from 25 to 50 percent; no specific haircut percent has been proposed for municipal bonds so far.

4. Will Congress end up passing this?

Most likely, yes — even if not this year, with Congress “up to its eyeballs” in other business, says Philip Fischer, who heads up municipal research for Bank of America Merrill Lynch. After all, you’ll be hard-pressed to find a legislator that doesn’t want to make municipal debt, a key financing tool used in their own jurisdictions, more attractive. It’ll get states and counties better rates and may marginally increase demand in the short-term.

5. Are banking regulators on board?

They’ve been divided on the HQLA question since 2016, when the Federal Reserve said it would allow HQLA treatment of state and municipal bonds that “meet the same liquidity criteria that currently apply to corporate debt securities.” The other two major financial regulating agencies, the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency, haven’t taken that step. The disagreement among agencies leaves banks in an awkward position, Fischer said. Neither the OCC or the FDIC have issued a statement in support of or against this latest bill.

6. Are munis really high-quality liquid assets?

That depends on whom you ask. The vast majority of municipals are certainly high quality, given the taxing power of the government agencies that issue them, but it’s also an extremely fragmented market that negatively affects just how liquid each issue may be at any given moment. They lack a dedicated exchange, so pricing can be disjointed, says Jeffrey Lipton, head of municipal research at Oppenheimer & Co. These peculiarities will require regulators to look beyond a rating to assess the trade volume and outstanding float of each specific bond before granting it HQLA status, he said. While this all will make the narrative more complicated, it shouldn’t disqualify the sector from the race.

7. Why does this matter?

If municipal bonds gain regulatory par with certain corporate debt issues, they figure to become an even more popular part of a bank’s portfolio. As of March 31, U.S. banks held a record $554 billion, or about 14.5 percent, of all outstanding municipal debt. Thanks goes in large part to President Barack Obama for this boom in bank municipal holdings. He signed a stimulus package in 2009 that gave banks enhanced tax incentives to purchase municipals. Granting certain municipals HQLA status now will likely see banks demand for municipals increase further. This would spark higher prices (and lower yields) for state and local debt. For President Donald Trump, a stronger market for municipal bonds might mean a better chance for his plan for $1 trillion in proposed infrastructure spending to come to fruition.

Bloomberg Markets

By Kristy Westgard

August 21, 2017, 2:00 AM PDT

Dallas Bond Deal for Statler Hotel Rehab Being Probed by SEC.

The Dallas Morning News has been digging into an unusual bond deal being used to help underwrite the Statler Hotel redevelopment in downtown Dallas, a massive improvement project that includes a building the News will soon call home.

At issue: The sale in 2016 of $26.5 million in municipal bonds backed by future tax incentives that the city of Dallas granted to the developer.

DMN reporters Miles Moffeit and Terry Langford have unearthed that officials with the Securities and Exchange Commission are questioning “at least four people involved in the $230 million renovation of the historic hotel and adjoining former library.”

From the Dallas Morning News:

> One focus of the SEC inquiry is the sale last year of $26.5 million in municipal bonds backed by future tax incentives that the city of Dallas granted to the developer under what’s called tax-increment financing. Cities use such deals to lure developers to build in specific areas with little economic growth.
>
> Under these programs, any increases in property-tax collections in these zones are rebated to developers over time and up to a certain limit — $46.5 million in the case of the Statler project.
>
> Rather than wait to collect these tax payments over decades, Centurion decided to raise money immediately by selling bonds that in the future would be paid off by the tax rebates.
> The IRS ruled last month that the bonds do not qualify for the tax exemption that investors were promised. The agency did not explain its reasoning, but Mike Culler, a public-finance tax lawyer for Squire Patton Boggs, said the deal probably failed to show a benefit to the public.
> The Wisconsin agency that was behind the bond sale said it has appealed the IRS decision.

This hasn’t been the first time that the News has put a spotlight on the project.

The Statler Hotel redevelopment budget, which has risen 50 percent over the past three years, is built on several government programs and hefty tax incentives, according to the Dallas paper.

And earlier this year, Moffeit and Langford reported on the IRS probing aspects of the project’s financing.

The new complex will include boutique shopping, fine dining, business offices, and hotel rooms, according to the Statler Hotel website. The Dallas Morning News will rent the old library building, which is part of the development as well as a national historic site.

The Texas Monitor

By Trent Seibert – August 18, 2017

[SR-FINRA-2017-027 - Proposed Rule Change.]

Proposed Rule Change Relating to Capital Acquisition Broker Rules 203 (Engaging in Distribution and Solicitation Activities with Government Entities) and 458 (Books and Records Requirements for Government Distribution and Solicitation Activities)

Financial Industry Regulatory Authority, Inc. ("FINRA") is filing with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change to adopt Capital Acquisition Broker Rules 203 (Engaging in Distribution and Solicitation Activities with Government Entities) and 458 (Books and Records Requirements for Government Distribution and Solicitation Activities) that would apply established "pay-to-play" and related rules to the activities of member firms that have elected to be governed by the Capital Acquisition Broker ("CAB") Rules and that engage in distribution or solicitation activities for compensation with government entities on behalf of investment advisers.

Read the Proposed Rule Change.

BDA to Submit Comment Letter: DOL Fiduciary Rule.

On August 7, 2017, in response to a Request for Information published by the Department of Labor, the BDA submitted a comment letter to the DOL focused on how it should amend the Fiduciary Duty Rule and the Principal Trading and Best Interest Contract Exemption.

BDA Comment Letter Summary — Primary Areas of Focus

- The Department of Labor and the Securities and Exchange Commission should work together to formulate an improved best interest standard of care
- The rule and exemptions unnecessarily prohibit access to the benefits of a dealer's inventory
- BDA urges the Department to remove the anti-arbitration clause from the Best Interest Contract Exemption
- The term "sufficiently liquid" should be removed from the principal trading exemption

Applicability Date Letter: Submitted July 2017

Recently, the BDA submitted a comment letter focused on whether the Department of Labor should delay the January 1, 2018 Best Interest Contract Exemption and Principal Trading Exemption applicability date. The letter is here.

- BDA's letter expresses strong support for delaying the applicability date of the exemptions until the Department of Labor has finished its review of the rule and proposed amendments to improve the exemptions

Additional Documents

DOL Enforcement Guidance is here.
Morgan Lewis Memo on Requirements of the Rule as of June 9th is here.

Bond Dealers of America

August 8, 2017

Labor Department Seeks 18-Month Delay in Fiduciary Rule.

Has proposed pushing the Jan. 1, 2018, compliance date to July 1, 2019

The Labor Department is proposing to delay the fiduciary rule's compliance deadline by 18 months, a move that experts say suggests the retirement-savings rule will emerge from a re-evaluation with significant revisions.

The agency, which has been reassessing the Obama-era rule's economic impact, said Wednesday in a court document that it submitted a proposal to push the Jan. 1, 2018, compliance date to July 1, 2019. The document, filed as part of a lawsuit in the U.S. District Court for the District of Minnesota, also says the Labor Department is considering loosening restrictions on the types of transactions that are prohibited under the rule, including insurance products and rollovers of individual retirement accounts.

The fiduciary rule "is likely here to stay, but its impact could be significantly reduced over the next few years if exemptions from the rule are significantly expanded," said Jamie Hopkins, a professor at the American College of Financial Services.

The Labor Department couldn't immediately comment.

The first phase of the rule, requiring financial-advice providers to act in retirement savers' best interest, took effect June 9. The request for a delay would give agency officials more time to conduct their economic-impact review and give industry players more time to weigh in. Last month, the Labor Department issued a request for information, writing that it "is interested in the possibility of regulatory changes that could alter or eliminate contractual…requirements," among other potential changes.

In Wednesday's filing, Labor Secretary Alexander Acosta said the agency had also proposed changes to how certain transactions are treated under the rule. Transactions such as IRA rollovers and insurance products including annuities could become exempt under the final rule, the document suggests.

"There is a lot on the table here," considering the questions the Trump administration has raised about the impact of the rule's compliance costs and legal liabilities, said Erin Sweeney, an attorney at Miller & Chevalier Chartered who represents parties in litigation regarding fiduciary obligations.

Ms. Sweeney said the delay would give the financial-services industry more time to comply with the regulation, while at the same time preventing firms from "starting down a compliance path only to do a zig-zag" if the rule is revised.

For retirement savers, the delay doesn't change the requirement that financial advisers put clients' interests before their own. It does, however, make it the best-interest standard harder to enforce. The rule as written by the Obama administration included a provision that would allow investors to bring class-action suits against advisers they say violated their fiduciary duty. While such suits don't typically yield big paydays for individual investors, the potential cost to advisers and firms was meant to prevent violation of the rule.

“Until you have a contract, it’s hard to imagine a situation where a lawyer brings a case,” Ms. Sweeney said.

Some financial-industry executives cheered the delay proposal. “I think that everyone was hoping for a delay,” said Ronald Kruszewski, chief executive at Stifel Financial Corp. “It’s encouraging that the DOL is taking a look at both protecting consumers and protecting choice.”

Investor watchdogs, meanwhile, expressed concern. “Retirement savers need and deserve a fully enforceable best interest standard backed by real restrictions on conflicts,” said Barbara Roper, director of investor protection at the Consumer Federation of America. “The biggest impediment to investors receiving the full benefits of the rule is uncertainty over its fate, and a delay of this length only contributes to that uncertainty.”

The delay notification stems from a lawsuit brought by Thrivent Financial for Lutherans against the Labor Department. The organization has challenged the department’s authority surrounding the rule and approach to how clients can bring cases against financial advisers they say violated their fiduciary duty. The case is one of several that has been levied against the department.

Expected to publish Thursday, the delay proposal was submitted to the Office of Management and Budget, the gatekeeper for revisions and delays to U.S. regulations.

The Wall Street Journal

By Lisa Beilfuss

Updated Aug. 9, 2017 5:23 p.m. ET

Write to Lisa Beilfuss at lisa.beilfuss@wsj.com

Market Wary of Planned MSRB Primary Offering Concept Release.

PHOENIX – Market participants are a bit mystified about what the Municipal Securities Rulemaking Board could be looking for in its upcoming concept release on primary offering practices, although some groups are working to update their own guidelines.

Issuers, dealers, and municipal advisors all told The Bond Buyer that they are unaware of any pressing problems or uncertainties in primary offering practices or MSRB rules governing primary offerings.

The board announced last month that it plans to put out a lengthy concept release sometime in the next couple of months that will seek market input on numerous aspects of primary offering practices. Concept releases are the generally the precursor to proposed new rules or rule changes. But unlike the federally-mandated municipal advisor rulemaking the board has spent much of its time on during the last several years, the genesis of this effort is more difficult to pin down.

“They’ve been talking about this for a little bit,” said John Vahey, managing director of federal policy for Bond Dealers of America. Vahey noted that the MSRB has now moved through the rulemaking mandated by the Dodd-Frank Act, which included setting up a new regulatory regime for muni advisors, and is now taking a look at its other rules. The MSRB has multiple rules that touch on primary offering practices including Rule G-11, on primary offering practices and Rule G-32, on disclosures in connection with primary offerings, as well as rules on the collection of certain data.

“We don’t yet know what this concept release is going to look like,” said Vahey. “Our members pound on the table about niche issues, but to my knowledge they’re not really focused on MSRB rules on primary offerings.”

“Nothing is jumping off the page at me,” he said.

MSRB executive director Lynnette Kelly recently hinted at a connection between the board’s primary offering effort and the Securities and Exchange Commission’s August 2015 enforcement case against Edward Jones. In that case, its first on primary market pricing of bonds, the SEC ordered the St. Louis based, retail-oriented dealer to pay more than $20 million for overcharging retail customers for new munis.

The SEC found that instead of selling new bonds to customers at the initial offering price as required, Edward Jones, acting as a co-underwriter, and the former head of its syndicate desk, took bonds into the firm’s own inventory and then improperly sold them to customers at higher prices. In some cases, the firm failed entirely to underwrite and offer the new bonds to investors until secondary market trading began.

The firm has since dropped out of the negotiated underwriting business. But while sources acknowledge that the Edward Jones case is likely a factor in the MSRB’s effort to update its rules, they said they generally prefer for the market to produce guidance or update practices rather than regulators.

“That is a process that we as a trade association are doing as well,” said Leslie Norwood, a managing director, associate general counsel, and co-head of municipal securities at the Securities Industry and Financial Markets Association. Norwood said that SIFMA has long maintained a model document for a master agreement among underwriters, a contract setting forth the legal relationships between syndicate members in a negotiated offering. Norwood said SIFMA feels that master agreement has served well, but is nonetheless working on updating it and hopes to have that done in the next few months.

“We’re looking at it as market participants working together contractually,” Norwood said. “The MSRB is certainly looking at it from a rules-based approach. We’re following the MSRB’s process towards rule change.”

Emily Brock, director of the Government Finance Officers Association’s federal liaison center, said GFOA members want to address the topic of primary offering disclosure in a new best practice that will be considered for approval this year, but that it has not lobbied the MSRB to propose further regulations on dealers or muni advisors. The MSRB does not regulate issuers, but does have a Dodd-Frank mandate to protect them.

“There are gray areas,” Brock said. “But no, we’re not asking for more regulation.”

The National Association of Municipal Advisors is also unsure of the MSRB’s specific aim, but has a general list of topics for which it will watch.

“NAMA will develop comments in response to specific practices the MSRB’s upcoming proposal will address,” said Susan Gaffney, the group’s executive director. “Some areas we will watch for include – ensuring issuer objectives are being followed, including structuring decisions; whether or not MSRB rules correspond with new Internal Revenue Service issue price rules; and if there are ways to enhance EMMA so that additional data can be utilized when pricing bonds.”

The MSRB has not committed to a timetable for the concept release, but has indicated it would likely be sometime in the fall.

The Bond Buyer

By Kyle Glazier

08/08/17 07:03 PM EDT

Ex-Los Angeles Investment Banker Gets Extra Five Years for Tribal Bond Fraud.

NEW YORK — A former Los Angeles investment banker imprisoned for 11 years for a stock manipulation scheme was sentenced on Friday to an additional five years for misappropriating proceeds from a bond issue by a Native American tribe.

Jason Galanis, 47, was sentenced by U.S. District Judge Ronnie Abrams in Manhattan, who also ordered him to forfeit more than $43 million.

"There simply aren't enough words to fully express how profoundly sorry and remorseful I am," Galanis, once dubbed "Porn's New King," said before the sentence was imposed. "I stand before you humiliated, utterly humiliated."

Abrams said that while she was pleased to learn that Galanis had been teaching other inmates in prison, his conduct, which prosecutors say harmed both investors and the Oglala Sioux Nation in South Dakota, warranted a substantial punishment.

According to prosecutors, beginning in 2014, Galanis and his father, John, persuaded the Wakpamni Lake Community Corp, an affiliate of the Oglala Sioux Nation, to issue $60 million in municipal bonds.

Together with his father and five associates, Galanis and his co-defendants then misappropriated bond proceeds, prosecutors said. They said he obtained $8.5 million for himself to fund a lavish lifestyle.

The scheme left bond investors holding worthless securities, and the tribal corporation with no way to make interest payments due on the bonds, prosecutors said.

Galanis pleaded guilty to the scheme in January.

He had already pleaded guilty in July 2016 to a separate scheme to manipulate shares of the now defunct reinsurer Gerova Financial Group Ltd.

In February, U.S. District Judge Kevin Castel sentenced Galanis to 11 years and three months in prison for the Gerova scheme, also ordering him to forfeit $38 million, a mansion in Bel Air, California, and a $7 million apartment in New York.

Galanis was dubbed "Porn's New King" by Forbes magazine in 2004 after buying the nation's largest processor of credit card payments for internet pornography.

Three years later, the SEC fined him $60,000 after alleging he prepared false accounting information for Penthouse International Inc, in which he held a large stake.

By REUTERS

AUG. 11, 2017, 5:42 P.M. E.D.T.

(Reporting By Brendan Pierson in New York; Editing by Andrew Hay)

MSRB Examining Primary Offering Practices and Rules.

PHOENIX – The Municipal Securities Rulemaking Board is preparing to issue a concept release seeking market feedback on a broad range of primary offering practices, MSRB executive director Lynnette Kelly said Friday.

The concept release, a type of document the MSRB uses to seek input on potential rule changes, is large and should be released sometime in the next two months, Kelly said following the conclusion of the MSRB's recent board meeting of its fiscal year, which ends on Sept. 30.

The MSRB has a number of rules that touch on primary offering practices, Kelly said, such as MSRB Rule G-11, on primary offering practices, MSRB Rule G-32, on disclosures in connection with primary offerings, and the collection of certain data.

MSRB executive director Lynnette Kelly said the MSRB wants to ask a lot of questions about primary offering practices.

Kelly specifically mentioned the Securities and Exchange Commission's August 2015 enforcement case against Edward Jones and whether that might lead to rule changes. In that case, its first on primary market pricing of bonds, the SEC ordered the St. Louis based, retail-oriented dealer to pay more than $20 million for overcharging retail customers for new munis.

The commission found that instead of selling new bonds to customers at the initial offering price as required, Edward Jones, acting as a co-underwriter, took bonds into its own inventory and then improperly sold them to customers at higher prices. In some cases, the firm failed entirely to underwrite and offer the new bonds to investors until secondary market trading began.

In the wake of that case, SEC staff openly questioned whether industry practices needed to change.

Work on the concept release dates from around that time, or slightly afterwards, according to Kelly.

"This has been in motion 12-18 months," she said.

The announcement of the release came a day after the MSRB reraised decades-old concerns about issuers selecting or influencing the selection of underwriter's counsel prior to primary offerings, an issue Kelly described as a "tangent" to the concept release's aim, as the MSRB has no authority to mandate issuer behavior.

Before adjourning, the board also agreed to file with the SEC changes to its Rule G-34 on CUSIP numbers. If approved by the SEC, the change would, for the first time, require non-dealer municipal advisors to be subject to the CUSIP requirement for new issue securities that are sold in competitive offerings.

Dealers had complained about the MSRB's "clarification" that they are required to obtain CUSIP numbers for new issue securities sold in private placement transactions, including direct purchases, where the dealer is the placement agent.

The rule change includes an exception for dealers and municipal advisors from the CUSIP number requirements. Under the exception, CUSIP numbers are not needed for direct purchases by banks, their non-dealer control affiliates and consortiums, where the dealer or municipal advisor reasonably believes the purchaser's intent is to hold the securities to maturity.

Kelly also noted that the deadline for registered MAs to take and pass the Series 50 qualification exam is Sept. 12, but that 128 of the 633 MA firms registered with the MSRB still do not have a single person who has passed the test.

The MSRB has been reaching out to MAs about this and has some concerns about the implications for issuers and for dealers who rely on the independent registered municipal advisor or IRMA exemption from MA registration when they provide advice to issuers. A pilot Series 54 exam for MA principals should be available in 2019, said Kelly.

The board agreed to revise draft amendments to Rule G-21 on dealer advertising, and to file them, along with a proposed new Rule G-40 on municipal advisor advertising, with the SEC. The MSRB said its proposed amendments to Rule G-21 would, among other things, enhance the MSRB's fair-dealing provisions by harmonizing Rule G-21 with certain of FINRA Rule 2210's content standards for advertisements, including testimonials. Similarly, proposed new Rule G-40 would set forth general provisions, address professional advertisements and require principal approval for advertisements by MAs.

Kelly said the board next week will announce new members and officers slated to take their seats on the MSRB's Board when it begins its new fiscal year Oct. 1.

The Bond Buyer

By Kyle Glazier

Published July 28 2017, 12:45pm EDT

MSRB Announces New Officers and Board Members for Fiscal Year 2018.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) today announced new officers and members of its Board of Directors who will begin their terms on October 1, 2017. Lucy Hooper, Executive Vice President at Davenport & Company LLC, will serve as Chair of the Board. Arthur Miller, Managing Director, Goldman, Sachs & Co., will serve his second term as Vice Chair.

"The Board revised the MSRB's strategic goals this year to address the evolving dynamics of the municipal securities market," said MSRB Executive Director Lynnette Kelly. "Our newly elected leadership represents a strategic combination of market expertise and continuity, and will provide a steady hand as we pursue these new goals."

New members joining the Board for four-year terms beginning October 1, 2017 are William M. Fitzgerald, Sr., Founder, Fitzgerald Asset Management, LLC; Manju S. Ganeriwala, Treasurer, Commonwealth of Virginia; Seema Mohanty, Founder and Managing Director, Mohanty Gargiulo, LLC; Donna Simonetti, former executive director at JP Morgan; and Beth Wolchock, Managing Director, Oppenheimer & Co. Inc.

“I am delighted that we have attracted such a diverse and experienced class of new Board members, who will undoubtedly help advance the MSRB’s compliance, transparency and education objectives,” Kelly said.

The MSRB also announced that Board member Gary Hall, whose term was set to expire September 30, 2017, will serve an additional two years on the Board to complete the term of Pat Sweeney, who recently resigned from the Board due to a job change.

The Board, which has 11 independent public members and 10 members from firms regulated by the MSRB, including broker-dealers, banks and municipal advisors, establishes regulatory policies and oversees the operations of the MSRB. All Board members must be knowledgeable about the municipal securities market and were selected from more than 90 applicants.

Other Board members are J. Anthony Beard, Renee Boicourt, Robert Clarke Brown, Julia Harper Cooper, Ron Dieckman, Richard Ellis, Jerry W. Ford, Richard Froehlich, Lakshmi Kommi, Kemp J. Lewis, Chris Ryon, Edward J. Sisk and Dale Turnipseed.

MSRB Officers and New Board Members, Fiscal Year 2018

Chair-Elect Hooper has been an MSRB Board member since 2014. She currently serves on the Nominating and Governance Committee. Ms. Hooper is Executive Vice President at Davenport & Company LLC where she has served as Director of Fixed Income Sales and Trading since 2000. She joined the firm in 1981 and has held various fixed-income positions. Earlier she worked as a trader and in fixed income sales for First and Merchant National Bank, which became Sovran Bank. From 2000 to 2008, Ms. Hooper served as a subject matter expert on the MSRB’s Professional Qualifications Advisory Committee. She is past chair of the Board of Trustees at Randolph-Macon Woman’s College (now Randolph College), where she graduated magna cum laude and Phi Beta Kappa with a bachelor’s degree.

Vice Chair-Elect Miller has been an MSRB Board member since 2014 and will serve his second term as Vice Chair in the 2018 fiscal year. He is Managing Director of the Public Sector & Infrastructure Group in the Investment Banking Division of Goldman, Sachs & Co. Mr. Miller joined Goldman Sachs in 1985, where he serves as Co-head of the Public Finance Strategies and Analytics Group. He has previously worked in the firm’s New Product Development Group, and the Fixed Income Research Group. He started his career as an associate attorney at Mudge Rose Guthrie Alexander & Ferdon. Mr. Miller earned a bachelor’s degree from Princeton University, a master’s degree from the University of North Carolina, a law degree from Duke University School of Law, and a master’s of law from New York University.

William M. Fitzgerald, Sr. is the Founder of Fitzgerald Asset Management LLC where he manages debt portfolios for institutional and high-net worth investors. He also serves as the Founder and Chief Investment Officer at Global Infrastructure Asset Management LLC. where he manages investment vehicles that finance infrastructure projects with equity and debt. Prior to his current role, Mr. Fitzgerald was until 2008 a managing director and chief investment officer at Nuveen Asset Management, which he joined in 1998, and was ultimately responsible for $67 billion in assets under management. Mr. Fitzgerald has a bachelor’s degree from Beloit College and a master’s degree in business administration from the University of Chicago Booth School of Business. He also is a Chartered Financial Analyst.

Manju S. Ganeriwala is Treasurer of the Commonwealth of Virginia where she is responsible for overseeing the management of the Commonwealth's investment portfolio, issuance of general obligation bonds and appropriation-backed bonds for debt-issuing authorities, management of outstanding debt, and administration of the State's insurance and unclaimed property programs. She is chair of the Commonwealth's Treasury Board and serves on 10 other public boards, including the Virginia Housing Development Authority, the Virginia Port Authority, the Virginia Resources Authority, and the Virginia College Savings Plan. Prior to becoming Treasurer in 2009, Ms. Ganeriwala served as a deputy secretary of finance at the Commonwealth of Virginia, where she advised the governor on all state financial matters, including crafting the state budget, developing revenue forecasts, issuing debt and retaining the Commonwealth's "AAA" bond rating. Her earlier service to the Commonwealth includes leadership positions serving as the chief financial officer for the Virginia Department of Medical Assistance Services and as an associate director of the Virginia Department of Planning and Budget. She is a member and past president of the National Association of State Treasurers (NAST), a member and past chair of the State Debt Management Network, and a member of National Association of State Auditors, Comptrollers and Treasurers (NASACT). Ms. Ganeriwala is the recipient of multiple public finance awards including the NAST Harlan Boyles-Edward T. Alter Distinguished Service Award (2016) and the Jesse M. Unruh Award (2014), the Virginia Women in Public Finance Lifetime Achievement Award (2015), the Northeastern Women in Public Finance and the Bond Buyer, Trailblazing Women in Public Finance Award (2015), and NASACT's President's Award (2013). Ms. Ganeriwala has a bachelor's degree from the University of Bombay and a master's degree in business administration from the University of Texas at Austin.

Seema Mohanty is the Founder and Managing Director of Mohanty Gargiulo, LLC where she oversees client development, relationship management and daily operations of the capital markets advisory business, including derivatives and municipal bond pricing. She serves as swap advisor for sophisticated municipal securities issuers, including government and non-profit clients with large and complex derivatives portfolios. Prior to her current role, Ms. Mohanty was managing director and head of municipal derivatives and structured products at UBS, where she also managed the firm's first book of credit facilities for tax-exempt clients. Earlier she served as managing director at Morgan Stanley, where she managed the issuer derivatives marketing group, and worked at JP Morgan early in her career. Ms. Mohanty has a bachelor's degree from the University of Michigan and a master's degree in business administration from the University of Chicago Booth School of Business.

Donna Simonetti is a former executive director at JP Morgan, where she was director of fixed income compliance. In that capacity, she advised the firm's public finance department on compliance issues regarding the sales, trading, underwriting and investment banking of municipal securities. Prior to joining JP Morgan in 2008, Ms. Simonetti was managing director principal at Bear Stearns and Co., Inc., where she oversaw compliance activities in the firm's municipal bond and public finance departments. Previously she was a senior vice president and senior business analyst in the municipal capital markets division at First Albany Capital, which she joined in 1981 and earlier served as a municipal credit analyst and institutional municipal sales principal. Ms. Simonetti began her career as a municipal credit analyst at Fidelity Management and Research Company. Throughout her career, Ms. Simonetti served on numerous industry committees and practice groups, including the MSRB's Uniform Practice and Glossary Committees. She currently serves on the finance committee of the board of The Telling Room, a non-profit writing center. Ms. Simonetti has a bachelor's degree from the State University of New York at Albany and a master's of business administration from Northeastern University.

Beth Wolchock is Managing Director and Municipal Principal at Oppenheimer & Co. Inc., where she leads the firm's municipal securities underwriting activities. In a career spanning more than 40 years, Ms. Wolchock has undertaken a progression of roles and responsibilities in underwriting and public investment banking arenas. Prior to joining Oppenheimer in 2013, Ms. Wolchock held positions at CastleOak Securities, LLP where she created the firm's municipal department and established its underwriting business; at Jackson Securities, LLC, where she was a branch manager and oversaw sales and trading; and at Artemis Capital Group (later Dain Rauscher Inc.), where she was a senior vice president and managed the firm's syndicate department. Earlier in her career, Ms. Wolchock was an underwriter and syndicate specialist successively at PaineWebber Inc., Kidder Peabody and Dean Witter Reynolds, Inc. Ms. Wolchock was a member of the Board of Governors for the Municipal Bond Club of New York. She has a bachelor's degree from the State University of New York at Buffalo.

Date: August 2, 2017
Contact: Jennifer A. Galloway
202-838-1500
jgalloway@msrb.org

MSRB Modernizes Customer Account Transfer Rule.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) received approval from the Securities and Exchange Commission (SEC) to amend MSRB Rule G-26, on customer account transfers, to modernize the rule and promote a uniform customer account transfer standard for all municipal securities dealers. The amendments will be effective on January 29, 2018. Read the approval notice.

"The MSRB recognizes the need to revisit its rules over time to ensure that they continue to achieve their purpose and reflect the current state of the municipal market," said MSRB Executive Director Lynnette Kelly. "Updating our customer account transfer standards increases efficiency and reduces confusion and risk to investors, ultimately allowing them to better move their municipal securities to a dealer of their choice."

Rule G-26 was adopted in 1986 as part of an industry-wide initiative to create a uniform customer account transfer standard for all dealers engaged in municipal securities activities. Today's amendments update Rule G-26 to better harmonize with the customer account transfer rules of other self-regulatory organizations to promote the uniform standard.

The amendments are part of a broader retrospective review of the MSRB's uniform practice rules, which previously resulted in changes to modernize close-out procedures and support the industry-wide shift to a T+2 settlement cycle. Read more about the MSRB's regulatory efficiency initiatives.
Date: July 31, 2017

Contact: Jennifer A. Galloway, Chief Communications Officer
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What Happened to L.A.'s Push to End its Pay-to-Play Reputation? So Far, Not Much.

As an election loomed earlier this year, Los Angeles politicians were eager to prove that moneyed interests had not bought City Hall.

Five City Council members called for a ban on campaign contributions from real estate developers seeking city approvals, saying it would address the perception that L.A. engages in “pay-to-play” politics. One of them went even further, pushing for full public financing, a system that would bankroll campaigns with taxpayer money instead of checks from wealthy donors.

Six months later, neither proposal has had a hearing at City Hall.

Although both were referred to a council committee headed by council President Herb Wesson, no meetings have been scheduled so far. The effort to overhaul campaign funding did not come up last week, when Wesson laid out an ambitious agenda for the next 2 ½ years.

City leaders say they are still committed to reviewing the proposals. But neighborhood leaders and activists have been voicing doubts about whether they are serious.

“Look, it’s gone nowhere,” said Walter Hall, who serves on the board of the Greater Valley Glen Council. “Nothing has come out of the process since it started in January.”

The neighborhood council recently endorsed the developer donation ban, partly to prod city officials. Hall said his group also took action in response to a Times investigation into a real estate project known as Sea Breeze. The Times found more than $600,000 in contributions from donors linked directly and indirectly to the developer of that project, which was approved despite planning department opposition.

The proposals from city lawmakers to overhaul campaign finance laws were unveiled in January, when L.A.’s elected officials were fighting Measure S, a ballot proposal that would have imposed sweeping restrictions on real estate development. Measure S backers argued that wealthy developers use campaign contributions to persuade city politicians to approve out-of-scale building projects.

Developers spent millions to defeat the proposal, and voters rejected it in March.

Since then, backers of Measure S say City Council members have failed to follow through on their promises of reform. The proposed ban on developer donations is “completely dead as far as we can see,” said Jill Stewart, director of the Coalition to Preserve L.A., which pushed for passage of Measure S. “It was a lot of talk.”

City officials, in turn, say the proposals are very much alive — and will have a hearing at Wesson’s rules committee before the end of the year.

“I don’t kill anything. I don’t bury anything,” Wesson said. “But right now, I’ve got a rollout of an agenda that I think takes some priority.”

That agenda includes efforts to form a municipal bank, build more affordable housing, draft legislation to protect immigrants and hold a series of events aimed at improving race relations. Wesson’s committee also has been under the gun to finish crafting regulations for marijuana businesses before January, when licensed sales of recreational cannabis become legal across California.

The proposal to ban developer donations was co-authored by Councilman David Ryu, who was elected in 2015 after pledging not to accept such contributions. Nick Greif, a Ryu policy aide, said his boss wants a ban in place before fundraising begins for the 2020 city election — which leaves council members with time to deliberate.

“That said, we don’t want things to linger,” Greif added.

Councilman Paul Krekorian, who also sponsored the proposal, said he remains committed to keeping campaign finance reform at the top of this year’s agenda.

“We need to find solutions that build greater trust with the people we represent and make the entire system fairer and more transparent,” he said in a statement.

Three other politicians who backed the proposed ban on developer donations were running for reelection at the time — and faced challengers who had pledged not to accept donations from real estate developers needing city approvals.

Councilman Mike Bonin, who signed on to the developer donation ban, also brought forward a separate proposal for full public financing. Under such a system, candidates seeking public funding would have to get a minimum number of small donations from their constituents to demonstrate their campaigns are viable, then forgo any more fundraising.

Bonin spokesman David Graham-Caso said the plan is still being worked on. The councilman, he said, has not yet decided exactly when it would go to voters — in June or November of next year.

The public financing proposal will probably face opposition, said Michele Sutter, co-founder of the activist group Money Out Voters In, which supports the move.

“The folks who profit from this system and who get to wield greater influence as a result of it are not that interested in relinquishing that advantage,” she said.

A previous push for public financing in L.A. was abandoned after years of scrutiny. During those discussions, a city analyst warned public financing could be “very costly.”

If the system becomes too expensive, Angelenos may be reluctant to put additional public funds into political campaigns, said Jessica Levinson, president of the Los Angeles City Ethics Commission, which could be asked to vet the two campaign finance proposals.

“It can be tagged as welfare for politicians,” she said.

Levinson said that, even with a public financing system, wealthy donors could continue pouring unlimited amounts of money into independent committees that spend lavishly to support candidates. She also questioned whether a donation ban targeting developers would withstand a legal challenge. Other critics have argued that such a ban unfairly demonizes builders of much-needed housing.

In Valley Glen, however, the neighborhood council wants L.A. to go further by also prohibiting donations from developers who are “likely to submit plans” for projects in the future.

“Why would an out-of-town developer, or any developer, whose only business is to make money, give money [to a campaign] unless he thinks it’s going to be to his benefit?” said Hall, the neighborhood council member.

The Los Angeles Times

by Emily Alpert Reyes and David Zahniser

July 30, 2017

Conflicted Counsel: The MSRB Cautions Against Issuer Selection of Underwriter's Counsel.

Long-time municipal market insiders can recall an era when pay-to-play was rampant and kickbacks were just the cost of doing business. But with the advent of rules of professional conduct and greater transparency, today's municipal market participants operate with competence, accountability and integrity. The Municipal Securities Rulemaking Board (MSRB) carefully monitors market practices to identify threats to market integrity. One troubling practice from the market's opaque past has persisted—the practice known as "issuer designation of underwriter's counsel."

Underwriters' counsel are important members of the deal team. They assist underwriters with due diligence responsibilities, including conducting thorough and independent reviews of municipal securities issuers' offering documents. The heightened regulatory scrutiny on the adequacy of due diligence performed by underwriters of municipal securities in the wake of the Securities and Exchange Commission's Municipalities Continuing Disclosure Cooperation (MCDC) initiative underscores the importance of underwriters retaining independent, expert counsel.

Yet some municipal securities issuers designate the counsel of their underwriters, or exert undue influence in the selection. When counsel is selected by—and perhaps beholden to—the issuer, the counsel's allegiance and ability to scrutinize the issuer's documents with the necessary independence, rigor and expertise are called into question. Ultimately, there is the potential for investor harm if important and material information about the municipal securities or the issuer is misrepresented or omitted, whether purposefully or unintentionally. The underwriter also may suffer financial loss, reputational harm and fraud liability if it relies on insufficiently qualified or potentially conflicted counsel.

The MSRB first shone a light on this practice in 1998, articulating the view that underwriters "must be free to select counsel in whom they have confidence and who are free of the possibility of any conflicting allegiances to other parties involved in the underwriting process." Since that time, several industry groups have offered best practices encouraging less issuer involvement in the selection of underwriter's counsel. The MSRB has issued a market advisory to restate its concerns about the practice.

The MSRB recognizes that issuers often have compelling reasons for their involvement in selecting underwriter's counsel, such as managing costs, retaining counsel already familiar with the issuer's operations and finances and, in some cases, supporting women- or minority-owned firms. However, this practice gives rise to real or perceived conflicts of interest that undermine the integrity of the municipal market. This practice should not be a part of public finance.

The Bond Buyer

By Lynnette Kelly

Published July 27 2017, 2□34pm EDT

Lynnette Kelly is Executive Director of the Municipal Securities Rulemaking Board

FINRA and the MSRB Issue FAQs on Bond Mark-Up Disclosure.

On July 12, 2017, the Financial Industry Regulatory Authority (FINRA) and the Municipal Securities Rulemaking Board (MSRB) published new implementation guidance on the bond mark-up disclosure requirements set to take effect next spring. Under amended FINRA Rule 2232 and amended MSRB Rules G-15 and G-30, effective May 14, 2018, dealers will be required to disclose on retail customer confirmations their mark-ups on most municipal and corporate bond transactions, calculated from the bond's prevailing market price (PMP).

Read the FAQs.

Town Supervisor: Bonding Adviser Removed During Investigation.

Babylon Supervisor Rich Schaffer has removed the town's municipal finance adviser pending the outcome of a U.S. Securities and Exchange Commission investigation.

The SEC on June 30 asked town employees to preserve documents related to municipal bonding work by the adviser, Doug Jacob, a subcontractor for the town and former town comptroller, for evidence as part of a civil investigation, documents show.

The request to Town Attorney Joe Wilson states the agency believed the town may possess "documents and data that are relevant to an ongoing investigation."

The letter, provided to Newsday by town spokesman Kevin Bonner, asks Babylon officials to preserve documents "created on or after Jan. 1, 2015 that concern the town's issuance of general obligation bonds in 2015 and 2016; Red Hill Professional Services, Inc; and Douglas F. Jacob."

Jacob, 56, of Pelham in Westchester County, owns Red Hill, a general services company founded in 2007 that provides workers to the town. Jacob served as comptroller for the town for a decade before resigning in December 2003.

The town does not contract directly with Red Hill or Jacob, who has an office in the Town Hall Annex. Babylon officials contract with Herbert L. Greene, a solid waste consultant, who subcontracts to Jacob and Red Hill to provide workers for several town departments.

The SEC letter did not provide details about the focus of the investigation. An agency spokeswoman declined to comment.

But Schaffer said Jacob had shown him a separate letter from the SEC to Jacob about the investigation indicating it focuses on whether Jacob had violated the federal Dodd-Frank Act, which aims for better financial industry regulation, including making sure advisers put the municipality's interests ahead of their own.

At issue are Jacob's dual roles as financial adviser to the town and head of a company that provides workers for the town, Schaffer said.

"The question is whether or not they believe there's a conflict of interest" between Jacob's two roles and his ability to provide unbiased advice on bonding, Schaffer said. "I don't believe there is but I will leave it up to the professionals."

Red Hill employees in 2016 worked in 16 town departments including transportation, drug and alcohol counseling, the fire marshal and the town attorney's offices, according to documents. One of the employees is Jacob's son, Max Jacob, who has worked in the controller's office since 2010.

Doug Jacob is an SEC-registered municipal financial adviser and for more than a decade has been helping the town with annual bonding by acting as a "liaison between the town, the brokerage firms, and bond counsel," according to Bonner. Jacob did not respond to requests for comment. A message left at a number listed for Red Hill — the same number as Jacob — was not returned.

The town bonded for $65 million in 2015 and 2016. The town has not bonded yet this year.

Wilson in a July 8 letter told town employees that they must abide by the SEC's request to "preserve and retain" documents, noting the agency's letter "should not be construed as an indication that the town has done anything improper or violated the law."

Local governments frequently use advisers to help them decide how and when to issue the bonds and how to invest proceeds from the sales, according to the SEC's website. The Dodd-Frank Act, passed in 2010, required advisers to register with the SEC.

Greene in 2016 submitted invoices to the town for himself, Jacob and 32 Red Hill workers totaling $1.5 million, according to documents.

Jacob invoiced $115,712 for his own services that year as a subcontractor, according to Bonner. Greene's contract has one-year extensions running through the end of 2018.

Jacob was one of five top town officials who in 1997 were indicted on felony charges of falsifying documents filed with the state in order to hide a deficit.

Four of the officials were acquitted. Jacob was convicted in 1998 of eight misdemeanor counts of second-degree offering a false instrument for filing and was sentenced to probation.

Schaffer, who is also chairman of the Suffolk County Democratic Party, maintains the arrests were a political vendetta by then-Suffolk County District Attorney James Catterson Jr., a Republican. Schaffer said he believes Jacob was convicted of "actions every other town on Long Island takes" in moving money between the capital and operating funds.

Schaffer said Jacobs was used as a financial adviser on bonding because "he has a lot to offer the town and he's one of the main reasons why we have one of the highest bond ratings of any municipality on Long Island."

If the SEC finds a problem with Jacob's work, he will be permanently removed as adviser — but the town will continue to subcontract with his company, Schaffer said.

"Red Hill provides a very valuable service to the town and allows us to continue to operate as we do and provide the services that we do in the 2 percent tax cap world," he said.

Newsday.com

Updated July 30, 2017 6:00 AM

By Denise M. Bonilla

[FINRA And The MSRB Issue FAQs On Bond Mark-Up Disclosure: WilmerHale]

On July 12, 2017, the Financial Industry Regulatory Authority (FINRA) and the Municipal Securities Rulemaking Board (MSRB) published new implementation guidance on the bond mark-up disclosure requirements set to take effect next spring.1 Under amended FINRA Rule 2232 and amended MSRB Rules G-15 and G-30, effective May 14, 2018,2 dealers will be required to disclose on retail customer confirmations their mark-ups on most municipal and corporate bond transactions, calculated from the bond's prevailing market price (PMP).3

Key insights from the new implementation guidance are summarized below. The guidance, provided in the form of frequently asked questions (FAQs), attempts to clarify when and how mark-ups should be disclosed and how to determine PMP, among other topics. Nevertheless, the FAQs may raise new questions as dealers work to overhaul their systems to comply with the controversial new requirements before the May 2018 deadline. FINRA and the MSRB coordinated on the publication of the FAQs, consulting with the Securities and Exchange Commission (SEC) in advance. Both FAQs use the same numbering scheme (followed here), with minimal differences between the two versions.

[Continue reading.]

Last Updated: July 25 2017

Article by Paul R. Eckert, Bruce H. Newman and Daniel Martin

WilmerHale

[MSRB Holds Quarterly Board Meeting.]

Washington, DC – The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) held its quarterly meeting July 26-27, 2017 where it discussed municipal advisor professional qualifications, primary market practices and market transparency developments related to promoting a fair and efficient municipal securities market.

Electronic Municipal Market Access (EMMA®) Website
Consistent with the MSRB's new strategic goals that emphasize further evolving the [EMMA website] into a comprehensive transparency platform that meets the needs of municipal market participants and the public, the Board reviewed public and user feedback to improve the usefulness and usability of the EMMA website, and provided direction to staff on its priorities.

Municipal Advisor Professional Qualifications
The Board discussed professional qualifications requirements of municipal advisors, including the September 12, 2017 deadline for municipal advisors to take and pass the [Municipal Advisor Representative Qualification Examination (Series 50)]. As of July 25, 2017, 128 municipal advisor firms registered with the MSRB did not have at least one person qualified with the Series 50 exam or enrolled to become so qualified. The Board considered potential implications for municipal entity and obligated persons clients that hire municipal advisors and for dealers who may rely on the "IRMA" exemption, which provides assurance that municipal entities have engaged an independent registered municipal advisor to act as their fiduciary. The Board requested staff to continue its

education and outreach campaign to inform market participants, and will closely monitor the issue. The MSRB is holding a webinar at 3:00 p.m. ET on August 10, 2017 called, "What to Expect from Your Municipal Advisor," which will include a discussion on the potential implications for municipal entities of the upcoming municipal advisor exam deadline. Register for the webinar here.

The Board also discussed the next step in the development of the municipal advisor principal exam, which is to conduct a job analysis of municipal advisor principals to further develop the content outline for the principal exam. The MSRB anticipates that the principal exam will be available as a pilot in 2019.

Primary Offering Practices

The Board discussed comments received on proposed changes to MSRB Rule G-34, on CUSIP numbers, new issue and market information requirements, and agreed to file amendments with the SEC. The changes seek in part, to provide clarity and flexibility for dealers and municipal advisors in obtaining CUSIP numbers for new issues of municipal securities. The proposed changes would clarify the rule's definition of "underwriter" to reflect the MSRB's longstanding public interpretation that placement agents, when engaged in private placements, including direct purchases, are underwriters for purposes of Rule G-34. The proposed changes would amend the rule to make all municipal advisors in competitive sales of municipal securities subject to the CUSIP number requirements, thereby addressing any potential regulatory inefficiencies in competitive sales of new issues. The proposed changes would also establish an exception for dealers and municipal advisors from the CUSIP number requirements, and for dealers from the depository eligibility requirements, for direct purchases by banks, their non-dealer control affiliates and consortiums thereof, where the dealer or municipal advisor reasonably believes the purchaser's present intent is to hold the securities to maturity.

The MSRB is currently engaged in a multi-year review of primary offering practices to identify any necessary revisions to existing rules or the need for guidance to support existing protections for municipal securities investors and issuers. At its meeting, the Board agreed to publish a concept proposal seeking industry and public input on possible changes to the primary offering rules and practices of dealers in municipal securities such as aspects of MSRB Rule G-11, on primary offering practices, and MSRB Rule G-32, on disclosures in connection with primary offerings, and data points collected under the rule.

Advertising Rules

The Board discussed comments received on draft amendments to the MSRB's proposal to update and harmonize certain provisions of its municipal securities dealer advertising rule, MSRB Rule G-21, with those of other financial regulators, and to create similar advertising standards for municipal advisors. In response to market feedback, the Board agreed to revise draft amendments to Rule G-21 and to file them, along with proposed new Rule G-40, on municipal advisor advertising, with the Securities and Exchange Commission (SEC). The proposed amendments to Rule G-21 would, among other things, enhance the MSRB's fair-dealing provisions by harmonizing Rule G-21 with certain of FINRA Rule 2210's content standards for advertisements, including testimonials. Similarly, proposed new Rule G-40 would set forth general provisions, address professional advertisements and require principal approval for advertisements by municipal advisors.

Reporting of Information on Municipal Fund Securities

The Board discussed the MSRB's collection of data relating to municipal fund securities, specifically, ABLE (Achieving a Better Life Experience Act) programs and 529 college savings plans, and directed staff to continue work on several projects related to such data collection.

Date: July 28, 2017

Contact: Jennifer A. Galloway, Chief Communications Officer
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MSRB Publishes Market Advisory Addressing Conflicts of Interest with Issuer Designation of Underwriter's Counsel.

The Municipal Securities Rulemaking Board (MSRB) today published a market advisory addressing the practice of municipal securities issuers designating the counsel of their underwriters, or influencing the underwriter's selection of counsel. The MSRB's advisory restates concerns first raised by the organization in the 1990s that investors may be harmed in a variety of ways in any offering process that does not properly utilize the review, guidance and counseling of an independent, competent and appropriately critical underwriter's counsel. To minimize conflicts of interest and to reduce any influence by an issuer that may call into question the qualifications or independence of the underwriter's counsel, the MSRB suggests that an issuer refrain from involving itself in the underwriter's selection of counsel or that an issuer's involvement in such process be minimal and limited to concerns regarding competency, conflicts of interest and the avoidance of excessive costs.

Read the market advisory.

MSRB's G-42 Guidance Notes Ambiguities for MAs in Conduit Issues: Burr & Forman

Last week, the MSRB issued "guidance" on the application of Rule G-42 conduct standards for Municipal Advisors in conduit issues. The "guidance" highlights ambiguities from the "for or on behalf" language in the MA Rule when applied to conduit issues (where the MA interacts with both the municipal issuer and the conduit borrower).

Beyond issue-spotting though, the "guidance" merely urges care and defers to the SEC for after-th--fact "facts and circumstances" determinations. In fact, it includes a "don't ask us" disclaimer: These "are interpretive issues that are solely within the jurisdiction of the SEC. Requests for interpretation regarding such issue should be direct to the SEC's Office of Municipal Securities."

Extended to MAs in December 2015, Rule G-42 sets out conduct and disclosure standards following from an MA's statutory fiduciary duty to Municipal Entities ("ME") and duty of care to Obligated Persons. In a conduit borrowing, the governmental issuer is an ME and the conduit borrower is an Obligated Person (but might also be an ME).

There are six take-aways from the guidance:

1. First and always ask "who is the client": The issuer, conduit borrower or both? Who pays your fee isn't dispositive.
2. Next determine if the client is an ME (fiduciary duty) or OP (duty of care). If the conduit borrower also is an ME, then ME status (and your obligations) trump their status as an OP/conduit

borrower.
3. Assess actual and potential conflicts of interest now and throughout the representation.
4. Disclose and update those conflicts.
5. Mitigate those conflicts.
6. Withdraw if those conflicts are irreconcilable.

MSRB's guidance discusses potential conflicts and issues in five scenarios involving MAs' involvement in conduit borrowings.

- First, where an Issuer Hires MA for / to Conduit Borrower, consider, disclose and mitigate potential conflicts of interest (arising from the Issuer's payment of the MA's fee).
- Second, where an MA knows (or reasonably should) that an ME client will be seeking and passing along advice to a OP conduit borrower, then the MA should consider, disclose and mitigate potential conflicts arising from an actual or implicit "dual representation." The discussion notes that the MA's fiduciary duty to an ME may mean that the MA cannot "disclose away" actual conflicts. A scope limitation within an engagement may offer appropriate protections, together with thoughtful termination provisions. Clearly, an engagement letter should disclaim any advice to non-clients.

The same considerations apply to explicit dual representations, where:

- Third, the OP conduit borrower hires the MA to provide advice to both borrower and issuer.
- Fourth, dual but "independent" representations in which the OP and ME each hire the same MA.
- Fifth, dual but "independent" representations in which the OP and ME each hire the same MA, but the engagement is staffed by separate MAPs for each client (because the MA enterprise itself owes obligations to each client). So "Chinese Walls" may help mitigate, but won't avoid, conflicts of interest.

The guidance is MSRB Regulatory Notice 2017-13 (July 13, 2017), here.

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House Committee Unanimously Approves Bill to Classify Municipal Bonds as High-Qualify Liquid Assets.

The House Financial Services Committee on July 25 unanimously voted to report the Municipal Finance Support Act of 2017, H.R. 1624, to the full House of Representatives for consideration. The legislation, introduced by Representative Luke Messer (R-IN), would allow large banks to count some of their municipal bond investments, including tax-exempt housing bonds, as high-quality liquid assets (HQLAs) under federal bank liquidity standards. NCSHA and several other state and local organizations supported the bill.

H.R. 1624 would modify a regulation the Federal Reserve, the Department of Treasury, and the Federal Deposit Insurance Corporation (FDIC) released in October 2014 to ensure that large banks hold enough liquidity to continue making payments during periods of financial stress. Under the rule, banks with at least $250 billion in assets (or $10 billion in foreign exposure on their balance sheet) must maintain a minimum liquidity coverage ratio (LCR) comprised of certain financial investments that are considered HQLAs. The rule took effect at the beginning of 2017.

A previous summary of H.R. 1624 by NCSHA can be found here.

The legislation has 18 cosponsors: Republicans Randy Hultgren (IL), Peter King (NY), Bruce Polquin (ME), Richard Hudson (NC), Carlos Curbelo (FL), and Dennis Ross (FL); and Democrats Carolyn Maloney (NY), Gregory Meeks (NY), Robin Kelly (IL), Terri Sewell (AL), Kyrsten Sinema (AZ), Eleanor Holmes Norton (DC), Gwen Moore (WI), Marc Veasey (TX), Brad Sherman (CA), Ron Kind (WI), Nydia Velazquez (NY), and John Delaney (MD).

There is a similar bill in the Senate introduced by Senators Mark Warner (D-VA) and Mike Rounds (R-SD), S 828. Though the bill has been referred to the Senate Banking Committee, the Committee has not scheduled action on it.

JULY 28, 2017

BDA Submits Comment Letter: Proposed Limited Safe Harbor from FINRA Debt Research Rules for Desk Commentary.

BDA Comment Letter Summary

- BDA believes the best solution to help facilitate the timely flow of commentary to investment managers would be a clear interpretation of “research report” that demonstrates that the vast majority of desk commentary is not fundamental research
- If and when FINRA proposes rule text for the safe harbor, it should provide clarity on desk commentary content

Recent BDA Actions

- **BDA Comment Letter:** On July 14th, BDA submitted a comment letter in response to FINRA’s request for comment on a proposed safe harbor for desk commentary. The letter is here.
- **Morgan Lewis Memo:** In May, Amy Natterson Kroll of Morgan Lewis joined BDA’s conference call to discuss the proposed safe harbor. A memo on the proposal authored by Ms. Kroll can be read here.
- **FINRA Proposal:** FINRA has requested comment on a proposed safe harbor from the debt research rule specifically for desk commentary distributed to certain institutional customers.

Bond Dealers of America

July 17, 2017

MSRB Announces Topics to be Discussed at July Board Meeting.

The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) will meet July 26-27, 2017 in Washington, DC, where it will discuss the upcoming municipal advisor professional qualification deadline, public and user feedback on its Electronic Municipal Market Access

(EMMA®) website and other rulemaking and policy topics.

View the MSRB Board of Director's meeting discussion items.

New MSRB Fee to be Assessed on Underwriters to 529 College Savings Plans.

The Municipal Securities Rulemaking Board (MSRB) today filed with the Securities and Exchange Commission (SEC) amendments to MSRB Rule A-13, on underwriting and transaction assessments for brokers, dealers and municipal securities dealers, to assess a new annual fee on dealers acting as underwriters to 529 college savings plans. The amendments are effective immediately. The new fee is based on a percentage of total aggregate plan assets as of December 31 each year, as required to be reported by an underwriter on MSRB Form G-45. The MSRB will invoice for the new underwriting fee beginning in May 2018.

A key strategic priority of the MSRB is the financial sustainability of the organization, facilitated by the fair and equitable assessment of fees across all regulated entities. The new underwriting fee will defray the MSRB's costs of operating and administering its rulemaking, market transparency and educational activities concerning dealers acting as underwriters to 529 college savings plans.

View the SEC filing.

Study Finds EMMA has Reduced Price Volatility, Price Differentials.

WASHINGTON – The Municipal Securities Rulemaking Board's introduction of EMMA and its subsequent requirements for dealers to disclose near-real time information on the system has narrowed measures of market inefficiencies like price volatility and price differentials but has not eliminated the advantage institutional investors have over retail investors, according to a study from Komla Dzigbede.

The paper was one of several chosen to be presented as part of the Brookings Institute's annual Municipal Finance Caucus here. Dzigbede, an assistant professor at Binghamton University, was invited to present the paper during one of the conference's sessions.

The study, published this month, explores secondary market trade data on California state general obligation bonds issued between 2005 and 2014. That period of time was chosen to cover the span before EMMA was launched in March 2008 as well as the time after the MSRB's 2009 introduction of requirements for dealers to report information to the new system. The requirements touched on, among other things, auction rate securities disclosure and all-electronic official statement dissemination standards. They also included mandatory disclosure of trade information on a near real time basis to EMMA.

EMMA and the establishment of the subsequent disclosure requirements to the system have helped investors by giving those in the market more information to use as they carry out transactions, Dzigbede said.

Regulators "must respond more effectively to counteract disparities in information flow and rent-seeking behavior, which creates unequal opportunities for the retail investor segment of the market," said Komla Dzigbede, assistant professor at Binghamton University.

Average daily trade prices rose in the post-regulatory period while trade price differentials decreased by an average of $0.18. Dzigbede said that the trade price rise may be attributable to investors' gradually demanding increased yields as more information on bonds became available because of the increased disclosures. That increase in information may also be the underlying cause of the trade price differential decline as investors were more able to assess the value of bonds, he said.

Trade volatility, which Dzigbede said is generally associated with an inefficient market, declined by 0.26% in the post-EMMA regulation period, according to the data. While that is good news and shows the regulations were effective, Dzigbede said that the data shows that institutional investors benefited more from the changes, seeing a higher margin of decline for volatility than retail investors.

He said that finding confirms "evidence on the inequities in trade pricing that tend to favor large investors over small investors in municipal securities secondary markets."

So while the regulation was generally good for the market and "should give renewed impetus" to such regulatory efforts, there is still work to be done to lessen the advantage institutional investors have, Dzigbede said.

He added that regulators "must respond more effectively to counteract disparities in information flow and rent-seeking behavior, which creates unequal opportunities for the retail investor segment of the market." One way to do that, according to Dzigbede, is to identify spaces within the market that are attractive to retail investor trades and target protective regulatory schemes there.

He also said it is important for the MSRB and Securities and Exchange Commission to help educate investors, especially small ones, about things like complex, sophisticated debt instruments and the mechanics of trading portfolios and the risks associated with them.

Karol Denniston, a partner with Squire Patton Boggs in San Francisco who specializes in bankruptcy matters who was chosen to comment on Dzigbede's paper, said that the market is "never going to be an even playing field" between institutional and retail investors.

Institutional investors have "more information, bigger purchases, and better access to the market," Denniston said. "I'm not sure if we're ever going to see a level of disclosure that is going to balance out" retail and institutional investors.

She agreed with Dzigbede that regulators need to focus more on promoting and ensuring strong disclosure in the municipal market but said the enforcement of the disclosure provisions is particularly important right now as states like California deal with funding pensions and other post employment benefits.

"The premise of the paper is good, disclosure will make the market more efficient," Denniston said.

"[But] there needs to be some mechanism to enforce [disclosure regulations] so people take it seriously. We need some teeth."

Her comments are drawn from experiences she has had while working with troubled entities. She said that she sees some issuers having financial troubles that are reluctant to report them because they want to try to keep up appearances. That lack of disclosure is especially problematic as states and municipalities confront a variety of fiscal challenges like pensions, she said.

The Bond Buyer

By Jack Casey

Published July 18 2017, 11:13am EDT

[Electronic Trading: Strengthening Best Execution in the Muni Market.]

In preparing the municipal bond market in late 2015 for a new order-handling standard, the Municipal Securities Rulemaking Board took note of an important trend. “As the availability of electronic systems that facilitate trading in municipal securities increases,” the MSRB wrote, “dealers need to determine whether these systems might provide benefits to their customer order flow.”

The MSRB’s guidance underscored a development seen in other markets and asset classes when electronic trading takes hold. As regulators move to raise execution standards, electronic trading comes to play a significantly more important role in the compliance process.

That is especially the case in a market as complex and fragmented as municipal bonds. Though about half the size of the U.S. corporate bond market in value, the muni market features about 20 times the number of securities and about 10 times the number of issuer entities, by one researcher’s estimate. Those totals include a complicated variety of coupons and structures, as compliance officers can attest. It’s not surprising that a large number of muni issues trade rarely.

Electronic trading proves especially valuable in markets such as municipal bonds, where liquidity is highly dispersed and discontinuous. Market participants gain the power to conduct price discovery efficiently across a broader range of potential counterparties, identifying trading opportunities not available to them through typical voice and messaging channels. Adding to the power of electronic trading in the municipal bond market in the last several months is the emergence of an “all-to-all” marketplace, in which dealers as well as asset managers can interact with one another on an anonymous basis.

In helping solve the muni market’s liquidity puzzle, electronic trading has, in effect, raised the bar on best execution. Market participants who embrace fully integrated electronic trading strengthen their ability to achieve and validate best execution. Overall, electronic trading puts them in a better position to assess market quality across multiple sources of liquidity, audit their activities, measure their outcomes, fine-tune their policies and practices, manage operational risks and respond to customers.

Rule G-18’s Execution Standard

Reflecting the muni market’s complexities and its over-the-counter status, regulatory views on best execution have evolved slowly. It was only last year when the Municipal Securities Rulemaking Board put into effect its first explicit rule for best execution.

MSRB Rule G-18 creates “an order-handling and transaction-execution standard.” The rule requires dealers to exercise “reasonable diligence” to determine the best market in the security it seeks to trade on behalf of a customer. Then dealers must buy or sell securities in that market so that the resulting price to the customer “is as favorable as possible under prevailing market conditions.”

In its guidance, MSRB instructed dealers to establish policies spelling out how they meet the standards, and to review these annually in light of changes in market conditions and market structure, among other factors. The standard does not apply to investors with at least $50 million in assets as long as they affirm that they meet the MSRB definition of “sophisticated municipal market professionals,” or SMMPs. Also excluded are inter-dealer trades, though customer trades cleared through another dealer are covered by the standard.

It was in the context of identifying the “best market” that the MSRB took note of the growing importance of electronic trading in its guidance in late 2015.

Since then, the emergence of the “all-to-all” electronic marketplace has begun to change the context for addressing the MSRB’s standard. By bringing together bids and offers of major national and regional dealers as well as institutional investment managers, the “all-to-all” environment provides a previously unavailable, dynamic view of market quality and conditions incorporating a wide range of liquidity sources. Potential buyers and sellers see not only levels offered by dealers, but those offered by investment managers as well.

Operational Benefits

With these pricing and liquidity insights come a number of significant operational advantages. At the pre-trade stage, pricing history and current quotes are easily viewed, as well as evaluative data from two widely used sources. Pre-trade and post-trade integration with order management systems helps manage exposures and reduce operational risks. Rounding out these efficiencies is automated settlement.

Of prime importance to the compliance process is the detailed audit trail generated by electronic trading. This gives compliance staff a record of market conditions and levels available at the time of the trade. Audit trails open the way for post-trade analysis and provide relevant data for the annual reviews of dealers’ policies and procedures required by Rule G-18. For investment managers, the audit trail can help them assess the quality of execution they are receiving.

As has been seen in other fixed-income categories, electronic trading starts slowly and then adoption rates over time tend to accelerate. Though in its early stages, all-to-all trading is poised to become a more important factor in the consolidation of muni market liquidity as investment managers grow more comfortable “making” prices as well as “taking” them. In that scenario, best execution — how to achieve and validate it efficiently and credibly — looks likely to remain among the leading factors driving increased adoption of electronic trading in the muni market in the months and years ahead.

The Bond Buyer

By Hardy Manges

July 10 2017, 9:00am EDT

Hardy Manges is Head of Municipal Dealer Sales at MarketAxess, responsible for new business development and strategy, training, and relationship management with dealers in the institutional municipal market.

[SIFMA Asks SEC to Reject 'Inefficient' MSRB Account Transfer Proposal.]

WASHINGTON – The Securities Industry and Financial Markets Association is urging the Securities and Exchange Commission to reject proposed Municipal Securities Rulemaking Board changes on customer account transfers, saying the amendments are inefficient and that the board would be better off simply cross-referencing other regulators' rules.

Bond Dealers of America is not asking the SEC to disapprove the proposal, but is seeking several changes including extending the period between when the changes are adopted and when they become effective to give dealers more time to adjust to a number of amendments taking effect then.

The SIFMA and BDA comments respond to an SEC filing from the MSRB containing proposed changes to MSRB Rule G-26 on customer account transfers. Rule G-26 currently requires dealers to cooperate in the transfer of customer accounts and includes various procedures for carrying out the transfer process. A transfer occurs when a customer decides to transfer an account from one dealer, the carrying party, to another, the receiving party. G-26 lays out specific time frames during which the transfers must occur as well as limits on why the receiving party can protest a customer's transfer instruction.

The rule was adopted in 1986 and is part of an industry-wide initiative to create a uniform customer account transfer standard, according to the MSRB. The standard is primarily driven by the Automated Customer Account Transfer Service (ACATS) of the National Securities Clearing Corp. (NSCC). ACATS is a system that facilitates the transfer of securities from one trading account to another at a different brokerage firm or bank.

The MSRB's rule, which governs municipal security-only customer account transfers, is similar to other self-regulatory organization rules, such as New York Stock Exchange's Rule 412 and Financial Industry Regulatory Authority's Rule 11870. The MSRB periodically modifies its requirements under G-26 to conform to provisions in the parallel rules of other self-regulatory organizations, which have changed somewhat in recent years, so that there is a consistent standard.

SIFMA echoed its past comments to the MSRB in its most recent letter, saying that Rule G-26 in its current form is unnecessary and that dealers would be better off having the MSRB cross-reference the other regulators' rules, particularly FINRA Rule 11870.

"SIFMA and its members feel the proposed amendments take an approach that is a step backward; instead of supporting rulebook simplification and harmonization and promoting automation to facilitate faster transactions, the proposed amendments are inapposite," wrote Leslie Norwood, managing director and associate general counsel with SIFMA.

Norwood added that SIFMA still believes that most of the firms subject to G-26 and no other regulatory rules regarding account transfers don't participate in ACATS anyway.

The MSRB responded to FINRA's past suggestions by saying that if it were to simply incorporate FINRA's Rule 11870 by reference, it "potentially could be seen as delegating its core mission to protect investors, issuers, and the public interest and to promote a fair and efficient municipal market."

SIFMA said it strongly disagrees with the MSRB's rationale for rejecting their recommended approach and pointed to other MSRB rules like G-41 on anti-money laundering compliance program and G-35 on arbitration that include cross-references.

"In this instance, the MSRB would not be seen to be delegating its core mission to protect the municipal securities market, as there is nothing particularly unique regarding the transfer of customer accounts with respect to municipal securities," Norwood wrote.

She added that if the MSRB stays with its decision against cross-referencing, it could choose to instead allow FINRA member firms to follow FINRA 11870 and NYSE member firms to follow NYSE Rule 412 instead of G-26 while also requiring firms not covered by either to follow Rule G-26.

"If the primary purpose of the changes and the draft amendments is to re-establish consistency with ACATS and the rules of other SROs by conforming G-26 to significant updates by the NSCC, the NYSE and FINRA that have relevance to municipal securities, the best way to accomplish this is to have one governing rule that is cross-referenced by the other self-regulatory organizations," Norwood wrote.

Additionally, SIFMA said that having different rules for account level transfers could result in: additional compliance burdens, conflicting examiners from different regulators applying different rules to the same customer account transfer, and confusion among customer.

"We feel these reasons are significant enough to warrant complete rule harmonization governing these procedures," Norwood wrote.

Both SIFMA and BDA included concerns in their letters about the need to harmonize the timeframes under MSRB Rules G-26 and G-12 on uniform practice with FINRA rule 11870 because G-12 was recently amended to shorten the amount of time dealers had to close out account transfer fails. Both dealer groups said FINRA should harmonize its rule to those of the MSRB.

BDA also proposed that the effective date be changed from some time around January 2018 to about 180 days after the adoption of the Department of Labor's principal trading and best interest contract exemptions, which are to become applicable on Jan. 1, 2018. The group said that having an effective date around January 2018 would add to already significant regulatory changes dealers will have to be adjusting to around that time.

BY SOURCEMEDIA | MUNICIPAL | 07/06/17 07:08 PM EDT

By Jack Casey

MSRB Names General Counsel and Chief Compliance Officer.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) announced today that it has promoted Michael L. Post, who has held leadership roles in the MSRB's Market Regulation department since 2013, to serve as General Counsel. In this role, Post will serve as senior legal counsel and policy advisor to the Board of Directors, and will oversee Board governance, rulemaking for municipal securities dealers and municipal advisors, regulatory relationships and legislative affairs.

"Mike has successfully guided the MSRB's regulatory affairs through an intense period of rulemaking, driven in part by our expanded mandate under the Dodd-Frank Act and the priorities outlined in the 2012 Securities and Exchange Commission Report on the Municipal Securities Market," said MSRB Executive Director Lynnette Kelly. "He is a trusted advisor to the Board and we are thrilled to have him step into this role as our Chief Legal Officer, Bob Fippinger, departs at the end of the month."

Before joining the MSRB as Deputy General Counsel in 2013, Post served for more than 10 years in various senior roles at the Securities and Exchange Commission (SEC). From 2007 to 2009, he was Counsel to Chairman Christopher Cox, advising on a wide range of legal, policy and management issues arising primarily out of the Division of Trading and Markets, Division of Enforcement and Office of Municipal Securities. He also served as a senior litigation counsel in the appellate group in the SEC's Office of the General Counsel and received the Manuel F. Cohen Outstanding SEC Younger Lawyer Award. From 1998 to 2003 Post was in private practice in the Supreme Court and appellate litigation group at Sidley Austin LLP. He began his legal career as a judicial law clerk to Judge Paul J. Kelly, Jr. on the U.S. Court of Appeals for the Tenth Circuit.

Post earned a juris doctor from The George Washington University Law School, a master's of public administration degree in public policy analysis from Arizona State University and a bachelor's degree in economics from the University of California, Los Angeles.

The MSRB also announced that it has named Gail Marshall Chief Compliance Officer. Marshall has served as Associate General Counsel – Enforcement Coordination since 2015. She is responsible for managing the MSRB's professional qualifications program, enforcement support initiatives and internal corporate legal activities.

"Gail is an indispensable resource for fellow securities regulators and MSRB-regulated firms," Kelly said. "She works tirelessly to support industry needs and facilitate regulatory compliance."

Prior to joining the MSRB as Associate General Counsel in 2015, Marshall served as Of Counsel at Bingham McCutchen LLP from 2000-2015 where she advised broker-dealers and investment advisers on compliance with federal, state and self-regulatory organization regulatory matters, and represented clients in examination and enforcement proceedings. Earlier she was an attorney with the SEC where she served as special counsel to Commissioner Isaac C. Hunt, Jr., as well as special counsel in the Division of Trading and Markets and Division of Enforcement.

Marshall received a master's of law in securities and financial regulation from Georgetown University Law Center, a juris doctor from New England School of Law and a bachelor's degree in management from Westfield State University.

Date: July 10, 2017

Contact: Jennifer A. Galloway, Chief Communications Officer
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MSRB Provides Implementation Guidance on Mark-up Disclosure.

Washington, DC – In advance of the May 2018 implementation of landmark new regulations that enhance the transparency of costs associated with municipal securities transactions for retail investors, the Municipal Securities Rulemaking Board (MSRB) is providing extensive guidance to assist municipal securities dealers in preparing to comply.

Amendments to MSRB Rule G-15 require dealers to disclose additional information on retail customer confirmations for a specified class of principal transactions, including the dealer's mark-up or mark-down as determined from the prevailing market price of the security. Today's guidance, provided in a clear question-and-answer format, addresses the new confirmation disclosure requirements, determination of the prevailing market price and disclosure to customers of the time of execution of trades and link to more security information on the Electronic Municipal Market Access (EMMA®) website. Read the FAQs.

"By offering additional guidance with nearly a year remaining for firms to prepare, the MSRB aims to facilitate the industry's adoption of this historic new level of price transparency for retail investors," said MSRB Executive Director Lynnette Kelly. "Today's guidance is one example of the MSRB's renewed commitment to supporting regulated entities' compliance with new and existing standards of conduct. Regulated entities can expect to see additions to these FAQs as more questions on the mark-up rule arise, as well as best practices and other compliance resources on a variety of topics in the months ahead."

The mark-up disclosure requirements were approved by the Securities and Exchange Commission on November 29, 2016 and take effect on May 14, 2018, affording dealers approximately 18 months from the adoption of the amendments to develop appropriate processes and systems.

To further support understanding of and compliance with changes to Rule G-15, the MSRB will host a half-day seminar on November 2, 2017 in Washington, DC to give municipal securities dealers the opportunity for an in-depth discussion of the mark-up disclosure requirements and the determination of prevailing market price. Register to attend. Register to participate via webcast.

If needed, the MSRB will host a half-day seminar on an additional date in 2018 to provide further opportunity for in-depth discussion. The MSRB also will be providing education to retail investors to promote understanding of the new information available on their trade confirmations.

The MSRB continues to work in coordination with the Financial Industry Regulatory Authority (FINRA), which has adopted similar confirmation disclosure rules and corresponding guidance for other areas of the fixed income markets.

Date: July 12, 2017

Contact: Jennifer A. Galloway, Chief Communications Officer
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MSRB and the Municipal Forum of New York Host Municipal Finance Day in Washington, DC.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) and the Municipal Forum of New York will host recent high school graduates participating in the 2017 Urban Leadership Fellows Program for "Municipal Finance Day" in Washington, DC on Friday, July 14, 2017.

"This is the sixth consecutive year that the MSRB has connected young people who are interested in careers in public finance with the industry's regulators and policymakers," said MSRB Executive Director Lynnette Kelly. "Each year we are energized and excited to inspire the next generation of leaders and innovators in the municipal securities market."

The Urban Leadership Fellows Program provides underserved graduates of New York City's public high schools with an opportunity to explore careers in finance through a paid summer internship. The participants' visit to Washington, DC supplements the practical skills gained at their internships with an understanding of the legal, regulatory and policy implications facing the municipal securities market.

This year's featured speakers at Municipal Finance Day include Representative Gwen Moore of Wisconsin; Hester Peirce, Director, Financial Markets Working Group and Senior Research Fellow, Mercatus Center at George Mason University; and MSRB Executive Director Lynnette Kelly.

The Municipal Forum of New York has sponsored the Urban Leadership Fellows since 1992 through its Youth Education Fund.

Date: July 13, 2017

Contact: Jennifer A. Galloway, Chief Communications Officer
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MSRB Provides Guidance on Duties of Non-Solicitor Municipal Advisors in Conduit Financing Scenarios.

To facilitate compliance with its Rule G-42, on duties of non-solicitor municipal advisors, the Municipal Securities Rulemaking Board (MSRB) today provided interpretive guidance addressing the applicability of the rule in several scenarios that may arise in connection with the issuance of municipal securities for a conduit borrower. The MSRB's guidance discusses a municipal advisor's relationship(s) with, and duties and obligations owed to, a municipal entity issuer, an obligated person that is a conduit borrower, or both, in these scenarios.

Read the regulatory notice.

Groups Ask MSRB to Broaden CUSIP Exception for Private Placements.

WASHINGTON – Market groups are asking the Municipal Securities Rulemaking Board to broaden a potential exception to its proposal to clarify that CUSIPs are required for private placements, saying the current version doesn't go far enough because it excludes non-bank entities.

The groups made their requests in comment letters responding to a modified proposal from the MSRB on its Rule G-34 on CUSIP numbers. The original proposal, released for comment on March 1, clarified that Rule G-34 requires dealers to obtain CUSIP numbers for new issue securities sold in private placement transactions, including direct purchases, where the dealer is the placement agent. The proposal also broached adding a requirement that non-dealer municipal advisors for the first time be subject to the CUSIP requirement for new issue securities that are sold in a competitive offering.

The board recast that proposal in June in response to market concerns by adding an exception for private placements that involve a limited number of participants and are not expected to be resold. The exception would allow a dealer acting as an underwriter or a placement agent in a new private placement with a bank to "elect not to apply for assignment of a CUSIP number if the dealer has a reasonable belief that the purchasing bank is likely to hold the securities to maturity or limit the resale of the municipal securities to another bank."

It would also apply for MAs in competitive sales of munis where the securities are purchased directly by a bank and the MA believes the bank will hold the securities to maturity or limit any resale to another bank.

Leslie Norwood, managing director and associate general counsel with the Securities Industry and Financial Markets Association, said SIFMA and its members "welcome" the MSRB's exception but believe "that the exception should be clarified to clearly accommodate similar non-bank purchasers."

SIFMA, in addition to the American Bankers Association, is proposing language that would provide an exception for dealers or MAs if the underwriter or MA reasonably believes that the purchaser of the munis is: a bank; any entity directly or indirectly controlled by the bank or under common control with the bank other than a broker-dealer; or a consortium of the previous institutions used to participate in a purchase of a new issue of municipal securities.

The SIFMA-proposed exception would also require that the munis are either being purchased with no present intent to sell or distribute or that resales will be limited to the institutions described above or qualified institutional buyers or accredited investors as defined by Securities and Exchange Commission rules.

ABA's proposed exception differs from SIFMA's in that it specifies that the exception should apply if the purchasers represent their intentions not to resell and to only resell to the particular investors named, meaning dealers and MAs could rely on the investors' representations. SIFMA does not specifically include the need for a representation.

Bond Dealers of America agreed that the exception should apply to non-bank affiliates. It, along with Bloomberg's Open Symbology Group, also suggested that the MSRB consider moving away from a CUSIP requirement and instead allow other security identifiers.

SIFMA said that in the absence of the language it is proposing, the MSRB should clarify the documentation underwriters and MAs would be required to produce during a regulatory examination. It is asking that a reasonableness standard apply and made clear that written guidance from the MSRB "would be extraordinarily helpful."

The MSRB said in its June proposal that it expects both dealers and MAs to have policies and procedures in place that are reasonably designed to help them come to conclusions about whether to get a CUSIP number. Dealers and MAs would also be expected to document their findings that play into any ultimate determinations about whether to get CUSIPs. However, it said it would not set prescriptive steps to comply with the exception, specify instances where the exception would apply, or define the parameters for how a dealer should craft its policies and procedures.

Emily Brock, director of the Government Finance Officers Association's federal liaison center, said GFOA supports the ABA's representation idea because it would address the group's concern that the original exception language was not clear enough and would ultimately damp demand for bank loans and direct purchase financings. The language ABA is proposing would "allow for all participants to rely on the investor's representation and will add certainty that CUSIPs are not assigned to those securities," Brock said.

The National Association of Municipal Advisors agreed with GFOA and ABA in its comment letter, saying the inclusion of the "represent" language would mean "all parties will have a better understanding and ability to ensure that the intent of the investor is known based on fact."

NAMA also said it is concerned that the process for getting CUSIPs under the proposal would require dealers and MAs to get the CUSIPs before they can determine if they are needed and leave them without the possibility of reimbursement if the CUSIPs are ultimately unnecessary.

Both GFOA and NAMA also said the MSRB should consider including exceptions for other situations like state and local government bonds purchased by other state and local governments with no intention to resell.

NAMA also reiterated its opposition to the MSRB's intent to require non-dealer MAs to be subject to the CUSIP requirement, saying the requirement does not align with the regulatory structure or roles and responsibilities associated with MAs.

The requirement would not benefit MA clients, would create confusion when a competitive deal does not have an MA involved, and would blur the line between MA and dealer activity, according to Susan Gaffney, executive director of NAMA and author of the group's letter.

"Instead of expanding the current responsibility of MAs to obtain CUSIPs in competitive sales, the MSRB should altogether eliminate the responsibility of having any MA (independent or broker/dealer MAs) obtain CUSIP numbers," Gaffney wrote. "This is an activity best suited for underwriters who use the identifiers to sell the bonds."

Gaffney said the MSRB should be aware of the time and cost burdens MAs would face if the proposal were to be approved.

Norwood wrote that there is currently a regulatory imbalance between dealers and MAs because of the existing CUSIP requirements and that the MSRB's proposal to include non-dealer MAs is "an opportunity to level the regulatory playing field."

She added that SIFMA understands the concern about non-dealer MAs possibly acting as dealers under the proposed requirements and asked that the SEC confirm that such activity in this context would not constitute dealer activity.

The Bond Buyer

By Jack Casey

07/03/17 07:07 PM EDT

SIFMA Submits Comments to the SEC on Proposed Rule Change to Amend MSRB Rule G-26, on Customer Account Transfers.

SIFMA provided comments to the Securities and Exchange Commission (SEC) on the Municipal Securities Rulemaking Board's (MSRB) proposed rule filing SR-MSRB-2017-03, which would amend MSRB Rule G-26, on customer account transfers. SIFMA incorporates by reference our prior comment letter to the MSRB as part of this proceeding, and specifically request that the SEC consider the issues raised in that letter as part of its consideration of the Proposal. SIFMA and its members strongly urge you to disapprove the proposed rule change in its current form.

Read the letter.

BDA Submits Comment Letter: MSRB Second Request for Comment on Draft Amendments to and Clarifications of MSRB Rule G-34, on Obtaining CUSIP Numbers.

The BDA submitted a comment letter to the MSRB in response to their second request for comment seeking industry input on draft rule amendments to MSRB Rule G-34, on CUSIP numbers, new issue, and market information requirements. You can find our final comment letter here.

BDA's comment letter addresses the following:

- Expresses support for the changes the MSRB made from the original request for comment
- Requests clarifications exempting direct purchases by banks from the CUSIP and depository eligibility requirements
- Requests a clarification where direct purchase transactions are not purchased by banks but instead by their non-bank affiliates
- Suggests that the MSRB should not refer specifically to CUSIP but to any identification number widely accepted in the municipal securities market

Background on updated proposed amendments:

- Provides a limited exception to the requirement to obtain CUSIP numbers, and to apply for depository eligibility, in the case of a direct purchase of municipal securities by a bank, affiliated banks or a consortium of banks formed for the purpose of participating in the direct purchase.
- Amends the definition of "underwriter" in Rule G-34(a) to cross reference to the definition of "underwriter" set forth in Exchange Act Rule 15c2-12(f)(8) and requires all municipal advisors to obtain CUSIP numbers when advising an issuer in a competitive new issue transaction in municipal securities.
- Requires all municipal advisors to obtain CUSIP numbers when advising an issuer in a competitive new issue transaction in municipal securities, however, the MSRB seeks comment on draft proposed exceptions from each of these requirements in certain limited circumstances.
- The MSRB proposes to make the application of the draft rule amendments set forth in this second request for comment prospective.

You can find BDA's letter to the MSRB for the original proposed amendments here.

Bond Dealers of America

June 29, 2017

MSRB MA Compliance Guidance Details Rules for Firms, Professionals.

WASHINGTON – The Municipal Securities Rulemaking Board has released a compliance advisory for municipal advisors that details rules applicable to MAs and provides examples of potential violations.

The document, released on Thursday, follows the board's announcement of its new strategic goals, which include an organizational shift toward assisting regulated entities with their compliance efforts.

The MSRB said that goal prioritizes initiatives like issuing regulatory guidance and advisories to support compliance with its rules. The board said it issued the MA compliance document “to aid advisor firms with understanding recently implemented MSRB rules and identifying potential compliance risks.”

“This advisory is designed to aid municipal advisors in the process of establishing, maintaining, reviewing, testing and modifying written compliance policies and supervisory procedures,” the MSRB said in the advisory. “The MSRB engages in an ongoing dialogue with municipal market participants through outreach events and education activities so that the compliance resources it prepares are appropriately tailored and responsive to market needs.”

The MSRB also said the guidance is intended for general information purposes only and included links in each section to give MAs the ability to access more information about the rules.

One rule the guidance covers is MSRB Rule G-42 on core duties of municipal advisors. Rule G-42 applies to MAs engaging in municipal advisory activities other than the solicitation of municipal entities or obligated persons on behalf of certain third parties. The rule subjects MAs to a duty of care and a duty of loyalty.

The duty of loyalty, among other things, requires that an MA deal honestly with the municipal entity client and with the utmost good faith. It also requires an MA act in the best interest of its municipal entity client without regard to self-interest. The duty of care covers requirements like ensuring the MA possesses the degree of knowledge and expertise needed to provide a municipal entity client with informed advice.

One violation of the rule can occur if the MA fails to inform their municipal entity client that the underwriter the MA is recommending has agreed to recommend the MA for services on another transaction it is underwriting. If an MA tells its client that it has chosen to limit the scope of the due diligence it will undertake to identify any conflicts of interest that may need to be disclosed, the MA would also be in violation of the rule.

The MSRB recommends, among other things, that MAs assess how they are ensuring their professionals are adhering to the rule as well as how well it is structuring client agreements and detailing the responsibilities of each party.

The board also included considerations for MAs associated with its Rules G-37 on political contributions and G-20 on gifts and gratuities.

G-37 is designed to address pay-to-play practices in the market and generally prohibits MAs from engaging in advisory business with a municipal entity within two years of certain contributions to an official of such municipal entity. The MSRB said a failure to track payments made by MA professionals at fundraising events and failures to submit required quarterly disclosure filings to the board could count as violative conduct.

Rule G-20 generally prohibits an MA from giving any item or service of value in excess of $100 per year, in aggregate, to any recipient if the gift or service is in relation to the municipal securities or MA activities of the recipient’s employer. A failure to review regular business expenses to gauge the frequency of gifts of meals or entertainment hosted by the firm could lead to potentially violative conduct, the MSRB said.

The board included considerations and possibly violative conduct in relation to rules that ensure MA firms and professionals are properly qualified as well as rules that firms have appropriate compliance programs and properly maintain their books and records.

The Bond Buyer

By Jack Casey

Published June 29 2017, 2:42pm EDT

MSRB Publishes Compliance Advisory for Municipal Advisors + Webinar

Just a few weeks ago, the Municipal Securities Rulemaking Board (MSRB) announced new strategic goals that include an organizational shift to assisting regulated entities with their compliance efforts. This goal prioritizes such initiatives as issuing regulatory guidance and advisories to support compliance with MSRB rules.

The MSRB is providing this Compliance Advisory for Municipal Advisors to aid municipal advisor firms with understanding recently implemented MSRB rules and identifying potential compliance risks. The advisory addresses applicable MSRB rules implemented since the publication of the MSRB's first compliance advisory for municipal advisors.

This updated advisory describes factors a municipal advisor firm should consider when evaluating the effectiveness of its compliance controls and the need to implement measures to mitigate its exposure to compliance risks. Proactively addressing compliance risks benefits municipal advisors, their municipal entity and obligated person clients and, ultimately, investors and public confidence in the municipal securities market.

Register to attend a free educational webinar on compliance risks identified in this advisory on Thursday, August 3, 2017 at 3 p.m. ET.

We look forward to your participation and feedback during the webinar and on an ongoing basis to help ensure our future compliance resources are appropriately tailored and responsive to market needs. We plan to publish a compliance advisory for municipal securities dealers soon. The next annual Compliance Advisory for Municipal Advisors, as well as one for municipal securities dealers, will be published in early 2018.

For additional compliance resources, municipal advisors are encouraged to visit the MSRB's website (www.msrb.org).

SEC Probes Bankers From Barclays, Morgan Stanley on Puerto Rico Bond Sales.

(Reuters) – The U.S. Securities and Exchange Commission may take action against bankers from Barclays Plc and Morgan Stanley for their roles in Puerto Rico bond sales, according to filings with the Financial Industry Regulatory Authority (FINRA).

According to records filed with FINRA, the SEC's staff has recommended the agency file an enforcement action against Barclays' Luis Alfaro and James Henn for alleged violation of fair dealing rules for their roles in the island's debt sales.

The SEC staff suggested that Henn, who has worked at Barclays since 2008, and Alfaro, who worked at First Bank Puerto Rico Securities before moving to Barclays in 2013, allegedly violated securities and municipal bond rules on fraud, deception and misrepresentation during the sale of Puerto Rico bonds.

The SEC staff also suggested sanctioning Morgan Stanley's Charles Visconsi, the co-head of public finance, and his former colleague Jorge Irizarry, in connection with disclosures Puerto Rico made in documents circulated to investors, according to FINRA records.

Barclays, Morgan Stanley and the SEC were not immediately available for comment. Reuters could not obtain contact information for Alfaro, Henn and Visconsi.

Bloomberg earlier reported on the allegations on the bankers.

Puerto Rico's financial oversight board said on Wednesday that it was still in debt restructuring talks with creditors of the island's power utility, PREPA, a day after rejecting a proposed deal to restructure $9 billion of the utility's bonds.

By REUTERS

JUNE 28, 2017, 9:33 P.M. E.D.T.

(Reporting by Parikshit Mishra in Bengaluru and Lisa Lambert in Washington; Additional reporting by Kanishka Singh in Bengaluru; Editing by Andrew Hay and Leslie Adler)

New MSRB Compliance Advisory Helps Municipal Advisors with Identifying Potential Compliance Risks.

Read the Advisory.

Cadwalader Lawyers Say That Financial CHOICE Act Might Alter SEC Enforcement Strategies And Procedures.

In a recent memorandum, Cadwalader attorneys Jason Halper, Jodi Avergun, Joe Moreno, Lex Urban, Kendra Wharton and Aaron Buchman posited that the "Financial CHOICE Act of 2017" (the "CHOICE Act") could alter SEC enforcement strategies and procedures significantly. The CHOICE Act would make several changes to the current SEC practice of using in-house administrative proceedings rather than federal district courts for enforcement actions. The CHOICE Act would, among other things, (i) reform investigations by (a) establishing an "Enforcement Ombudsman," (b) revising Wells notice procedures and (c) imposing further requirements for pre-enforcement analyses and evaluations, (ii) give respondents the choice between terminating SEC administrative proceedings and forcing the SEC to pursue action in federal court, or continuing administrative proceedings with the benefit of a higher "clear and convincing" burden of proof, (iii) strip Administrative Law Judges of the authority to issue barring orders, and (iv) require the SEC to announce and adopt any legal theory it would pursue through full notice-and-comment rulemaking before imposing that theory through an enforcement action.

Last Updated: June 22 2017

Cadwalader, Wickersham & Taft LLP

Commentary: Remodeling the Rule Book.

In our fast-moving society, yesterday's exciting innovations are today's antiquated has-beens. Every industry faces pressures to evolve in response to a rapidly changing political, economic and technological environment. Our brand-new smartphones become relics days out of the box, our state-of-the-art kitchens look dated within the decade, and yes, our long-standing regulations can risk hindering rather than advancing the fairness and efficiency of the municipal securities market.

But when it's time to remodel the kitchen, step back before swinging a sledgehammer. While some features are destined for the scrap heap, others stand the test of time and deserve preservation. The Municipal Securities Rulemaking Board (MSRB) takes a methodical, participatory approach to keeping its regulations for municipal securities dealers and municipal advisors up-to-date.

One of the major advantages of the MSRB's structure as a self-regulatory organization is having experienced cooks in the regulatory kitchen. The MSRB's regulatory activities are informed by the insight of participants in the municipal securities marketplace who serve on the Board of Directors. An incoming class of new members joins the Board each year, ensuring that the MSRB receives fresh input on the practical realities of its rules from professionals who embody the diverse perspectives and activities of broker-dealers, banks, municipal advisors, municipal bond issuers, investors and others. Board member input is one of the most important ways the MSRB considers, on an ongoing basis, the need for review of certain industry practices or changes to existing rules.

When the MSRB identifies the need to further draw on the expertise and perspectives of market participants, it rallies a "kitchen cabinet" in the form of ad hoc advisory boards or committees to advise on topics of market interest. For example, the MSRB has convened an Investor Advisory Group to ensure our investor protection proposals, such as potential changes to MSRB rules on primary offering practices, are informed at the earliest point of consideration by input from investors in municipal bonds.

For kitchen remodelers, construction plans must be vetted by everyone who will use the revamped space. So too with the MSRB's plans to update or modernize its existing rules. The MSRB may issue a concept release to solicit insight from market participants and other interested parties on the underlying issue, including possible alternatives to rulemaking. If rulemaking is pursued, the MSRB generally publishes a request for comment so that the public and regulated entities can provide input on the proposed rulemaking. The MSRB's policy on the use of economic analysis in rulemaking ensures that available data and information on any anticipated burdens of implementation are considered at the earliest stage of the rulemaking process.

It is the policy of the MSRB to regularly consider and evaluate its rules retrospectively and propose amendments as appropriate and consistent with the public interest. As anyone who has tackled a kitchen remodel can attest, these projects can impact the rest of the house. Taking a hard look at a specific regulation in the MSRB's rule book of roughly 45 standard-setting rules inevitably prompts consideration of other related rules. MSRB rules are helpfully categorized by their intent to foster fair practice, uniform practice, market transparency, professional qualification or operational standards. When one rule within a category is identified as in need of updating, other rules within that category also receive scrutiny. To further support retrospective rule review, the MSRB solicits public input on the entirety of its rule book and body of interpretive guidance, as it did in December 2012.

The MSRB does not close the door to input and conversation once updates to its regulations are adopted. Rather, we conduct extensive outreach to municipal securities dealers, municipal advisors, municipal entities, investors and fellow regulators on a regular basis to solicit feedback that informs the MSRB's policy initiatives. MSRB Board members and staff frequently participate in industry events around the country and engage regularly with industry trade associations, issuer associations, investor representatives and other stakeholders. The MSRB's outreach initiatives often lead to the development of interpretive guidance or compliance resources that help facilitate understanding of MSRB rules as they evolve.

Market feedback received throughout the year is synthesized and incorporated into the MSRB's formal strategic and operating planning processes. Periodically, the Board meets in a dedicated strategy session to review the MSRB's strategic direction and goals, which it did most recently in January 2017. These planning sessions are also informed by market conditions and relevant priorities of policymakers. The MSRB's strategic goals guide the development of the annual operating plans that prioritize activities the MSRB will undertake in any given year to best serve its mission. This process includes identifying MSRB rules that are candidates for amendment, consolidation, streamlining or deletion in the interest of achieving greater efficiency, effectiveness or alignment with current behaviors and conditions in the municipal market. For example, the MSRB last year made two sets of amendments to its uniform practice rules, to modernize close-out procedures for municipal securities and to pave the way for the industry-wide transition to a two-day settlement cycle.

The MSRB recognizes that to be effective and best fulfill its mission, its rules must be responsive to changes in the municipal securities market and broader landscape. Our self-regulatory structure, participatory processes and commitment to stakeholder engagement support the MSRB's ongoing efforts to create and maintain efficient and effective municipal market regulations. The MSRB welcomes industry and public feedback and pledges our continued focus on rule maintenance and modernization.

by Lynnette Kelly

June 26 2017, 10:16am EDT

The Bond Buyer

MSRB Files Proposed Amendments to Municipal Fund Security Advertising Requirements.

The Municipal Securities Rulemaking Board (MSRB) filed with the Securities Exchange Commission (SEC) proposed amendments to MSRB Rule G-21(e) related to municipal fund security product advertisements. The MSRB is proposing amendments to Rule G-21(e) to address important regulatory developments and to enhance protections for investors in municipal fund securities. The proposed amendments reflect changes to SEC rules governing money market fund advertisements and improve regulatory consistency of disclosure requirements for those municipal fund securities that invest in money market funds. View the filing.

The MSRB originally proposed these amendments as part of a broader request for comment on updating and harmonizing certain provisions of its municipal securities dealer advertising rule and establishing similar advertising regulations for municipal advisors. The MSRB continues to consider comments received from market participants on the other aspects of its proposal.

Many MA Firms Have Yet to Get Their Advisors Qualified.

WASHINGTON – As the deadline for municipal advisors to pass their qualification exam approaches, roughly 26% of registered firms have no advisors who have qualified, potentially leaving issuers with fewer firms on which to rely, according to regulators.

Those firms have until Sept. 12 to either have an advisor pass the Series 50 exam or get out of the business.

Continue reading.

The Bond Buyer

By Jack Casey

Published June 19 2017, 12:48pm EDT

MSRB Publishes Guide for Customer and Municipal Advisory Client Complaint Problem and Product Codes (and Webinar).

The Municipal Securities Rulemaking Board (MSRB) reminds regulated entities, which include brokers, dealers, municipal securities dealers and municipal advisors, of the October 13, 2017 effective date for amendments to rules related to customer and municipal advisory client complaints. Read the January 18, 2017 approval notice for amendments to MSRB Rules G-10, G-8 and G-9.

The amendments require, in part, that regulated entities keep an electronic complaint log of all written complaints of customers or municipal advisory clients using a standard set of product and problem codes. The MSRB Rule G-8 Customer and Municipal Advisory Client Complaint Problem and Product Codes Guide is now available.

The MSRB, in coordination with FINRA in the interest of consistency for those regulated entities that are also FINRA members, developed codes for the electronic complaint log required by Rule G-8 based on product and problem codes required by FINRA Rule 4530, but tailored to address municipal securities and municipal advisory activities. FINRA, in coordination with the MSRB, incorporates in its Rule 4530 product and problem codes explanations relating to municipal securities and municipal advisory activities, and includes Problem Code 15, Municipal Advisor Conflict of Interest, to address allegations relating to municipal advisor conflicts of interest.

The MSRB will host an educational webinar about the amendments to Rules G-10, G-8 and G-9 on Thursday, July 13, 2017 at 3:00 p.m. ET. [Register here.]

Reminder: Comments on Draft Amendments to MSRB Rule G-34 on CUSIP Numbers Due Next Friday, June 30.

Read the RFC.

NFMA Recommended Best Practices in Disclosure for Local Government General Obligation Debt.

The NFMA Disclosure Committee released the Recommended Best Practices in Disclosure for Local Government General Obligation Debt, draft dated June 22, 2017.

Comments will be taken through September 30, 2017, after which a final version will be prepared.

To view the paper, click here.

MSRB: See How Government Finance Professionals Use the MSRB's EMMA Website when Issuing Bonds.

Watch video.

MSRB: Hear From Government Finance Professionals About How EMMA Helps With Fulfilling Disclosure Obligations.

Watch video.

MSRB Announces New Strategic Goals, Including Focus on Supporting Compliance and Enhancing the EMMA Website.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) today articulated updated strategic goals that will guide the organization for the next several years and emphasize the importance of data, information and education in effective regulation of the municipal securities market.

"We are emerging from an intense period of rulemaking driven in part by the imperatives of the Dodd-Frank Act and the 2012 Securities and Exchange Commission Report on the Municipal Securities Market," said MSRB Executive Director Lynnette Kelly. "It's an appropriate time for the

MSRB to shift our focus and assist regulated entities with their compliance efforts. Our updated goals prioritize initiatives such as issuing guidance, advisories and FAQs that will support that endeavor."

The MSRB's 2017 strategic goals also include expanding the utility of its Electronic Municipal Market Access (EMMA®) website to provide widespread access to municipal market data and tools that support fair transactions and facilitate decision-making, and maximizing the use of data to support market transparency and regulation. Additionally, the MSRB will conduct a comprehensive analysis of relevant market data to maximize its availability, utility and quality for the benefit of all market stakeholders and the public.

A fourth strategic goal focuses on the MSRB's status as a self-regulatory organization, which ensures regulatory activities benefit from the insight of participants in the municipal securities marketplace. The MSRB plans to leverage the expertise inherent in the self-regulatory organization model to advance the integrity and efficiency of the municipal securities market.

The final strategic goal addresses financial stewardship. To carry out its Congressionally mandated mission, the MSRB must have financial stability and sustainability, and maintain sufficient reserves to operate without interruption, regardless of market conditions. The MSRB is committed to promoting financial sustainability by assessing fair and equitable fees, diversifying funding sources and spending responsibly.

The MSRB Board of Directors established the strategic goals after engaging in a long-term planning effort that included soliciting input from stakeholders, assessing changes in the market and considering the political, economic and technological environment. "These strategic priorities represent the interests of our stakeholders and a continued path to a fair and efficient municipal securities market," Kelly said.

The MSRB's updated strategic goals are:

1. Facilitate industry understanding of and compliance with MSRB rules through rule guidance, clarification and education in support of market efficiency.
2. Further evolve the EMMA website into a comprehensive transparency platform that meets the needs of municipal market participants and the public.
3. Optimize the use and dissemination of municipal market data to further support market transparency and inform regulation.
4. Leverage the MSRB's unique perspective and expertise as an independent self-regulatory organization.
5. Promote financial sustainability by assessing fair and equitable fees, diversifying funding sources and spending responsibly.

More information about the goals is available here.

Date: June 19, 2017

Contact: Jennifer A. Galloway, Chief Communications Officer
202-838-1500
jgalloway@msrb.org

MSRB Publishes Guide for Customer and Municipal Advisory Client Complaint Problem and Product Codes.

The Municipal Securities Rulemaking Board (MSRB) reminds regulated entities, which include brokers, dealers, municipal securities dealers and municipal advisors, of the October 13, 2017 effective date for amendments to rules related to customer and municipal advisory client complaints. Read the January 18, 2017 approval notice for amendments to MSRB Rules G-10, G-8 and G-9. The amendments require, in part, that regulated entities keep an electronic complaint log of all written complaints of customers or municipal advisory clients using a standard set of product and problem codes. The MSRB Rule G-8 Customer and Municipal Advisory Client Complaint Problem and Product Codes Guide is now available.

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Treasury Recommends Treating High-Grade Munis as HQLA.

WASHINGTON – The Treasury Department is recommending that high-grade municipal securities be included as high quality liquid assets under federal banking rules, a stance that state and local groups as well as some legislators have taken since the rules were first passed.

The Treasury made its recommendation to include munis as Level 2B liquid assets, the lowest level categorization of high quality, in a report compiled in response to President Trump's Feb. 3 executive order on core principles for regulating the U.S. financial system. The order laid out seven "core principles" that the Trump administration would like the financial system to adhere to, such as making regulations as efficient as possible. It directed Treasury to compile a report on how the current rules and regulations governing the financial system are operating with respect to those principles.

Treasury compiled its report after meeting with numerous regulators, including the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corp., and the Federal Reserve Board.

Department officials also met with a range of stakeholders. The recent report on the depository system is one of four that Treasury plans to release to comply with Trump's order. The others will focus on capital markets, the asset management and insurance industries, and non-bank financial institutions.

Treasury does not specify what types of munis it believes should qualify as "high-grade," meaning it would likely be up to the regulators to determine which munis they consider to be worthy of a Level 2B classification. Federal banking rules say HQLA should, among other things, be easily and immediately convertible into cash with little or no expected loss of value during a period of liquidity stress. HQLA should also have lower risk, and demonstrate minimal volatility.

Emily Brock, director of the Government Financial Officers Association's federal liaison center, said the report's recommendation of classifying some munis as HQLA "shows the administration's commitment to what we know to be the case, that muni bonds are not only high quality but also a liquid investment."

"I think that is a great testament to the progress of [munis as] HQLA," she added.

The Fed, OCC, and FDIC adopted rules in 2014 that require banks with at least $250 billion of total assets or consolidated on-balance sheet foreign exposures of at least $10 billion to have a high enough liquidity coverage ratio – the amount of HQLA to total net cash outflows – to deal with periods of financial stress.

State and local groups as well as other municipal market participants were troubled after the regulators did not include munis as HQLA under the new rules because of concerns that they were not liquid enough. Dealers and issuers said the choice to exclude munis would increase borrowing costs for state and local governments and lead to higher volatility in the municipal market.

The concerns spurred the Fed to act in April 2016 by revising its rule to count munis as level 2B HQLA assets if they meet the same liquidity criteria that applies to corporate debt. Market participants said they were grateful for the recognition but were still concerned that the proposal was too restrictive because the amended rule said munis could only account for 5% of total HQLA. There was also concern that the rule would be too limited because the Fed lacks jurisdiction over many of the larger banks that invest in munis. The FDIC and OCC did not change their rules to be line with the Fed's.

Muni market concerns also led to proposed, bipartisan bills in both the House and Senate during the last legislative session. Neither bill became law during the session but both have been reintroduced this session and have received support from state and local groups.

Sens. Mike Rounds, R-S.D., and Mark Warner, D-Va., have sponsored a bill that would require bank regulators to treat munis that are investment grade, liquid, and readily marketable as Level 2B liquid assets. Level 2B also includes corporate debt and publicly traded common stock. Reps. Luke Messer, R-Ind., and Carolyn Maloney, D-N.Y., go even farther with their bill, which would treat munis that are investment grade, liquid, and readily marketable as Level 2A liquid assets. Level 2A also includes debt from U.S. government-sponsored enterprises like Fannie Mae and Freddie Mac as well as foreign sovereign debt. While Level 2B assets can only make up 15% of a bank's HQLA, Level 2A assets can make up 40% under the current banking rules.

Brock said that having a recognition of munis as HQLA from the administration as well as from Congress is "a huge step in the right direction." She said GFOA is pushing for a Level 2A classification and that designation as Level 2B "is pretty much as drastic a concession as we're willing to make."

GFOA, along with 14 other state and local groups, wrote a letter to the Senate Banking Committee and each member of the House in April urging the committee and members to support the currently pending legislation. Brock said the request has been well-received in the committee.

Adding the administration's push for including munis under the regulators' rules gives a second way, aside from Congress, of reaching the groups' goal if the OCC, FDIC, and Fed all follow the administration's recommendation. Brock said that GFOA is supportive of all the efforts to achieve the goal and is of the perspective that whatever way gets munis included fastest is worth pursuing.

The Bond Buyer

By Jack Casey

Published June 13 2017, 3:45pm EDT

A Town's 'Creative Accounting' Leads to a Fraud Conviction.

Such misrepresentation is common in municipal bookkeeping. Rarely do officials answer for it.

For years, local governments have had little to fear from using dubious accounting practices to shore up their finances on paper. Sure, critics could scream: In 2015 Paul Volcker, a former chairman of the Federal Reserve, sounded the alarm about states and cities that used slippery accounting to "obscure their true financial position, shift current costs onto future generations, and push off the need to make hard choices." But rarely have officials been made to answer for their deception.

Until now. Last month a jury convicted Christopher St. Lawrence, the former town supervisor of Ramapo, N.Y., of federal charges including securities fraud in connection with the financing of a minor-league baseball stadium. Prosecutors have frequently jailed local officials for accepting bribes or stealing money. But Mr. St. Lawrence, who could serve prison time and is planning to appeal, is the first to face criminal charges for cooking a municipality's books. His conviction, part of an escalating federal enforcement effort, should be a wake-up call for towns, cities and states nationwide.

In 2010 residents of Ramapo voted 67% to 33% against using public money to build a new stadium for the Rockland Boulders. So Mr. St. Lawrence concocted an elaborate plan to have the town's economic-development agency float debt for the stadium. But the agency couldn't actually finance all the debt: Mr. St. Lawrence was funneling money to it from town accounts. Then he tried to hide Ramapo's weakening finances.

After assuring a bond analyst in 2013 that the town's budget was sound, Mr. St. Lawrence was caught on tape telling employees, with a laugh, that to make the numbers work "we're going to have to all be magicians." Prosecutors also accused him of recording on Ramapo's books a proposed $3.1 million sale of town property, even though the deal eventually fell through because the land was a rattlesnake habitat.

Mr. St. Lawrence's lawyers argued that he did not profit from the transactions. They portrayed him as a well-meaning official guilty only of creative financing. But several witnesses painted a picture of Mr. St. Lawrence as a man who lied to raise money for a pet project and then tried to cover up the result.

The former head of Ramapo's development agency, N. Aaron Troodler, was charged with conspiring to commit securities fraud and pleaded guilty. He testified at Mr. St. Lawrence's trial that the town had booked a $3.6 million payment from Mr. Troodler's agency for rights to the stadium land, even though there had been no such transfer.

Ramapo's finances remain in disarray, and the town has struggled to pay its debts. But the acting supervisor says there's no way to know how bad the situation is until officials complete a forensic audit. Meantime, Standard & Poor's has withdrawn Ramapo's credit rating because of the town's unreliable financial statements.

The jury's verdict ought to resonate far beyond Ramapo. Nearly 44,000 local governments issue debt, and for years the Securities and Exchange Commission, daunted by the task of trying to track their financial filings, did little to discipline public officials. But then came the financial crisis, followed by a rash of government defaults, including in Stockton, Calif., where one official described the city's bookkeeping as having "eerie similarities to a Ponzi scheme."

By early 2010 the SEC had created a new unit to police municipal misconduct. Later that year, regulators accused New Jersey of misleading investors over a decade about its pension debt. No penalties were imposed, but the state was told to change its practices. Since then, the SEC has gotten tougher. In 2013 it charged Miami and the city's budget director, Michael Boudreaux, with financial manipulation that included shifting money among its various accounts "to mask increasing deficits." In an unprecedented civil trial, a jury found both guilty, and a judge fined Miami $1 million and Mr. Boudreaux $15,000.

With Ramapo, the SEC and prosecutors went a step further by bringing criminal charges. But this may represent the proverbial tip of the iceberg. Municipal budgeting is littered with misrepresentations meant to raise money for favored projects, increase spending during election years, or reward political supporters with rich contracts. Investors and taxpayers should welcome a crackdown.

The Wall Street Journal

By Steven Malanga

June 16, 2017 6:00 p.m. ET

Mr. Malanga is a fellow at the Manhattan Institute and a senior editor for City Journal.

As the Countdown to the New Issue Price Regulations Continues, Let the Document Negotiations Begin!

The effective date of the new issue price regulations (Regulations) is less than a week away, and because of the need to discuss and plan for application of the new rules with issuers, underwriters and financial advisors for bonds that will be subject to the new rules, we are already gaining experience with documentation relating to the Regulations. NABL and SIFMA have done an excellent job of providing model documents – sale documents in the case of SIFMA and issue price certifications in the case of NABL – that will significantly smooth the transition from a reasonable expectations standard for establishing issue price to a general rule based on actual sales. Use of these model documents, with some variations, should ease the burden, which could otherwise be overwhelming, of negotiating these documents for each type of bond sale with each underwriter. Like all model documents, however, there will undoubtedly be fine tuning as we gain more and more experience working with the Regulations and negotiating documents for specific transactions. This post notes two negotiating issues that have been raised in current transactions.

Continue reading.

The Public Finance Tax Blog

By Bob Eidnier on June 5, 2017

Squire Patton Boggs

Outline For Discussion Of New Issue Price Rules.

New tax rules relating to establishing the issue price of publicly offered tax-exempt bonds become effective soon. This outline describes the new issue price rules, provides a high-level strategic analysis to help guide a discussion between an issuer and its advisors, and sets forth (at the end) the regulations themselves.

Basic Principles

Effective Date: The new tax rules for establishing the issue price of bonds apply to all tax-exempt bonds sold on or after June 7, 2017. Some preparation is required in advance of the pricing date to make sure the provisions of a notice of sale or bond purchase agreement (and any related agreement among underwriters) allow for the issuer to implement the new rules in the manner desired.

Issue Price established by CUSIP: The rules apply on a CUSIP-by-CUSIP basis. The sum of the CUSIP issue prices is the issue price of the entire issue of bonds. It is best to focus on CUSIPs rather than maturity dates due to split coupons or other features that materially differentiate the terms of bonds of the same maturity. The issue price for each group of substantially identical bonds is established separately.

Actual Facts and Safe Harbors: The approach of the new rules is to provide a baseline rule that establishes issue price based on actual facts (i.e., the first price at which 10% of a CUSIP is actually sold to the public) and then to provide safe harbor rules that allow the issuer to use the initial offering price as the issue price if certain requirements are satisfied, regardless of whether 10% of each CUSIP is sold at the initial offering price. If satisfying a safe harbor is desired but not achieved, actual facts will control.

Sales to Public: Perhaps the most helpful rule is that all sales by an underwriter to a party that is not an underwriter are treated as sales to the public. Any party that is not connected to the issuer through a contract or series of contracts (e.g., BPA, AAU, retail distribution agreement) is treated as the public. A sale of bonds to a known “flipper” is as good as a sale of bonds to a buy and hold investor.

Actual Facts Rule: Issue price can always be established based on the first price at which 10% of the principal amount of a CUSIP is actually sold to the public. Note that this rule may not be as clear as it seems. The exact time of sales of bonds to different investors may not be easy to establish.

Hold-The-Price Rule: One safe harbor that can apply in all public offerings is the hold-the-price rule. The issue price of a CUSIP is the initial offering price for that CUSIP (as evidenced by the pricing wire), so long as the underwriters have agreed in writing not to sell or offer any bonds of that CUSIP at a price higher than the initial offering price for a period of five business days after the sale date. The five-day requirement ends early if at some point 10% of the principal amount of that CUSIP has actually been sold to the public at any combination of prices that are not higher than the initial offering price.

Competitive Sale Rule: For bonds sold in a typical competitive sale process, the issue price of a CUSIP is the initial offering price for that CUSIP (as evidenced by the pricing wire), so long as the issuer receives at least three bids for the bonds from reasonably competitive bidders. The detailed requirements of this safe harbor, set forth at the end of this outline, should be consulted. Note that if three bids are not received, the winning bidder can be required (for example, in the notice of sale as a condition of making the bid) to satisfy the hold-the-price rule. The two rules are not mutually exclusive.

[Continue reading.]

Article by Andrea Ball, Charles C. Cardall, Richard Chirls, Dean Criddle, Kathryn V. Garner, Richard J. Moore, Edwin G. Oswald, Aviva M. Roth, Scott Schickli, Larry D. Sobel, John Stanley, Angela Trout, Winnie Tsien and George G. Wolf

Last Updated: June 6 2017

Orrick

[Analysts: Muni Disclosure Varies by Sector.]

PHOENIX – Analysts see major discrepancies in the quality of disclosure available across different sectors of the municipal market, while regulators would like to see good disclosure across-the-board.

Investor analysts had high praise for the quality of disclosure in the healthcare and senior living spaces generally, but had more mixed responses when it came to charter schools and certain revenue and general obligation debt for governments and essential services, particularly for smaller or less frequent issuers. Regulators have made improving muni market disclosure a priority in recent years, with enforcement actions aimed at underwriters and issuers as well as a new proposal to expand the scope of information investors would have access to.

Lisa Washburn, managing director with Municipal Market Analytics, said that the sectors with issuers that operate more like for-profits and companies generally have better disclosure, but that it “defies across the board categorization.” Hospitals are generally better disclosers not only in terms of the timeliness of filing, in part through quarterly disclosures, but also because they have been doing interim reporting for years, she said.

“If you look at it, the sector is smaller and the investors in health care are more concentrated so the investors were able to request and get more information from the hospitals and health care organizations,” Washburn said. “If you have a very concentrated investing base or you have a few very large investors, typically they can at least wield more influence on what you would get.”

Arthur Schloss, a senior analyst at Invesco, said that hospitals tend to provide good disclosure in a clear way due to their business-like structure.

“Areas like healthcare, hospitals … they tend to be very numbers-oriented,” Schloss said. “You tend to get very good presentation of the numbers.”

Schloss said he finds it extremely helpful to see detailed breakdowns of how management arrived at their calculations, because he sometimes finds methodology that could raise an eyebrow.

“I have seen several occasions where a borrower will calculate days of cash on hand, but they will include restricted cash,” he said by way of example.

Dean Lewallen, a high yield analyst at AllianceBernstein, said that healthcare and senior living generally have a universal way of presenting their information to investors that makes it easy for investors to navigate.

“Healthcare and senior housing have the most standardized presentation formats and are the most user-friendly for bondholders,” he said.

Julie Egan, chair of the National Federation of Municipal Analysts, agreed that hospitals are generally seen as strong issuers with regard to disclosure.

“Historically, hospitals have been a bit of a riskier sector and more difficult to analyze because often they have obligated groups and require more groups to be analyzed as well as reimbursement questions regarding payor mix,” Egan said. “It was probably more prudent to get quarterly information.”

Egan added that while quarterly reporting is not widespread for munis, it is something NFMA and analysts generally would like to see from the market. Egan said that fiscal troubles in Detroit and Puerto Rico have gotten analysts questioning some prior beliefs that general obligation bonds are “pretty golden and pretty safe.”

“We’ve been asking for quarterly disclosures for a long time and if our beliefs are changing we may very well require issuers to be more accommodating as far as disclosure,” Egan said.

Sectors with limited pools of investors, like those with higher risk securities, can generally get more types of disclosure on a more routine basis, like conference calls, access to managers, and things of that nature, Washburn said. Analysts consistently said that conference calls and issuer willingness to answer questions from bondholders is extremely helpful, but lamented that many issuers have been scared into being relatively unresponsive.

“There is frequently a reluctance to answer detailed questions,” said Joseph Rosenblum, AllianceBernstein’s director of municipal credit research. Rosenblum said that issuers are sometimes frightened that they could get into trouble for making information available to only a small segment of investors. He suggested that issuers faced with that problem could solve it by scheduling a conference call for all investors.

“It’s not as if we want insider information,” said Rosenblum.

“I wish there were more frequent calls,” said Lewallen. “If it’s an investment grade entity, maybe once a year is sufficient. If things get into trouble, you need to have conversations with your investors a lot more frequently.”

Periodic communication is necessary even if the continuing disclosure agreement requires relatively infrequent conversations, analysts said. Bondholders are much more likely to agree to measures to alleviate fiscal distress when they’ve been kept in the loop, said Schloss.

“I’ve always said I can’t help you if I don’t know what’s going on,” Schloss said.

“Lawyers have people so scared,” added Lewallen, explaining that many investors seem to believe that they must tell every single investor every piece of information available, or must say nothing to anyone at all.

Washburn said that weaker issuer disclosure, like strong disclosure, is not always sector specific.

However, she said smaller, infrequent local governments “generally speaking” struggle more with disclosure.

Charter schools were another sector that multiple analysts highlighted as sometimes being problematic for analysts. Lewallen said that while the standard quarterly conference calls common in healthcare and senior living would probably be too often for charter schools, there is school specific information such as test results pertinent to investors that could be disclosed in a more timely manner.

“They’ve got six months to get this general information out, and it’s not hard to do,” said Lewallen.

“Charter schools are sometimes difficult,” said Rosenblum.

Richard Ciccarone, president and chief executive officer of Merritt Research Services in Chicago, said water and sewer issuers could generally improve their disclosures.

“I think a lot of people take water and sewer bonds as being an essential service and therefore less rigorous disclosure is required for them to feel comfortable with it,” Ciccarone said. “There is a lot of work that needs to be done on water and sewer, particularly on getting better metrics in order to measure the quality of their security and their ability to make good on it.” Those metrics should include data usage, customers, water supply, quality of infrastructure, and maintenance programs, Ciccarone said.

While accuracy and fullness of disclosure are important, Ciccarone said, there is also the consideration of issuers’ timeliness in disclosing. Merritt does an annual survey on issuer’s timeliness of disclosure that measures the amount of time between the end of the issuer’s fiscal year and the time the audit is signed. The median reporting time for all issuers Merritt looked at for 2015, the most recent survey, was 151 days, a rise from 142 in 2014 and the first time the number had gone above 150 since 2008.

Of the issuers, wholesale electric, hospitals, and private higher education were the most timely in 2015, taking 105, 112, and 115 days to disclose, respectively. Counties and states took the longest with 180 and 182 days, respectively. Cities were close behind taking 172 days, according to the survey.

While disclosures can be improved, the analysts who spoke with The Bond Buyer generally agreed that disclosure overall has been getting better with time.

“My perspective is that there are gaps and there are things that need to be done, but over the last 30 years we’ve come a long way,” Ciccarone said. “I don’t mind mentioning that because I think it’s only fair to governments that we say that.”

“There’s been a big improvement, I’d say, in the quality of information and the timeliness,” said Lewallen.

Washburn pointed to the Securities and Exchange Commission’s Municipalities Continuing Disclosure Cooperation enforcement initiative, which focused on issuers’ and underwriters’ continuing disclosure failures, as a positive for disclosure in the market.

“Love or hate MCDC … I think that it has at least elevated the conversation about disclosure,” Washburn said.

The SEC is now considering another action aimed at ensuring proper disclosure. The recent regulatory proposal would require event notices to be filed for a broad range of “financial obligations,” if material, including private placements, bank loans, leases, guarantees and monetary obligations resulting from a judicial, administrative or arbitration proceeding. The SEC’s proposed amendments to its Rule 15c2-12 on muni disclosure would also require notices to be filed for actions and events related to financial obligations that “reflect financial difficulties.”

Many participants have criticized the proposal, which is meant to ensure investors and others have access to information about alternative financings to public bond offerings, as overly broad and burdensome. But market groups generally agree with the idea that increased disclosure on private placements and bank loans is important. The SEC is currently considering the numerous comment letters participants sent on the proposal.

Schloss said that while 15c2-12 and any amendments to it are fine as a basic framework, but good disclosure goes well beyond that.

“It’s more of a state of mind, or an outlook, than something you can narrowly require,” Schloss said. “It’s very hard to rigidly mandate.”

The Bond Buyer

By Kyle Glazier, Jack Casey

Published June 05 2017, 2:17pm EDT

MSRB Adds Exception in Revised Proposal Requiring CUSIPs for Private Placements.

WASHINGTON – The Municipal Securities Rulemaking Board has recast a prior proposal clarifying that CUSIPs are required for private placements by providing a limited exception in response to market comments.

Comments on the MSRB’s revised proposal are due by June 20.

The modified proposal is like the prior version that was released on March 1 in that it clarifies the requirement in MSRB Rule G-34 on CUSIP numbers for dealers to obtain CUSIP numbers for new issue securities sold in private placement transactions, including direct purchases, where the dealer is the placement agent. It also requires that non-dealer municipal advisors be subject to the CUSIP requirement for new issue securities that are sold in a competitive offering.

CUSIPs are groups of six- and nine- numbers and letters that identify an issuer and its securities. They are used for a number of purposes in the muni market, including trading, recordkeeping, clearance and settlement, customer account transfers and safekeeping.

Market groups representing dealers, MAs, and issuers responded to the initial proposal asking that the MSRB include an exemption for private placements that involve a limited number of participants and are not expected to be resold. A number of groups also said they were concerned that the proposed changes and clarifications could adversely impact the municipal market by discouraging banks from pursuing private placements and discouraging issuers from engaging placement agents and municipal advisors.

In response to these comments, the MSRB said that while it believes obtaining CUSIP numbers is a necessary aspect of activities like tracking trading and recordkeeping, it also "is of the view that the increase in the number of direct purchase transactions between municipal issuers and banks as an alternative to letters of credit and other similar types of financings may support an exception from the blanket requirement to obtain CUSIP numbers in all private placements."

The MSRB is proposing an exception in the modified proposed rule under which a dealer acting as an underwriter or a placement agent in a new private placement with a bank could "elect not to apply for assignment of a CUSIP number if the dealer has a reasonable belief that the purchasing bank is likely to hold the securities to maturity or limit the resale of the municipal securities to another bank."

There would also be an exception from applying for CUSIPs for MAs in competitive sales of munis where the securities are purchased directly by a bank and the MA believes the bank will hold the securities to maturity or limit any resale to another bank.

The MSRB said it expects both dealers and MAs to have policies and procedures in place that are reasonably designed to help them come to conclusions about whether to get a CUSIP number and to apply those policies and procedures during any CUSIP number-related evaluations. Dealers and MAs would also be expected to document their findings that play into any ultimate determinations about whether to get CUSIPs.

The board also clarifies that an MA advising an issuer in a competitive sale of new issue securities must apply for the CUSIP number no later than one business day after dissemination of a notice of sale or other such request for bids.

Lynnette Kelly, the MSRB's executive director, noted in a release accompanying the new request for comment that the MSRB modified the draft amendments in light of market feedback and added the MSRB "appreciates the thoughtful participation of commenters in the rulemaking process and invites further dialogue on how to ensure CUSIP number requirements appropriately reduce investor risk and regulatory uncertainty."

The MSRB said it is not setting prescriptive steps to comply with the exception and will not further specify instances where the exception would apply. It also will not define the parameters for how a dealer should craft its policies and procedures. The proposal also does nothing to affect a dealer's obligation to determine whether a transaction should be considered a loan or security, the board said.

Dealers had also been concerned that the first proposal would have been problematic because G-34 requires dealers to apply for depository eligibility and disseminate new issue information, something placement agents may not be able to do because they never purchase the securities.

The MSRB is extending a similar exception to the portion of G-34 that deals with depository eligibility to cover that concern. It proposes the exception cover munis purchased directly by a bank where the underwriter reasonably believes the bank is likely to hold or limit resale of the munis to another bank in a way that makes immobilization in a depository unnecessary. The underwriter would have to make a "principles-based assessment as to whether depository eligibility, and thus, dissemination of new issue information, would be necessary for the particular new issue" and be subject to requirements for policies and procedures and documentation, according to the MSRB.

The MSRB is additionally proposing to make the draft rule amendments prospective after commenters said market participants see the changes as new requirements.

Jessica Giroux, general counsel and managing director of Bond Dealers of America, said BDA is "pleased that the MSRB revised the proposed rule to create an exception for direct purchase transactions," adding it will "provide a major point of needed clarity in the municipal securities market." BDA is still reviewing the proposed changes and plans to comment on other aspects of the proposal in the future, she said.

Leslie Norwood, managing director, associate general counsel and co head of the Securities Industry and Financial Markets Association's municipal securities division, said the group is pleased the MSRB considered industry comments and that SIFMA plans to file a comment letter on the revised proposal.

"Although we are still reviewing the proposal, we believe the addition of an exception to the rule for certain direct placements and the clarification that the rule change will only be applied prospectively are positive changes to the proposal," Norwood said.

Susan Gaffney, executive director of the National Association of Municipal Advisors, said that while the group appreciates the MSRB's work to re-propose the rulemaking, "we remain concerned with the proposal, including having MAs obtain CUSIPs for competitive sales."

"Also, at first glance, the new provision that calls on MAs to 'reasonably believe' that the bank will "likely" hold the security seems to place a burden on MAs to determine the intent of investors, which may conflict with the regulatory limitations that exist with having MAs interface with investors," Gaffney added.

The Bond Buyer

By Jack Casey

06/02/17 07:07 PM EDT

GASB On The Horizon: Debt Disclosures, Including Direct Borrowing.

The GASB is preparing to issue the Exposure Draft, *Debt Disclosures, including Direct Borrowing*. The key question of the project is: *do current disclosure requirements convey the essential information about these transactions to users of financial statements?*

Since the GASB's debt disclosures standards were issued, governments have continued to innovate and diversify their debt portfolios. As a result, related disclosures can be inconsistent. Specifically, concerns have been raised about the adequacy of the disclosures regarding direct borrowings, such a bank loans.

Governments are turning to direct borrowings in lieu of issuing bonds. GASB disclosure requirements for direct borrowings are just as rigorous as they are for other types of debt offerings including bonds; however, direct borrowings contain provisions that often are not associated with other forms of debt, but are essential for users to know about.

One feature of the Board's proposal will be a definition of debt—including direct borrowings—to distinguish it from other types of long-term liabilities in applying disclosure requirements for notes to financial statements.

The Board in this project also considered potential new disclosures that financial statement users need related to debt and is expected to propose the following:

- Unused lines of credit
- Collateral pledged as security for the debt
- Significant events of default or termination events and their significant finance-related effect as specified in the debt agreement, and
- Subjective acceleration clauses.

What's next: An Exposure Draft is expected to be approved in the later part of June 2017. A 90-day comment period will follow after which the Board will consider and then redeliberate due process feedback. A final Statement is planned for spring 2018.

More information about the debt disclosures project.

Coming Soon: New GASB Leasing Guidance.

Later this month, the GASB is scheduled to issue new standards on lease accounting. As many of you know, leasing is an important activity for many state and local governments across the United States. It can be a financing option for obtaining access to certain necessary items—including vehicles, heavy equipment, and buildings—without having to buy them outright.

Through the forthcoming leasing guidance, the Board is seeking to align the accounting and financial reporting of lease transactions more closely with their economic substance. The guidance will be based on the underlying principle that leases are financings of the right to use an underlying asset for a period of time. It will eliminate the current distinction between operating and capital leases by treating all leases as financings.

Board deliberations in the leases project were informed by private-sector lease requirements of the Financial Accounting Standards Board (FASB) and the International Accounting Standards Board (IASB), which recently reexamined their leases standards.

WHY NEW GUIDANCE WAS NEEDED

The Board initiated the project because the current leasing guidance predates the GASB and doesn't take the conceptual framework into consideration—including the definitions of assets and liabilities. Moreover, the existing lease standards allow a lease to be structured in a manner that avoids reporting the economic substance of the transaction. That is, a long-term liability and related asset were not reported as a result of the lease transaction.

LEASE DEFINITION

The definition of a lease will change under the new guidance. The definition focuses on a contract that conveys control of the right to use another entity's non-financial asset, which will be referred to in the new Statement as the underlying asset.

LEASE TERM

The lease term is the period during which the lessee has a noncancelable right to use an underlying asset, adjusted for certain options to extend or terminate the lease.

SHORT-TERM LEASES EXCEPTION

The standard provides an exception for short-term leases, which are lease that, at their beginning, have a maximum possible term of 12 months or less. These leases are recognized based on the payment provisions of the contract.

LESSEE ACCOUNTING

Lessee governments—that is, governments that pay to use another entity's capital asset (the underlying asset) for a given period—will report the following about their leases (except for short-term leases):

- An intangible lease asset that represents the government's right to use the underlying asset
- A corresponding lease liability
- Amortization expense from using up the lease asset during the lease, and
- Periodic interest expense on the lease liability.

LESSOR ACCOUNTING

Lessor governments—that is, governments that lease their capital assets to others—will report the following about their leases:

- A receivable for the right to receive payments
- A corresponding deferred inflow of resources
- Lease revenue, reported systematically over the lease term, and
- Periodic interest revenue from the receivable.

EFFECTIVE DATE AND TRANSITION

The requirements of the leasing guidance are to be effective for reporting periods beginning after December 15, 2019, with earlier application encouraged.

More information about the leases project.

BDA Submits Comments to Department of the Treasury and the Internal Revenue Service on Recommendations for the 2017-2018 Priority Guidance Plan.

The BDA submitted comments to the Department of the Treasury and the Internal Revenue Service on recommendations for items that we believe should be included in their 2017-2018 Priority Guidance Plan. You can view our final comments here.

The Treasury Department's Office of Tax Policy and the IRS use the Priority Guidance Plan each year to identify and prioritize the tax issues that should be addressed through regulations, revenue rulings, revenue procedures, notices, and other published administrative guidance. The 2017-2018 Priority Guidance Plan will identify guidance projects that the Treasury Department and the Service intend to work on as priorities during the period from July 1, 2017, through June 30, 2018.

BDA's letter focuses on the following topics:

- **Political Subdivision:** BDA continues to urge the IRS and Treasury to withdraw the proposed rules and release a new set of proposed regulations that reflect the concerns expressed by BDA and other participants in the municipal bond market.
- **Tax Exempt Bonds & Infrastructure:** The BDA believes tax-exempt bonds can and should continue to play a leading role in infrastructure investment.
- **Issue Price:** We suggest that the IRS and Treasury should monitor the impact of the new rules on the market.

The regulatory notice can be found here.

Bond Dealers of America

June 1, 2017

MSRB Seeks Additional Comment on Requirements for Obtaining CUSIP Numbers.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) is seeking additional public comment on draft amendments to MSRB Rule G-34, on obtaining CUSIP numbers. Consistent with its previous proposal, the MSRB's revised draft amendments clarify the obligations of municipal securities dealers to obtain CUSIP numbers for new issue securities sold in private placement transactions, including direct purchases, and require all municipal advisors to obtain CUSIP numbers in competitive offerings. However, the MSRB is now requesting input on possible exceptions from each of these requirements in certain limited circumstances.

"In light of feedback from municipal market participants, the MSRB has modified its draft amendments to include a principles-based exception from the proposed requirements," said MSRB Executive Director Lynnette Kelly. "The MSRB appreciates the thoughtful participation of commenters in the rulemaking process and invites further dialogue on how to ensure CUSIP number requirements appropriately reduce investor risk and regulatory uncertainty."

The draft amendments would provide an exception to the requirements of Rule G-34 for municipal securities purchased directly by a bank where the underwriter on the transaction or the municipal advisor advising an issuer in a competitive offering reasonably believes that the bank is likely to hold the municipal securities to maturity or limit resale of the municipal securities to another bank. Dealers and municipal advisors relying on the exception would be expected to have in place policies and procedures reasonably designed to assist in their determinations.

Comments on the revised draft amendments should be submitted no later than June 30, 2017. Read the request for comment.

Date: June 1, 2017

Contact: Jennifer A. Galloway, Chief Communications Officer
202-838-1500
jgalloway@msrb.org

The Effective Date of the New Issue Price Regulations is Near.

On December 9, 2016, the United States Treasury Department published regulations (the "Issue Price Regulations") setting forth new rules for the determination of the issue price of a tax-exempt bond issue. The Issue Price Regulations changed a rule that had been in place for many decades. These new rules become effective for tax-exempt bonds **sold on or after June 7, 2017** and thus will affect bond issues now entering the pipeline.

What Is the Issue Price? The issue price is generally the reoffering price to the public of a tax-exempt bond at which a substantial amount of the bonds of the same maturity are sold. The issue price of the entire issue is the sum of the issue prices of the particular maturities of the bonds of the issue. There are special rules, described in "A Quick Recap of the New Issue Price Rules" below that apply in certain circumstances.

Why Is Issue Price Important? The yield on a tax-exempt bond issue is often relevant to many of the tax determinations made by an issuer with respect to that bond issue during the planning stages and could also affect post-issuance obligations of an issuer with respect to that bond issue. Calculating the yield on a bond issue essentially involves discounting the cash flow (principal and interest payments) on the bond issue back to a target amount, which is the issue price. The discount rate is the yield. Thus, a critical component in determining the yield on a bond issue is the issue price.

When Must the Yield Be Determined and Therefore When Must the Issue Price Be Known? In some cases, the issue price must be known and the yield must be determined on the sale date of the bonds. It is especially important to know the issue price and yield on the sale date in the case of an advance refunding bond issue, where the yield on the reinvestment of the bond proceeds in an escrow fund is limited to the bond yield and the escrow investments must be purchased on the sale date. In other cases, such as a current refunding or a new money bond issue, determining the issue price and the yield is less critical from a timing perspective, but generally still needed for overall compliance.

When Does the Yield on the Tax-Exempt Bond Matter? The yield on a tax-exempt bond issue will matter (i) in an advance refunding, because the escrow yield is restricted to the bond yield, (ii) where arbitrage rebate payments or yield reduction payments may be owed to the IRS, and (iii) where certain moneys derived from or related to the tax-exempt bond issue can only be invested in a fixed relationship to the bond yield (such as conduit bonds and single family mortgage revenue bonds).

What Will Happen Next. We have drafted language that will be included in (i) the Bond Purchase Agreements (for negotiated sales of tax-exempt bonds) and Notices of Sale (for competitively sold tax-exempt bonds) as well as (ii) new Issue Price Certificates that the underwriter or direct purchaser of tax-exempt bonds must sign at closing. The form of the required Issue Price Certificate is included as an exhibit to the Bond Purchase Agreement or the Notice of Sale, as applicable. By executing the Bond Purchase Agreement for a negotiated bond or submitting a bid for a competitively bid bond, the underwriter or direct purchaser is acknowledging the application of the new rules and its duties to sell the bonds, and in some instances hold the offering price of the bonds, in accordance with the new rules and to supply the necessary information to the issuer to properly document the issue price.

What Should an Issuer or Conduit Borrower of Tax-Exempt Bonds Do Now. As issuers and conduit borrowers plan their upcoming bond or bond anticipation note issues, they should consult with their Bond Counsel and, where applicable, their Municipal Advisors (sometimes referred to as Financial Advisors), to review the new language and the implications of the new Issue Price Regulations. For negotiated sales, the issuers and conduit borrowers should also consult with the underwriter and underwriter's counsel regarding the underwriter's responsibilities in establishing the issue price.

A Quick Recap of the New Issue Price Rules. Generally, the issue price is the first price at which a substantial amount (10%) of the bonds of each maturity are sold to the "public." The public is any "person" other than an "underwriter" or a related party to an underwriter. A person is any individual or entity for tax purposes and so would include corporations and partnerships. An underwriter is any person who agrees in writing with the issuer that it will participate in the initial sale of the bonds to the public or an entity who agrees with a lead underwriter to do so.

There are three special rules. First, if the bonds are sold in a private placement, the issue price is the purchase price paid for the bonds. **Second**, if the issuer chooses, the issue price will be the initial offering price to the public (typically the price shown in the Official Statement for the bonds) if the underwriter agrees to offer the bonds at a price no higher than that initial offering price for the first five business days after the sale date. **Third**, if the issuer conducts a competitive sale and receives at least three qualified bids, the issue price will be the reasonably expected initial offering price stated in the winning bid. A competitive sale is (i) a process in which the issuer offers the bond for sale to underwriters at specified written terms where those bid terms are disseminated in a manner reasonably designed to reach potential underwriters, (ii) all bidders have an equal opportunity to bid, (iii) the issuer receives bids from at least three underwriters who have established industry reputations for underwriting new issuances of municipal bonds, and (iv) the issuer awards the bonds to the bidder who submits a firm offer to purchase at the highest price or lowest interest cost.

An issuer can choose any of the permitted methods of establishing the issue price, but the issuer must identify the method chosen not later than the issue date of the bonds. This will typically be evidenced in the Tax Certificate for the bonds.

All of the rules described above apply to bonds sold for money. If bonds are sold for property, such as in the case of certain lease transactions where the vendor performs certain services in exchange for rent payments under the lease, special rules apply that are beyond the scope of this QuickStudy.

Locke Lord QuickStudy

May 31, 2017

JDSUPRA

MSRB Files Amendments to Modernize Customer Account Transfers.

The Municipal Securities Rulemaking Board (MSRB) today filed with the Securities and Exchange Commission (SEC) proposed amendments to MSRB Rule G-26, on customer account transfers. If approved by the SEC, the amendments to Rule G-26 would promote a uniform customer account transfer standard for all municipal securities dealers. The MSRB believes the amendments will make the transfer of customer securities account assets more flexible, less burdensome and more efficient, while reducing confusion and risk to investors and allowing them to better move their municipal securities to their dealer of choice.

View the filing.

Single Audit Roundtable Meets.

The Single Audit Roundtable conducted its first meeting of the year to discuss issues surrounding the single audit. The roundtable is a forum established by the American Institute of Certified Public Accountants and hosted by KPMG where federal audit and accountability representatives meet with members of the non-federal and state government audit communities.

In normal fashion the agenda featured updates from the U.S. Office of Management and Budget, AICPA and the U.S. Government Accountability Office, as well as an update on the status of Federal Audit Clearinghouse activities.

OMB did not reveal a lot of new issues but did talk about the themes of this year's budget proposal: effectiveness, efficiency, accountability and cyber security. It is the Trump Administration's goal to look closely at all federal agencies and their functions to determine if there are changes that can be made to address the themes set forth in the budget proposal. In terms of the single audit and the Uniform Guidance, OMB is looking for input from the grants and audit communities on what sort of changes can be made in the short and long term that will address effectiveness, efficiency and accountability.

OMB also stated that several items are being held pending review to determine if the proposed regulation, guidance or initiative would have a cost or burden associated with it. Such items include:

- An OMB proposal that would amend portions of the Uniform Guidance in the procurement and pension cost areas.
- Additional frequently asked questions that would further clarify inconsistencies in the Uniform Guidance and address minor implementation issues.
- A new schema for the Catalog of Federal Domestic Assistance (CFDA).
- The Single Audit Quality Study.

Representatives from the AICPA Government Audit Quality Center provided an update on center activities. Currently, the center has 230 member firms and 31 state audit offices. Collectively, 93 percent of single audit (dollars) are represented. The AICPA also noted that they are currently working on internal control. Specifically, on what practitioners need to do better work in this area.

Members of the GAO Yellow Book team provided an update on the Yellow Book noting that comments on the exposure are due by July 6 with the final issuance projected for 2018. GAO noted that the new Yellow Book will include a big change in the peer review area specifically with organizations that are not affiliated with a recognized organization. For these organizations, there are several additional peer review requirements.

Additionally, GAO provided that there are quite a few new requirements around performance audits and a new requirement specifically on waste. Auditors are not expected to seek out waste in their audit.

The next roundtable will be held in November.

NASACT

May 15, 2017

[SIFMA Municipal Division Recognized by National Federation of Municipal Analysts.]

Washington, D.C., May 17, 2017 – SIFMA today received an Industry Contribution Award from the National Federation of Municipal Analysts (NFMA). The award recognizes SIFMA's contributions to issues related to municipal securities disclosure, in particular SIFMA's efforts to bring together stakeholder groups to discuss disclosure and advocate where there is common interest.

Michael Decker, managing director and co-head of SIFMA's Municipal Securities Division, received the award at a luncheon today in Washington, D.C. The NFMA specifically noted Mr. Decker's efforts to coordinate and lead an industry working group to author a letter to the Municipal Securities Rulemaking Board which recommended several enhancements to the EMMA system to aid transparency.

"I am honored to receive this award on behalf of our members," said Mr. Decker. "SIFMA has consistently worked to improve disclosure in the markets, and we support the goals of investor protection and market transparency."

The NFMA has presented awards annually since 1984. The awards are given to individuals or entities that further the goals of the NFMA for the enhancement and betterment of the municipal bond industry.

Contact: Katrina Cavalli, 212.313.1181, kcavalli@sifma.org

[Dodd-Frank Rollback Could Hinder Funding of Accounting Standards Board.]

The anticipated rollback of the 2010 Dodd-Frank financial-overhaul law could affect funding the Government Accounting Standards Board receives, according to the not-for-profit organization that oversees it.

The board, known as the GASB, sets financial accounting and reporting standards for state and local governments in the U.S.. The Financial Accounting Foundation is responsible for the oversight and administration of the activities of both the GASB and the Financial Accounting Standards Board, which is responsible for standards of both public and private companies as well as not-for-profit organizations.

A provision in Dodd-Frank allows the foundation to charge a fee for GASB's services. The fee is paid by broker dealers regulated by the Financial Industry Regulatory Authority, or FINRA, that trade in the municipal bond market.

Before the introduction of the provision, the board was voluntarily funded by organizations that are required to follow the standards the GASB writes, creating a potential conflict of interest, said Matthew Broder, vice president of public affairs at the foundation.

"For the past six years, the GASB has enjoyed reliable and independent funding fees to support operations," he said. The funding could be threatened if the Dodd-Frank Act is pared back, Mr. Broder added.

GASB fees made up 18% of the Financial Accounting Foundation's total revenue in 2016. The organization is also funded by fees for FASB's services, that come from a provision in the 2002 Sarbanes-Oxley corporate-governance law. FASB is funded through fees paid by publicly-listed companies and entities in the U.S.. More than half of the foundation's revenue in 2016 came from such fees.

The scaling back of financial regulations faces opposition. The Council of Institutional Investors, an advocacy group, sent a letter to the House of Representatives Wednesday asking them to oppose the Financial Choice Act, a bill that aims to roll back both Sarbanes-Oxley and Dodd-Frank.

THE WALL STREET JOURNAL

By RHEAA RAO

May 19, 2017 7:55 am ET

BDA Submits Comment Letter: SEC Proposed Amendments to 15c2-12.

On May 15, 2017, BDA submitted a comment letter in response to the SEC's proposed amendments to Exchange Act Rule 15c2-12 which proposes to add two items to the list of event notices to be included in continuing disclosure undertakings. You can find our final letter HERE.

Letter Overview:

- The BDA generally supports the concept of the Proposed Amendments, but offers suggestions to streamline the proposal
- The BDA believes that the definition of financial obligations and the new listed event (16) need to be redrafted more narrowly around bondholder concerns related to competing bank debt
- The BDA believes that something more than just the use of "material" is necessary if the Proposed Amendments will actually result in widespread compliance within the municipal securities market
- The BDA believes that the SEC needs to provide interpretative guidance concerning how dealers should due diligence compliance with the Proposed Amendments to ensure that event filings are material for dealers reporting the related event filings under their MSRB Rule G-47 time of trade responsibilities

Additional Links:

- BDA outside counsel Nixon Peabody has created an alert on the proposed amendments that be read here.
- The SEC's press release and Fact Sheet on the proposed amendments can be found here.

Bond Dealers of America

SIFMA Submits Comments to the SEC on Proposed Amendments to Rule 15c2-12.

The Securities and Exchange Commission has proposed rule amendments Rule 15c2-12 with the goal of improving investor protection and enhancing transparency in the municipal securities market. The amendments to Rule 15c2-12 add two event notices to Continuing Disclosure Agreements. First, issuers and obligated persons must disclose information on the incurrence of alternative financings, including bank loans, direct placements, and similar obligations, and terms of such financings. Second, issuers and obligated persons must disclose any default or termination events with regard to those alternative financings.

View Comments.

See also:

- Press Release: SEC Proposes Rule Amendments to Improve Municipal Securities Disclosures
- Federal Register Notice

May 15, 2017

New York Town Official Convicted in Landmark Bond Fraud Case.

NEW YORK — An elected official of a New York City suburb was convicted on Friday of what authorities have called the first criminal securities charges brought over municipal bonds, a spokesman for federal prosecutors said.

Christopher St. Lawrence, the elected supervisor of Ramapo, New York, was convicted by jurors in federal court in White Plains, New York, of 20 counts including securities fraud, wire fraud and conspiracy. The charges stemmed from actions aimed at securing financing for a stadium in the town.

A lawyer for St. Lawrence could not immediately be reached for comment.

New York federal prosecutors charged St. Lawrence in April 2016 along with Aaron Troodler, former executive director of the town-owned Ramapo Local Development Corp. Prosecutors said the two men defrauded investors who helped finance a controversial minor league baseball stadium.

Troodler pleaded guilty in March under an agreement with prosecutors and testified against St. Lawrence at the trial.

The case followed U.S. regulators’ push in recent years to bring civil actions against those accused of misconduct in the $3.7 trillion U.S. municipal bond market.

Prosecutors said Ramapo and the development corporation sold more than $150 million of bonds while Troodler and St. Lawrence concealed the town’s deteriorating finances.

The town’s financial woes were largely due to a $58 million minor league ballpark project, prosecutors said. The park is home to the Rockland Boulders.

Ramapo residents rejected a plan to guarantee bonds used to finance the park in a 2010 referendum, and St. Lawrence told residents that no public money would be used to pay for the project. But Ramapo ended up paying more than half the cost, according to prosecutors.

St. Lawrence and Troodler falsified the town's finances to help sell the bonds, including by putting millions in fake receivables on its books, prosecutors said.

St. Lawrence is also facing civil claims by the U.S. Securities and Exchange Commission.

In May 2016, after the charges were filed, Moody's Investors Service downgraded the town's outstanding bonds two notches to A3, still in the investment grade category. In February, Moody's withdrew its rating altogether because the town did not file audited financial statements.

The town, which is 28 miles northwest of New York City and had 126,595 residents as of the 2010 census, has said it significantly reduced its debt and cut its exposure to the development corporation by 62 percent as of Dec. 31.

By REUTERS

MAY 19, 2017, 4:00 P.M. E.D.T.

(Reporting By Brendan Pierson in New York; Editing by Cynthia Osterman)

NFMA Comments on Proposed Amendments to SEC Exchange Act Rule 15c2-12.

The National Federation of Municipal Analysts commented to the SEC on proposed amendments to Exchange Act Rule 15c2-12 (File No. S7-01-17).

To view the letter, click here.

BDA / Nixon Peabody Issue Price Summary Document.

BDA and Nixon Peabody have released an Issue Price Summary Document to assist BDA members in engaging issuer clients in conversations about the new issue price rules, which are effective on June 7th.

The BDA / Nixon Peabody document is designed to provide an overview of the new issue price rules, including important new definitions and requirements related to competitive and negotiated deals.

BDA Next Steps on Issue Price

BDA and Nixon Peabody will host an in-depth conference call on issue price during the week of May 22nd. That call will include a more detailed overview of how the obligations and requirements of underwriters will differ for negotiated and competitive deals. It will also provide an opportunity for BDA members to ask questions and discuss priority compliance issues.

Please expect a scheduling email for that call shortly. In the interim, please email jvahey@bdamerica.org with any issue price questions so we can be sure to address common questions on the upcoming call.

Additional Information

The final IRS issue price rule is here.
The SIFMA model issue price documents are here.
The NABL model issue price certificates are here.

MSRB to Pull its Proposed Minimum Denomination Rule from the SEC.

WASHINGTON – The Municipal Securities Rulemaking Board is pulling its proposed standalone minimum denomination rule from the Securities and Exchange Commission after dealers argued it is overly complex and would hamper liquidity.

The SEC must approve the rule for it to take effect. But the board decided to pull the rule back during its quarterly board meeting here last week where it discussed comments market participants had submitted to the SEC.

The board also decided to seek a second round of comments on its controversial proposal to require CUSIP numbers for
private placements and publish guidance for so-called solicitor municipal advisors, an MA that solicits issuers or others borrowers for business on behalf of certain other professionals.

The board is instructing its staff to have more discussions with stakeholders as it further considers the future form of the stand-alone minimum denomination rule, according to MSRB executive director Lynnette Kelly. The current minimum denomination requirements under MSRB Rule G15 will remain in place as the discussions continue, she said.

"The feedback [on the proposal] was very specific and quite negative," Kelly said. "Given that feedback, the board decided it wanted to obtain more information regarding any proposed amendment and, in order to allow for this because of an upcoming statutory deadline for the SEC to act, the board agreed to withdraw its current rule proposal with the SEC and … conduct additional outreach to a diverse, broad group of municipal market participants."

Kelly added that the MSRB specifically will be soliciting feedback from issuers, which did not submit comments to the SEC on the proposal.

The standalone Rule G49, as it was proposed, would have contained current requirements from MSRB Rule G15 that prohibit dealers from engaging in transactions with customers in amounts below the minimum denominations of municipal securities set by issuers. It also would have included two current exceptions to the prohibition as well as one more exception first proposed in April 2016. That exception would allow a dealer that has bought a customer's liquidated position in an amount less than the minimum denomination to sell those bonds to one customer with no prior holdings of the bonds and to any customers who already have positions in the bonds.

The standalone rule also would have eliminated the current requirement in G15 that a dealer, in some situations, must obtain a "liquidation statement" from a party that isn't its customer but rather the party from which the dealer purchased the securities. The current rule requires the liquidation statement to be obtained before the sale of securities to another customer and confirm that the original selling customer fully and completely liquidated its below-minimum position.

By taking away the liquidation statement, the MSRB felt that another safeguard was needed for an existing exception under G15 that says a dealer can sell a below-minimum amount of a bond to a customer if the sale is a result of another customer liquidating his or her entire position in the bonds.

It proposed a new "safeguard" that would prohibit a dealer engaged in an interdealer trade from selling less than all of a below-minimum position that the dealer acquired either from a customer that fully liquidated its below-minimum position or from another dealer. That prohibition would satisfy the MSRB's goal by preventing the creation of additional below-minimum positions, the MSRB said.

Dealer groups complained that the proposed new safeguard would have limited interdealer transactions and thus liquidity.

Tom Dannenberg, Bond Dealers of America's chair, said the proposed rule was complex and that the board had lost sight of the original intent of the regulations, protecting small investors.

The MSRB is going out for a second round of comments on the CUSIP rule proposal after participants said the change would have negative repercussions for the muni market in part because banks looking for loans would be dissuaded from buying municipal securities. Many market groups refer to the proposal as a change, but the MSRB has held that it is more of a clarification of its longstanding interpretation of its rule. The proposal additionally requires non-dealer MAs acting as financial advisors in a competitive sale to get CUSIPs.

Kelly said the first proposal "was quite proscriptive" and that the proposal underlying the next request for comment will be designed to provide dealers flexibility when they are acting as placement agents. It "will be more principles-based, which will give dealers more flexibility but require that dealers establish certain policies or procedures or conversations internally about whether or not a particular transaction needs a CUSIP," Kelly said.

The MSRB, responding to other criticisms, is also holding off for the time being on an SEC filing about its proposed advertising rules designed to harmonize advertising regulations for dealers and MAs. An advisors' group complained the proposal did not do enough to distinguish between dealers and MAs. The board instructed its staff to continue working on that proposal.

The board will be publishing regulatory guidance for solicitor municipal advisors some time in May, Kelly said, to provide more clarity and promote understanding of the MSRB rules that apply to those participants. The guidance will cover, among other things, registration, professional qualifications, supervisory responsibilities, and conflicts of interest.

There were also discussions on future staff work to study the way MSRB rules have affected municipal advisors and the current state of primary offering practices in the market.

The Bond Buyer

By Jack Casey

Published May 01 2017, 11:40am EDT

MSRB Provides Guidance on Application of Rules to Solicitor Municipal Advisors.

Washington, DC – To promote understanding of the regulatory framework for municipal advisors acting as solicitors, the Municipal Securities Rulemaking Board (MSRB) today published guidance summarizing MSRB rules applicable to this category of municipal advisory activity. Solicitor municipal advisors, for compensation, solicit municipal entities, including public pension plans, and obligated persons for business on behalf of certain other financial professionals.

Under the MSRB's mandate to protect municipal entities and obligated persons, the MSRB has developed a core regulatory framework for all municipal advisors. Today's guidance comprehensively summarizes that framework and specifically addresses how that framework applies to solicitor municipal advisors. The guidance also compiles and includes links to the numerous resources available from the MSRB and the Securities and Exchange Commission for additional information.

"One component of creating a comprehensive regulatory framework for municipal advisors is addressing the activities of solicitor municipal advisors in their interactions with public pension plans, municipal bond issuers and other municipal entities," said MSRB Executive Director Lynnette Kelly. "Today's guidance furthers the MSRB's efforts to ensure all municipal advisors understand their regulatory obligations."

The MSRB established the core standards of conduct for non-solicitor municipal advisors with the 2015 adoption of MSRB Rule G-42. When developing Rule G-42, the MSRB communicated its intention to undertake separate rulemaking or guidance for solicitor municipal advisors. MSRB outreach to and questions received from solicitor municipal advisors informed the development of the new guidance.

"While the guidance is directly responsive to requests for information from solicitor municipal advisors, we believe all municipal advisors can benefit from the rule summaries and resources provided," Kelly said.

Read the guidance.

Access additional resources for municipal advisors.

Date: May 4, 2017

Contact: Jennifer A. Galloway, Chief Communications Officer
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MSRB Holds Quarterly Board Meeting.

Washington, DC – The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) held its quarterly meeting April 26-27, 2017 where it discussed the role of solicitor municipal advisors as well as industry feedback on several regulatory topics related to protecting investors and municipal entities, and promoting a fair and efficient municipal securities market. The Board also met with Securities and Exchange Commission (SEC) Acting Chairman Michael Piwowar.

Consistent with the MSRB's federal mandate to develop a comprehensive regulatory framework for municipal advisors, the Board discussed the role of the category of municipal advisors that, for compensation, solicit municipal entities and obligated persons for business on behalf of certain other financial professionals. To directly address the application of MSRB rules to these "solicitor" municipal advisors, the Board agreed to publish guidance designed to promote understanding of the regulatory framework that applies to solicitor municipal advisory activities. The MSRB also expects that, more generally, all municipal advisors may benefit from the forthcoming guidance.

The MSRB has been implementing its municipal advisor regulatory framework for several years. When the developing regulatory framework is more fully in place, the MSRB plans to assess retrospectively the impact and effectiveness of the municipal advisory framework. At its recent meeting, the Board discussed the importance of this future analysis to understanding the benefits and costs of the municipal advisory regulatory regime.

Advertising Rules

The Board also discussed comments received on the MSRB's proposal to update and harmonize certain provisions of its municipal securities dealer advertising rule with those of other financial regulators, and to create similar advertising standards for municipal advisors. The MSRB received substantive input on both aspects of its proposal and will continue to consider that input as it develops enhancements to the regulatory framework for advertising by municipal market professionals.

Primary Offering Practices

The MSRB is currently engaged in a multi-year review of primary offering practices to identify any necessary revisions to existing rules or the need for guidance to support existing protections for municipal securities investors and issuers. At its meeting, the Board discussed preliminary input from market stakeholders and the MSRB's retail investor advisory group, and policy themes related to syndicate practices. The Board directed staff to continue its review of primary offering practices, with the goal of publishing a concept proposal to solicit formal industry feedback.

In a related discussion, the Board evaluated comments received on proposed changes to MSRB Rule G-34, on CUSIP numbers, new issue and market information requirements, to clarify the rule's definition of "underwriter" and requirements for obtaining CUSIP numbers when dealers act as placement agents in municipal securities transactions, including direct purchases. In response to comments received, the Board agreed to issue a second request for comment to refine the rule's application and provide flexibility to dealers when acting as placement agents.

Minimum Denominations

The Board also discussed comments received by the SEC on the MSRB's proposal to amend provisions in MSRB Rule G-15, on transactions below the minimum denomination of an issue. The Board determined it is desirable to obtain more information and, if possible, greater consensus, regarding any proposed amendments. To provide time for the MSRB to engage in meaningful outreach with stakeholders and obtain additional information, and in light of the upcoming statutory deadline for the SEC to act on the proposal, the Board agreed to withdraw its current proposal. By deferring SEC action, the MSRB can conduct additional outreach to a broad and diverse group of market participants, including issuers that establish minimum denominations for their municipal securities issues, and to the extent appropriate, reach greater consensus on any future amendments that may be considered. In the meantime, below-minimum denomination transactions will continue to be governed by existing Rule G-15(f).

Updates to Customer Account Transfers

As part of the MSRB's regulatory efficiency initiative, the Board discussed comments received on its review of existing MSRB Rule G-26, on customer account transfers, and agreed to seek SEC approval of proposed changes designed to modernize the rule and promote a uniform customer account transfer standard for all brokers, dealers and municipal securities dealers.

Date: May 1, 2017

Contact: Jennifer A. Galloway, Chief Communications Officer
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MSRB Reminds Municipal Advisors of September 12, 2017 Deadline for Series 50 Exam.

The Municipal Securities Rulemaking Board (MSRB) is reminding municipal advisor firms of their obligation to ensure that every individual associated with the municipal advisor firm is qualified in accordance with the rules of the MSRB. Pursuant to MSRB Rule G-3, an associated person of a municipal advisor firm who engages in municipal advisory activities on behalf of the municipal advisor firm is required to be qualified as a "municipal advisor representative" by passing the Municipal Advisor Representative Qualification Examination (Series 50). After September 12, 2017, only an associated person of a municipal advisor firm who has passed the Series 50 exam can engage in municipal advisory activities on behalf of the municipal advisor firm.

Read the full notice.

Resources:

FAQs about the Series 50 exam
Content outline for the Series 50 exam
Additional information on the MSRB's website

T+2 Settlement Cycle Change Set for September 2017.

The MSRB recently announced the September 5, 2017 effective date of amendments to MSRB Rules G-12, on uniform practice, and G-15, on confirmation, clearance, settlement and other uniform practice requirements with respect to transactions with customers, to define regular-way settlement for municipal securities transactions as occurring on a two-day settlement cycle (T+2). The SEC had previously approved these amendments and other technical changes to MSRB rules on April 29, 2016. The migration to a T+2 settlement is expected to provide significant benefits to the financial industry broadly, including the mitigation of counterparty risk and an increase in global settlement harmonization by aligning the U.S. markets with other major markets.

Read the full regulatory notice.

House Financial Services Committee Holds a Markup of the Financial CHOICE Act.

On May 4, the House Financial Services Committee concluded their markup of H.R. 10, the Financial CHOICE Act of 2017. While none of the Democratic amendments offered were agreed to, the manager's amendment offered by Chairman Jeb Hensarling (R-Texas) passed in a voice vote, and the bill was favorably reported to the House in a 34-26 party line vote. The next step will be a vote by the full House of Representatives. The bill includes several provisions of interest to the municipal market, including a repeal of the Volcker Rule – which has disrupted Tender Option Bond programs – and a repeal of the Dodd-Frank Act provision, which has resulted in municipal securities dealers footing the cost of the Governmental Accounting Standards Board, among others.

SIFMA Hearing Summary

Most Special Districts Lag in the Transparency Department.

Special districts are all over, and according to one of the first nationwide reports on them, most aren't revealing even basic information online about how they're spending public money.

When citizens turn on their faucet, visit a library or fly out of an airport, there's a good chance they're being served by a special district. These entities frequently spend hundreds of millions in public funds a year, but information about how those dollars are used is often scarce.

A report published this week by U.S. PIRG, a public interest research group, is likely the first national review of online transparency practices for special districts. It found that most of them fail to meet basic transparency standards, and a slight majority of the special districts reviewed received failing grades.

Some of the more common special districts include water and sewer districts, airports and parking authorities. They've proliferated over the past several decades, with more than 38,000 nationwide as of 2012, according to Census of Governments data. States like Colorado, Illinois and Kansas have a particularly large number of special districts.

According to the U.S. PIRG report, just 38 percent of the special districts reviewed published their most recent budgets on their websites, while only 30 percent posted comprehensive annual financial reports. Eleven of the districts failed to post any financial information online at all.

The 42 districts slapped with failing grades in the report include housing authorities, large hospital districts and statewide utility authorities. According to U.S. PIRG, most of them provided only one financial document online, rather than both budgets and financial reports. Of the districts that did publish annual reports, many covered only the highlights of them.

Reporting requirements for special districts vary, but they're often not held to the same standards as cities, counties and other localities.

"We really didn't see the same level of transparency that we'd come to expect from general purpose governments," says U.S. PIRG's Michelle Surka, who co-authored the report. "The difference is really striking."

For the study, researchers assessed a sample of 79 larger special districts. They included entities with the 20 highest total expenditures nationally, the 20 highest expenditures for each government function type and others spending the most in each state.

Other reviews conducted by individual states have identified similar holes in transparency. A 2012 report by the Kentucky Auditor's Office, for instance, found that 40 percent of the state's special districts failed to submit budgets as required, while nearly half of larger districts had not performed audits on an annual basis. It concluded that current laws did not provide "sufficient consequences" for districts that failed to comply with reporting requirements and recommended stronger incentives.

Districts earning the top scores in the U.S. PIRG report were the Port of Houston Authority, Chicago Transit Authority and Metropolitan Transit Authority of Harris County. All have established user-friendly websites with multiple datasets available for download.

If there's one common trait shared by the higher performing districts, it's that they're in states that have taken steps to bolster reporting practices.

Illinois, for example, passed a law in 2015 that led to creation of the Greater Chicago Mass Transit Transparency and Accountability Portal, which posts regular spending, contacts and employee data. U.S. PIRG's Surka also cites Kentucky, which launched a central reporting agency for its districts, and Texas, where the state comptroller runs a Transparency Stars program that encourages disclosure.

Some special districts might not post financial information on their own websites but instead share data with state agencies that post it elsewhere online. U.S. PIRG gave these districts partial credit in its scoring.

In some cases, Surka actually suggests that states take the lead in publishing special districts' data. The U.S. PIRG report reviewed large special districts that manage big budgets, but there are also many smaller districts with volunteer boards that might not be able to fund and maintain comprehensive online checkbook sites.

While special districts' governing bodies are primarily responsible for making their financial information available, the report outlines several steps states and localities can take to improve reporting practices. These include establishing a central registry of all special districts, uniform reporting requirements and tasking a government agency with tracking districts' financial data.

"Improving budget and spending transparency will make special districts — which often exist in the shadows of our democracy — more accountable to governments that created them and the public they serve," the report states.

GOVERNING.COM

BY MIKE MACIAG | APRIL 28, 2017

BDA Comment Letter on the Presidential Memo on the Fiduciary Duty Rule.

Today, the BDA submitted a comment letter that is focused on the questions raised by President Trump's February 3rd memorandum.

Comment Letter Summary

In response to the issues raised in the Presidential Memo, the BDA's comment letter states that the rule will unnecessarily restrict access to fixed-income securities, including municipal securities and certain corporate and mortgage securities, and that will hurt investment returns and restrict investment strategies. The letter stresses that the Department of Labor has unnecessarily denied investors the benefits of access to dealer inventories. Furthermore, BDA asks for another enforcement memorandum from the DOL to provide enforcement clarity related to the upcoming June 9 applicability date and the BDA also reiterates its objection to the economic cost-benefit analysis, which was based on mutual fund fees.

Bond Dealers of America

April 19, 2017

MSRB to Mull MA Impact Analysis, Critical Comments at Meeting.

WASHINGTON – Municipal Securities Rulemaking Board members meeting here next week will discuss the framework for an analysis of the costs and burdens of rules affecting municipal advisors a protecting investors.

Comments from the market on the board's recent draft amendments to require CUSIP numbers for private placements will also be up for discussion at the meeting. While many of the market groups believe the MSRB's inclusion of placement agents under its Rule G34 on obtaining CUSIPs would be a change, the MSRB has said it would be more of a clarification because it has always believed that G34 applies to private placements.

Many of the groups urged the MSRB to provide an exemption from obtaining CUSIPs for participants involved in private placements for a single purchaser or a bank, its affiliates or subsidiaries if it moves forward with the amendments. Such an exemption would alleviate concerns that the changes would discourage banks from pursuing private placements and issuers from engaging placement agents and MAs because CUSIPs may signify the placement is a security and not a loan, they said.

Dealer groups praised another part of the draft amendments that would give non-dealer MAs acting in competitive deals the same responsibility to apply for CUSIPs that dealer-MAs have in competitive deals under the current rule. However, the National Association of Municipal Advisors worries that the requirement could bring non-dealer MAs closer to crossing the line into dealer activity.

The board will also review comments on a proposal to change the MSRB's advertising rule for dealers and apply comparable provisions to MAs for the first time.

NAMA, which suggested the MSRB withdraw its proposal, raised concerns that the proposal fails to adequately differentiate between the "products" that underwriters and investment advisors offer to retail customers and the "services" that MAs generally provide to their issuer clients. The group said that if the MSRB pursues the rule, it needs to properly bifurcate it to separately cover products and services.

In addition to calls for other changes, such as allowing requests for proposals and qualifications to be excluded from the definition of advertising, NAMA also wants the board to give guidance on how the rule would apply to MA websites and social media platforms.

SIFMA said it is pleased that the MSRB is proposing to level the regulatory playing field between dealers and MAs, but asked for better harmonization with existing Financial Industry Regulatory Authority requirements. One such change would mean the MSRB would abandon its "one size-fit--all" approach to the definition of advertising and instead use FINRA's three categories for communication – institutional, retail, and correspondence.

The board is also expected to weigh whether it should publish guidance on the application of various existing MSRB rules to solicitor MAs that are not subject to MSRB Rule G42 on core duties of MAs.

That discussion is in response to solicitor MAs asking for such guidance.

The Bond Buyer

By Jack Casey

Published April 19 2017, 1:38pm EDT

MSRB Offers Complimentary E-Learning Course for Municipal Bond Issuers.

Washington, DC – To support the educational needs of municipal government professionals who finance public projects with municipal bonds, the Municipal Securities Rulemaking Board (MSRB) now offers a free online course specifically designed for these professionals. "Being an Informed Municipal Bond Issuer" provides engaging lessons to highlight best practices and potential pitfalls in the municipal bond issuance process.

"Most municipal government professionals can benefit from strengthening their understanding of the municipal securities market," said Lynnette Kelly, Executive Director of the MSRB. "We created this resource to address a need for continuing education in our market and deliver a high-quality product that serves a broad group of stakeholders."

The course, part of the MSRB's growing catalog of interactive, online MuniEdProSM courses, was developed with input from senior government finance professionals. Participants assume the role of the issuer in a series of real-world scenarios that illustrate important considerations at various stages of the issuance process, including the roles and responsibilities of key members of the financing team and the disclosure obligations of an issuer. Watch a short video for a look behind the scenes of MuniEdProSM.

Register for MuniEdProSM here to take the free, 45-minute course. Continuing professional education credit is available. The course also can be integrated into in-house learning management systems.

"Being an Informed Municipal Bond Issuer" is latest educational resource for state and local governments offered by the MSRB, which also maintains an extensive library of multimedia resources in its online Education Center and provides on-demand educational webinars.

For more information about MuniEdPro, contact MSRB Chief Education Officer Ritta McLaughlin at rmclaughlin@msrb.org or 202-838-1306.

Date: April 19, 2017

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MSRB Announces Regulatory Topics to be Discussed at April Board Meeting.

The Board of Directors of the Municipal Securities Rulemaking Board (MSRB) will meet April 26-27, 2017 in Washington, DC, where it will discuss comments received on proposed amendments to the MSRB's dealer advertising rule and CUSIP rule, current initiatives related to additional data and market tools on the Electronic Municipal Market Access (EMMA) website, and other rulemaking and policy topics.

View the MSRB Board of Director's meeting discussion items.

Overview Of Continuing Disclosure Requirements For Bond Issuers: Smith Gambrell & Russell

Introduction

Government bodies take on specific obligations to file information regularly ("continuing disclosure") when they issue bonds through an underwriter. Failure to affirmatively make such filings has significant consequences. These continuing disclosure obligations are the subject of this Overview.

Governmental bonds generally are exempt from the requirements of registration and the filing of periodic disclosure reports under the federal Securities Acts of 1933 and 1934. The exemptions apply both to the governmental bonds of states and local government units, and to "private activity" bonds issued by governmental authorities for the benefit of nonprofit and for-profit companies when the bonds meet the requirements of the Internal Revenue Code for exclusion of interest from federal income taxation. The reason usually stated for these exemptions is that the involvement of the state or local government unit places such securities in a more publicly accessible and more regulated environment than conventional corporate securities.

However, in the mid-1980's, the Securities and Exchange Commission ("SEC") adopted Rule 15c2-12 (the "Rule") in order to regulate and improve the market for securities (generally referred to herein as "Bonds") issued by state and local governmental bodies ("Governmental Issuers"). The Rule directly regulates only bond underwriters (the parties that purchase Bonds with a view to reselling them), but indirectly requires persons committed to support payment of Bonds ("Obligated Persons") to make continuing disclosure. Usually the Governmental Issuer is the Obligated Person taking on continuing disclosure obligations, but Obligated Persons can also include others that obtain the benefit of a Bond issue by using the facilities financed and agreeing to pay the Governmental Issuer amounts that will repay the Bonds.

Rule 15c2-12 has two basic elements. First, it requires that a substantially final "preliminary official statement," providing disclosure of the material information concerning an issuance of Bonds, be reviewed and provided to potential Bond purchasers, and that a final official statement be prepared and made available. Second, the Rule requires that underwriters participating in most Bond offerings obtain from the Governmental Issuer of the Bonds (and/or one or more other Obligated Persons) a written continuing disclosure agreement to provide continuing disclosure with respect to those Bonds. The consequences of this second provision are discussed below.

Continuing Disclosure Obligations Under Rule 15c2-12

Rule 15c2-12 requires that an underwriter, prior to purchasing or selling Bonds in connection with a covered Bond offering, determine that the Governmental Issuer, and/or one or more Obligated Persons for whom financial or operating data is presented in the official statement, has undertaken in writing to provide to every nationally recognized municipal securities information repository ("NRMSIR") and to the appropriate state information depository ("SID"), if any (there being none in Georgia and several other states) the following:

- By a specified date, annual financial and operating information for the Governmental Issuer and each other Obligated Person for whom financial information or operating data is presented in the official statement (an "Annual Information Filing");
- When and if available, audited annual financial statements for Obligated Persons ("Audits");
- In a timely manner, notice of the occurrence of one of eleven material events described below (a "Material Event Filing"); and
- In a timely manner, notice of a failure of any person required to provide the Annual Information Filing referred to above, on or before the date specified in the continuing disclosure agreement ("Notice of Failure").

Although the Rule originally stated that a filing will be made with each NRMSIR, procedures have been established for one centralized filing with a "Central Post Office." Filing can be made by email.

The specific continuing disclosure obligations taken on will be set out in the continuing disclosure agreement. The form of a continuing disclosure agreement is not prescribed by Rule 15c2-12, other than the requirement that it contain undertakings addressing the matters described above. The continuing disclosure agreement usually takes the form of a "continuing disclosure certificate" signed by the Governmental Issuer or other Obligated Person, or a continuing disclosure agreement between the Governmental Issuer or other Obligated Person and the Bond trustee or some other disclosure agent. The continuing disclosure agreement is executed in connection with the preparation for or closing of the Bond issue, and is enforceable against the signing party by the holders of the Bonds. The continuing disclosure agreement will be included in the closing transcript for the issue and typically is made an appendix to or set forth substantially in full in the text of the official statement.

Annual Information Filing and Audit Requirements

Continuing disclosure agreements must address the following requirements for Annual Information Filings and Audits:

- The specific financial information and operating data to be provided;
- What financial statements are to be filed and when;
- In reasonable detail, the accounting principles pursuant to which financial statements will be prepared, and whether the financial statements will be audited; and
- The date each year by which annual financial information will be provided.

The Rule is quite specific about the undertaking that the party providing disclosure must make, with one significant exception. The Rule does not specify what annual financial information is to be provided in an Annual Information Filing, other than to state that the required information will be set forth in the continuing disclosure agreement and that the information will cover each person obligated for the Bonds for whom financial information or operating data is presented in the official statement. “Annual financial information” is defined as financial information or operating data, provided at least annually, of the type included in the official statement with respect to an Obligated Person.

The apparent intent of this requirement is to cause the Governmental Issuer or other Obligated Person(s) to make annual filing of the information necessary to update and keep current the material information concerning that person (or other persons) set forth in the official statement. However, this intent is not clearly stated in the Rule, and the Obligated Persons and the underwriter can negotiate to determine the content of the continuing disclosure agreement. Annually providing updates of all information in the official statement could be a considerable task, and arguably some of the information in the official statement, while of some relevance to an investor, is not necessary or even material and can be excluded (for example, the number of bank branches and the number of deposits in a county, items which are typically included in the official statement).

The most usual practice with respect to the contents of Annual Information Filings is to require, in addition to the Obligated Person’s annual financial statements, the filing of other annual information necessary to update the significant tables and other disclosure presented in the official statement; for example, the most recent tax levy and collection data pertinent to a tax-backed bond issue.

In fact, there is wide variation in the content required by various continuing disclosure agreements. Some require little or nothing in addition to the information contained in the annual financial statements, and others require information that would appear not to be addressed by the terms of the Rule (for example, information that does not constitute “financial or operating data” of the Obligated Person, such as lists of the ten largest employers in a community).

Because each continuing disclosure agreement constitutes a separate, negotiated obligation enforceable for the life of the relevant Bonds, care should be taken that the continuing disclosure requirements are consistent with respect to timing and content. Otherwise the Obligated Person may be required to make different filings at inconsistent times, or to cumulate the lists of required disclosures from the various agreements.

Financial information or operating data constituting an Annual Information Filing may be contained in a document or set of documents submitted as part of a disclosure filing, or may be included by specific reference to documents previously provided.

Material Event Filings

A continuing disclosure agreement must require a Governmental Issuer or other Obligated Person to give timely notice of the following events with respect to the Bonds being offered, if material:

- Principal and interest payment delinquencies;
- Nonpayment-related defaults;
- Unscheduled draws on debt service reserves reflecting financial difficulties;
- Unscheduled draws on credit enhancements reflecting financial difficulties;
- Substitution of credit or liquidity providers, or their failure to perform;
- Adverse tax opinions or events affecting the tax-exempt status of the Bonds;
- Modifications to rights of bondholders;

- Bond calls;
- Defeasances;
- Release, substitution or sale of property securing repayment of the Bonds;
- Rating changes.

Consequences Of Failure To Make Required Disclosures

There are several consequences to a failure to comply with continuing disclosure obligations:

The continuing disclosure agreement is an enforceable obligation, and the Obligated Person may be compelled, either by the underwriter, by any holder of the Bonds, and sometimes by other persons, to make the disclosure reports called for;
Failure to comply with the continuing disclosure obligations should be disclosed in future official statements;
Failure to comply with continuing disclosure obligations may "chill the market" for the Obligated Person's Bonds, since the Bond market may feel it cannot rely on that person to comply in the future;
If an aggrieved person could prove a loss arising out of the failure to disclose, an action for damages for breach of contract or securities fraud is a possibility; for example, an investor might assert that he would have sold his Bonds before a decline in their price if missing information had been timely filed; and
The continuing disclosure agreement requires Obligated Persons to file a Notice of Failure to comply.

Exemptions From Continuing Disclosure Requirements

Since Rule 15c2-12 applies to underwriters, it follows that the Rule does not apply to Bonds or other forms of financing placed with a financial institution or investor that is not underwriting the Bonds. This type of financing is commonly known as a "private placement."

The Rule also does not apply to underwritten limited offerings where the Bonds have authorized denominations of not less than $100,000, but only in one of three specific types of transactions:

- The Bonds are sold to no more than 35 persons, each of whom the underwriter reasonably believes has knowledge and experience in financial and business matters and that is capable of evaluating the merits and risks of the investment and is not purchasing for more than one account or with a view to distributing the Bonds;
- The Bonds have a maturity of nine months or less; or
- The Bonds are "tender option securities" that may be tendered by the holder back to the Governmental Issuer or its agent at a minimum of par value at least as frequently as every nine months (for example, variable rate demand bonds).

Also, a partial exemption is available to "small issuers," but this exemption is somewhat illusory. The partial exemption applies if no Obligated Person with respect to the Bond issue is an Obligated Person with respect to more than $10,000,000 in aggregate principal amount of outstanding Bonds that are subject to the Rule, including the new Bonds to be issued. In such an event, a continuing disclosure agreement, although it must require Material Event Filings be made, need not require Annual Information Filings of financial operating information concerning the Obligated Persons or filings of financial statements with the NRMSIRs. The exemption is somewhat illusory because if it is to be utilized, the official statement must identify by name, address and telephone number the persons with the Governmental Issuer or other Obligated Person from whom the information that otherwise would be included in such an Annual Information Filing can be obtained, and any company or member of the public may demand copies of the financial statements, financial information and operating data as called for in the continuing disclosure agreement. Such financial statements, financial information and operating data must include, at a minimum, those which are customarily prepared by such Obligated Person and are publicly available.

Finally, if Bonds have a stated maturity of 18 months or less, a continuing disclosure agreement need only require that Material Event Filings be made.

Summary

Although the federal securities laws do not directly require Governmental Issuers of Bonds (and the parties that benefit from and support Bonds) to make periodic or other reports of information pertinent to the Bond issue, a similar requirement has been imposed indirectly through the SEC's Rule 15c2-12. Pursuant to the Rule, Governmental Issuers of Bonds and/or other Obligated Persons with respect to the Bonds must enter into continuing disclosure agreements specifying the filing and information requirements, unless one of several full or partial exemptions apply. Governmental Issuers and other Obligated Persons need to be acutely aware of the requirements in the agreements for continuing disclosure that they sign in connection with each Bond issue, and with the content and timing of reports they obligate themselves to make. Failure to comply with these continuing disclosure agreements may have serious consequences, as described above.

Article by James P. Monacell

Last Updated: April 19 2017

Smith Gambrell & Russell LLP

[New York Town Official to Face Trial in Landmark Bond Fraud Case.]()

NEW YORK — An elected official of a New York City suburb faces trial on Wednesday in what authorities have called the first criminal securities fraud case involving municipal bonds.

Christopher St. Lawrence, the elected supervisor of Ramapo, New York, has been charged with securities fraud, wire fraud and conspiracy. Prosecutors say he defrauded investors who helped finance a controversial minor league baseball stadium.

Jury selection is set to begin before U.S. District Judge Cathy Seibel in White Plains, New York federal court on Wednesday morning.

New York federal prosecutors charged St. Lawrence in April 2016 along with Aaron Troodler, former executive director of the town-owned Ramapo Local Development Corp. Troodler pleaded guilty last month under an agreement with prosecutors.

The case followed U.S. regulators' push in recent years to bring civil actions those accused of misconduct in the $3.7 trillion U.S. municipal bond market.

Prosecutors said Ramapo and the development corporation sold more than $150 million of bonds while Troodler and St. Lawrence concealed the town's deteriorating finances.

The town's financial woes were largely due to a $58 million minor league ballpark project, prosecutors said. The park, originally called Provident Bank Park and now Palisades Credit Union Park, is home to the Rockland Boulders.

Ramapo residents rejected a plan to guarantee bonds used to finance the park in a 2010 referendum, and St. Lawrence told residents that no public money would be used to pay for the project. But Ramapo ended up paying more than half the cost, according to prosecutors.

St. Lawrence and Troodler falsified the town's finances to help sell the bonds, including by putting millions in fake receivables on its books, prosecutors said.

St. Lawrence is also facing civil claims by the U.S. Securities and Exchange Commission.

In May 2016, after the charges were filed, Moody's Investors Service downgraded the town's outstanding bonds two notches to A3, still in the investment grade category. In February, Moody's withdrew its rating altogether because the town did not file audited financial statements.

The town, which is 28 miles northwest of New York City and had 126,595 residents as of the 2010 census, has said it significantly reduced its debt and cut its exposure to the development corporation by 62 percent as of Dec. 31. Nonetheless, some of Ramapo's general obligation bonds have dropped in price this year in a few small trades.

By REUTERS

APRIL 19, 2017, 6:03 A.M. E.D.T.

(Reporting By Brendan Pierson in New York; Additional reporting by Hilary Russ in New; Editing by Dan Grebler)

NFMA Issues Comment on GASB Project No. 3-251, Financial Reporting Model Improvements – Governmental Funds.

On April 19, 2017, the National Federation of Municipal Analysts issued a response to GASB on Project No. 3-251, *Financial Reporting Model Improvements – Governmental Funds*.

To read the Comment, click here.

GFOA Files Comments on MSRB Rule G-34.

On March 31, 2017, Government Finance Officers of America filed comments as requested by the MSRB on draft rule amendments to Rule G-34 that would require for a dealer to obtain CUSIP numbers for new issue securities sold in private placement transactions and also require municipal advisors that are not dealers to be subject to the CUSIP requirement.

In the comments, GFOA emphasized a major and overriding concern "that the proposed rulemaking could dampen the bank loan and direct purchase markets, putting issuers in the unfavorable position of either not using a financing structure that is in their best interest, or having to pay more for those financings." Instead, GFOA suggested that the MSRB spend effort and resources enhancing the EMMA system with regard to bank loan information, and continue to work with GFOA and other market participants to identify EMMA improvements that would accommodate the transactions being listed on an issuer's home page when Form G-32 is filed.

View the Comments.

Muni-Tech and E-Trading: Opportunities and Considerations for Investors.

The growth in both equity and fixed income e-trading, also known by its more formal regulatory moniker "alternative trading system," has been a bit of a blessing and a bit of a curse for investors. On one hand, there is no question automation and e-trading platforms give both individual and institutional investors more offerings and improved public market liquidity. This quickly translates into improved pricing, execution and transparency—all the things one wants to have for "fair, orderly and efficient markets."

The curse part is spelled out pretty clearly in the SEC Rule 15c3-5 "Risk Management Controls for Brokers or Dealers with Market Access." Technology increases the speed of complex algorithm-driven transactions across interlinked markets, so that "errors generated by one system or firm can quickly propagate across the marketplace." No one wants a repeat of the flash crash of May 2010 again. Events like that don't exactly bolster investor confidence.

While well established in equity trading, e-trading platforms are also quickly expanding in the fixed-income markets. In 2016, the Securities Industry and Financial Markets Association (SIFMA for short) pulled together a thorough report detailing electronic trading platforms in U.S. corporate and municipal securities. The report outlined, in ten categories and 35 subcategories, the components of e-trading, from trade size to counterparty visibility. Then it applied those in its examination of the nearly 20 platforms currently offering trading functions in the fixed-income markets.

In addition to technological advances, regulations have also been a change agent. This is particularly true in the municipal bond market. In 2014, Municipal Securities Rulemaking Board, the self-regulatory body of the municipal bond market that operates under the oversight of Congress and the SEC, received SEC approval for Rule G-18. The rule codifies the parameters defining "best execution," usually referred to around the market as 'best-ex.' Best execution is to assure that a customer buying or selling a bond is getting the very best price. Charged in its charter to promote fairness and efficiency in the $3.7 trillion municipal securities market, the MSRB instituted the rule to accomplish exactly that.

Perhaps proving the law of unintended consequences, the best-ex rule gave a boost to municipal e-trading platforms . Since e-trading platforms are SEC registered broker-dealers, they are subject to all MSRB rules. So, being SEC compliant and giving access to potentially a larger investor pool with more trade-price transparency, the platforms—there are currently six with muni-specific dedicated interfaces—were a solution to a number of the municipal bond broker-dealers' needs.

One particular need the muni market always has is for better liquidity for retail-size bond offerings. Liquidity can be measured a variety of ways: number of offerings, number of bids, bid-ask spread, time between listing and sale, speed of execution. There is no official designation as to what 'retail size' is, but generally blocks of bonds under $500,000 par value is the accepted rule of thumb. Given that roughly 50% of the bonds in the municipal market are in retail accounts (more if you add bonds held by retail's surrogates—advisors and trusts), it's the largest aggregate part of the market.

All of the major market participants—broker-dealers, funds and registered investment advisors (particularly those managing the burgeoning separately managed accounts business)–saw the best-ex benefits to listing offerings and buying bonds on e-trading platforms. Moreover, the more that joined, the more saw they had to join. It was the network effect writ large.

This did not go unnoticed by the MSRB. "In all markets, efficiency of transactions is improved when a greater number of potential buyers and sellers is involved," said MSRB Executive Director Lynnette Kelly. "Electronic trading has developed into another important venue broker-dealers can use in the municipal market to achieve best execution and fair pricing for their customers."

With the regulators paying attention, so were compliance officers. As municipal e-trading platforms became an established part of the market, compliance teams realized they needed to learn the ins-and-outs of the muni market as well. Even a cursory understanding of e-trading highlighted some key benefits for compliance. Consider the data-capture. In addition to the trade basics of coupon, maturity, yield, price and settlement, e-trading platforms trap virtually everything surrounding the trade: time of listing, time of the trade, number of bids, cover bid (the next highest offer away from the winning bid) and total trades, just for starters.

Other benefits include diminished counterparty risk and a cleaner path for trade clearing. Not only can complete documentation be presented should there ever be a question, but also since everything is digitized the record keeping is simpler. Moreover, the automated process means fewer costly 'fat finger' mistakes to find and unwind. Be it a client, auditor (internal or external), counsel, or regulator, the e-paper trail is consistent and complete.

Municipal e-trading platforms are advancing rapidly, with more participants, more offerings and more robust interfaces. They are pushing the market from over-the-counter to exchange, organizing a market that is comprised of numerous submarkets (*see Muni Bond Manager's Journal: Pay Attention To Bond Submarkets*). As with anything in tech, change is a constant and only constantly changing faster. The issues that gave rise to e-trading—and equally now have arisen from it—are being watched carefully by regulators. For both market and regulatory reasons, it's time to get up to speed.

Forbes

by Barnet Sherman, Contributor

Apr 14, 2017

(This is the first article of a two part series on e-trading and the fixed income markets)

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SEC Issues New Material Event Notices Under Proposed Rule 15c2-12 Amendments: Holland & Knight

HIGHLIGHTS:

- The U.S. Securities and Exchange Commission (SEC) has proposed adding two additional triggers – in new subparagraphs (15) and (16) – for the material events notice requirements under Rule 15c2-12 (the Proposed Rule).
- According to the SEC, the purpose of the Proposed Rule is to improve investor protection and enhance the financial transparency of municipal bond issuers by improving investor and market participant access to timely information relating to a municipal issuer's financial obligations.
- The Proposed Rule contains two general categories of disclosures. The first relates to disclosures with respect to "financial obligations" (which are broken down into various subcategories) and certain covenants therein. The second relates to defaults, accelerations, terminations and workouts.
- Comments on the Proposed Rule should be submitted to the SEC on or before May 15, 2017.

The U.S. Securities and Exchange Commission (SEC) on March 1, 2017, proposed adding two additional triggers – in new subparagraphs (15) and (16) – for the material events notice requirements under Rule 15c2-12 (the Proposed Rule). At first blush, they seem relatively innocuous. According to the SEC, the Proposed Rule was designed to improve investor protection and enhance the financial transparency of municipal bond issuers by improving investor and market participant access to timely information relating to a municipal issuer's financial obligations.

Early discussions concerning the first section of the Proposed Rule suggested that the intent was to address reporting requirements for bank loans (Direct Placements) incurred by issuers that often were not reported to the secondary market. As noted below, the first section of the Proposed Rule is much broader than that. The second section of the Proposed Rule is intended to require disclosure of defaults, accelerations and terminations that reflect financial difficulty. Specifically, the two new event disclosure requirements contained in the Proposed Rule read as follows:

> (15) Incurrence of a financial obligation of the obligated person1, if material2, or agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the obligated person, any of which affect security holders, if material; and
>
> (16) Default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation of the obligated person, any of which reflect financial difficulties.

The rule goes on to define "financial obligations" to mean a:

> (i) debt obligation, (ii) lease, (iii) guarantee, (iv) derivative instrument, or (v) monetary obligation resulting from a judicial, administrative, or arbitration proceeding. The term financial obligation shall not include municipal securities as to which a final official statement has been provided to the Municipal Securities Rulemaking Board consistent with this rule.

In its description of the proposed amendments, the SEC outlines the intent behind the rule changes and provides examples of each category that will be useful in interpreting its intent. Below is a brief summary of the SEC release, which paraphrases a number of the Commission's thoughts with respect to it.

Components of the Proposed Amendments to Rule 15c2-12

As is the case with all existing 15c2-12 reporting events, the obligation of a governmental entity to report the new triggering events comes not as a direct mandate from the SEC to the issuer, but rather as an obligation of the Participating Underwriter to assure that the issuer or "obligated person" agrees to provide the disclosure – usually through the execution of a "continuing disclosure agreement."

The Proposed Rule contains two general categories of disclosures. The first relates to disclosures with respect to "financial obligations" (which are broken down into various subcategories) and certain covenants therein. The second relates to defaults, accelerations, terminations and workouts.

Financial Obligations

As set forth in the definition above, a "financial obligation" can include a debt obligation, lease, guarantee, derivative instrument or monetary obligation resulting from a judicial, administrative or arbitration proceeding. The term "financial obligation" does not, however, include municipal securities as to which a final official statement has been provided to the Municipal Securities Rulemaking Board (MSRB) consistent with the Rule.

Debt Obligations

The term "debt obligations" seems relatively straightforward and would include any material short- or long-term borrowing by the issuer or obligated person, issued under the terms of an indenture, loan agreement or similar contract that will be repaid over time. The Commission cites as examples a direct purchase of municipal securities by an investor and a direct loan by a bank.

Leases

The term "lease" includes both *operating* or *capital* leases. The Commission cites as an example a lease-purchase agreement to acquire an office building or an operating lease to lease an office building for a stated period of time.

Guarantees

Guarantees were included to capture contingent financial obligations incurred to secure obligations of a third party or obligations of the issuer. The guarantee may assume different forms, including a payment guarantee or other arrangement that could expose the issuer or obligated person to a contingent financial obligation. The Commission cites as an example a county's guarantee of the repayment of municipal securities issued by a town located in the county. The guaranty *may also be of an issuer's own obligations*, for instance, in connection with the issuance of variable rate demand obligations, where the issuer agrees to repurchase, with its own capital, bonds that have been tendered but are unable to be remarketed (where no third-party liquidity facility is provided).

Derivatives

Derivative instruments are intended to capture any swap, security-based swap, futures contract, forward contract, option, any combination of the foregoing, or any similar instrument to which an issuer or obligated person is a counterparty. The Commission cites as an example an interest-rate swap that allows the issuer to fix all or part of its exposure to variable interest rates. The Commission notes that the use of a derivative instrument can also expose the issuer or obligated person to a variety of risks, some of which may be significant.

Judicial, Administrative or Arbitration Proceeding

The Commission included monetary obligations resulting from a judicial, administrative or arbitration proceeding in the proposed definition of "financial obligations" because the requirement to pay such an obligation could adversely impact the issuer's or obligated person's overall creditworthiness and liquidity, and adversely affect security holders. It noted that a settlement order or consent decree that includes a monetary obligation would be included under this proposed definition.

The Commission noted that while information about monetary obligations resulting from judicial, administrative or arbitration proceedings may be publicly available through the media or otherwise, having this information available on MSRB's Electronic Municipal Market Access system (EMMA) would help provide investors and other market participants outside the immediate community with ready and prompt access to this information in an electronic format and in one central location.

Timing of Disclosure

The Commission noted that most event notices would be due in a timely manner not in excess of 10 business days, and that notice of the incurrence of a monetary obligation resulting from a judicial, administrative or arbitration proceeding should be provided within 10 business days of the *initial* imposition of the monetary obligation. This suggests that reporting is required whether or not the matter is subject to appeal.

Covenants and Agreements with Respect to Financial Obligations

The second category of trigger events related to financial obligations under the first Proposed Rule relates to an issuer's agreement to certain contractual terms, including covenants, events of default, remedies, priority rights or other similar terms of a financial obligation of the obligated person, *"any of which affect security holders, if material."* The Commission seems to be concerned with terms that could result in, among other things, contingent liquidity and credit risks, refinancing risk and reduced security for existing security holders.

Examples of some material terms cited by the Commission are the date of incurrence, principal amount, maturity and amortization, interest rate, if fixed, or method of computation, if variable (and any default rates), but the Commission notes that other terms may be appropriate as well, depending on the circumstances.

"Materiality," of course, is the key factor in determining whether a material events notice is required, but what is, in fact, material is not entirely clear. The Commission notes, for example, that an issuer or obligated person may incur a financial obligation for an amount that, absent other circumstances, would not raise the concerns that the Proposed Rule is intended to address. But if an issuer or obligated person agrees to provide a counterparty to a financial obligation with a senior position in the debt payment priority structure, and that agreement affects existing security holders, the event likely does rise to the level of importance that it should be disclosed to investors and other market participants.

Materiality seems to be determined by any event that has a material impact on the entities' liquidity or overall creditworthiness. Here the Commission noted that:

> [T]he increase or change in the issuer's or obligated person's outstanding debt can weaken the measures (e.g., debt service as a percentage of expenditures or debt service coverage ratio) used to assess an issuer's or obligated person's liquidity and

> creditworthiness and may result in a reevaluation of the issuer’s or obligated person’s overall credit quality. For example, an increase in outstanding debt could affect an issuer’s or obligated person’s level of debt service as a percent of expenditures, which industry commenters view as an important indicator of credit quality for general obligation bonds, or such an increase in debt could affect the amount of revenues available to pay debt service for revenue bonds, which is considered in connection with rate covenants or additional bonds tests. If an issuer’s or obligated person’s liquidity and creditworthiness is impacted, the credit quality of the issuer’s or obligated person’s outstanding municipal securities could be adversely affected which could impact an investor’s investment decision or other market participant’s credit analysis.

Timely access to disclosure about a material agreement to covenants, events of default, remedies, priority rights or other similar terms of a financial obligation – any of which affect security holders – could potentially provide important information about the creation of contingent liquidity risk, credit risk and refinancing risk that could impact the issuer’s or obligated person’s liquidity and overall creditworthiness, and affect security holders’ rights to assets or revenues. If an issuer’s or obligated person’s liquidity and creditworthiness is impacted and/or the rights of security holders are affected, the credit quality and price of the issuer’s or obligated person’s outstanding municipal securities could be affected.

Other examples cited by the Commission in its release include the following:

- a. financial obligations in which the issuer or obligated person agrees to covenants that are more restrictive than those applicable to the issuer’s or obligated person’s outstanding municipal securities, such as a requirement to maintain a higher debt service coverage ratio
- b. a more restrictive covenant that would potentially trigger an event of default more easily, and as a result thereof, the counterparty to the financial obligation would be able to assert remedies prior to existing security holders
- c. events of default that differ from those that are applicable to an issuer’s or obligated person’s outstanding municipal securities, such as a failure to observe any term of the financial obligation (as opposed to specifically identified terms) that would enable the counterparty to the financial obligation to assert remedies prior to existing security holders
  d. the inclusion of different remedies than the issuer or obligated person has provided to existing security holders
- e. the inclusion of an acceleration provision could provide that any unpaid principal becomes immediately due to the counterparty upon the occurrence of a specified event of default, without any grace period, which would effectively prioritize the payment of the financial obligation to the counterparty if the security holders do not have the benefit of the same provision; by agreeing to such a term, the counterparty to the financial obligation could benefit by being repaid prior to existing security holders
- f. granting material priority rights that provide the counterparty with better terms than existing security holders and, as a result, adversely affect the rights of existing security holders, such as granting superior rights to the counterparty in assets or revenues that were previously pledged to existing security holders and, as a result, reduce security for existing security holders
- g. structuring a debt obligation with a balloon payment that creates a refinancing risk; while this may not be typically identified as a covenant, event of default, remedy or priority right, such a term could potentially impact the issuer’s or obligated person’s liquidity and overall creditworthiness and adversely affect security holders
- h. imbedding terms in debt obligations and leases, allowing acceleration upon certain trigger events that could become material

- i. providing guarantees and including material terms therein, which affect security holders
- j. including terms in a derivative instrument that may create contingent liquidity risk for the issuer or obligated person, such as a requirement to post collateral or to pay a termination fee upon the occurrence of certain events; thus, the swap itself may not be material based on notional amounts and scheduled payments, but terms such as mark-to-market collateral posting requirements upon a downgrade or above a threshold, the inclusion of additional termination events, or the risk of termination payments upon trigger events controlled by the counterparty could adversely impact the issuer or obligated person's overall liquidity and overall creditworthiness, and thus require disclosure

The Commission notes that there are other material terms similar to covenants, events of default, remedies and priority rights that an issuer or obligated person may agree to that could, among other things, create liquidity, credit or refinancing risks that could affect the liquidity and creditworthiness of an issuer or obligated person, or the terms of the securities they issue.

The Commission notes that by agreeing to a material covenant, event of default or remedy under the terms of a financial obligation, such as the examples provided above, security holders could be affected, and the issuer or obligated person may create contingent liquidity and credit risks that could potentially impact the issuer's or obligated person's liquidity and overall creditworthiness.

Defaults, Accelerations, Terminations and Modification of Terms

The second part of the Proposed Rule in subclause (16) would require an event notice under two scenarios, namely (1) the occurrence of a default, event of acceleration or termination event, and (2) the modification of terms, or other similar events under the terms of a financial obligation of the issuer or obligated person, in each case provided the occurrence reflects financial difficulties. The phrase *"any of which reflect financial difficulties"* applies to all of the events listed in the proposed event notice requirement under subclause (16), i.e., a default, event of acceleration, termination event, modification of terms or other similar events. To clarify the intent, the Commission gave the following examples:

> For example, an issuer or obligated person may covenant to provide the counterparty with notice of change in its address and may not promptly comply with the covenant. A failure to comply with such a covenant may not reflect financial difficulties; therefore, absent other circumstances, this event likely does not raise the concerns the proposed amendments are intended to address. On the other hand an issuer or obligated person could agree to replenish a debt service reserve fund if draws have been made on such fund. In this example, if an issuer or obligated person fails to comply with such covenant, then such an event likely should be disclosed to investors and other market participants.

The Commission notes that a *default* could be a monetary default – in which an issuer or obligated person fails to pay principal, interest or other funds due – or a non-payment-related default, which occurs when the issuer or obligated person fails to comply with specified covenants. Generally, under standard contract terms, if a monetary default occurs or a non-payment-related default *is not cured within a specified period,*3 such default becomes an "event of default" and the trustee or counterparty to the financial obligation may exercise legally available rights and remedies for enforcement, including acceleration.

A *termination event* (typically found under a swap) generally allows either party to a financial obligation to terminate the agreement subject to certain conditions, and in some cases will result in the payment of a termination fee by the issuer or obligated person. Thus the occurrence of a termination event under a derivative instrument may reflect financial difficulties that could adversely impact the issuer's or obligated person's overall creditworthiness.

Modification of Terms

The Commission notes that prior to an event of default or acceleration, a modification of terms of any financial obligation may occur when an issuer or obligated person is in a distressed financial situation. For example, there may be circumstances in which an issuer or obligated person, due to financial difficulties, anticipates not meeting the terms of a financial obligation, such as a covenant to maintain a specified debt service coverage ratio, and the issuer or obligated person is able to negotiate the modification of the terms of the financial obligation with the counterparty. In addition to negotiating a change to certain covenants in the financial obligation with the counterparty, *to avoid default* under the terms of the financial obligation, the issuer or obligated person could agree to new terms, including providing the counterparty with superior rights to assets or revenues that were previously pledged to existing security holders. The Commission notes that disclosure of these modifications could provide important information about the current financial condition of the issuer or obligated person, including potential impacts to the issuer's or obligated person's liquidity and overall creditworthiness, and whether security holders have been affected.

Other Similar Events

The Commission noted that "other similar events" in the Proposed Rule would share similar characteristics to one of the listed events (i.e., a default, event of acceleration, termination event or modification of terms). For instance, an issuer or obligated person could fail to perform a covenant not related to payment required under a financial obligation that does not result in the occurrence of a default, but the occurrence of this other event does reflect financial difficulties of the issuer or obligated person. The Commission provided as an example a situation where an issuer fails to meet a construction deadline with respect to a facility being financed by the proceeds of a financial obligation due to financial difficulties. As a result of the failure to meet this deadline, a default does not occur but the lender is entitled to take possession of the facility and complete construction. The Commission noted that, like other events described above, the occurrence of the failure to meet a performance covenant reflecting financial difficulties, whether or not that failure triggers a "default," could provide information relevant in making an assessment of the current financial condition of the issuer or obligated person, including potential adverse impacts to the issuer's or obligated person's liquidity and overall creditworthiness, and whether security holders have been affected.

The Commission suggested that the event notice for the occurrence of any of these events that reflect financial difficulties generally should include a description of the event and the consequences of the event, if any.

Conclusions

So what should be disclosed under the Proposed Rule? It is likely that issuers will not want to judge the materiality of each event or circumstance described above, or take the time or incur the expense of providing summaries of each new financial obligation. In most instances, then, unless the SEC provides more clarification, it seems likely that issuers will post on EMMA the full text of each applicable agreement. That actually could defeat the purpose of disclosure.

It should be noted that the security for many conduit bonds are structured as general corporate obligations of the obligated person. Thus any subsequent financial obligation for which corporate security is provided could have a material adverse effect on industrial development bonds with respect to which the obligated person is responsible. Given the volume of transactions entered into by a conduit obligated person, particularly with a large corporation, the obligated person probably will be forced to judge materiality so as to avoid continual postings. Perhaps auditors can assist in developing a materiality standard, but even if the size of the financial obligation is otherwise not material, legal review may be required if there is any question as to whether covenants in new financial obligations might be more favorable that those held by existing security holders.

The SEC has requested comments on the Proposed Rule and, to date, a number of comments have been submitted, most of which have requested clarification or safe harbors. For example, Digital Assurance Certification LLC (DAC), an accounting firm and former affiliate of Ernst & Young LLP, in its assessment of the Proposed Rules on March 31, 2017, suggested that:

> "However, unless the SEC's proposal is more sharply targeted, DAC is concerned that the proposal as currently structured would not effectively achieve its stated purpose, would create significant new burdens for issuers, obligated persons and underwriters, and would result in a flow of highly unstructured information into the marketplace that would make it extremely difficult for investors to efficiently identify and assess the items of information that would be relevant to such investors' specific interests in their bond holdings."

DAC then proposed a number of suggestions that would significantly narrow the scope of the Rule, including among other things, tightly defining "financial obligations" and eliminating monetary obligations arising from judgments and other obligations that do not arise from transactions for borrowed money.

Comments on the Proposed Rule should be submitted to the SEC on or before May 15, 2017.

Notes

1 "Obligated Person" under the Rule refers to both the issuer and, in a conduit financing, the underlying obligor. The latter category may become more problematic since corporations and other non-governmental entities will often have much more complex debt, lease, guaranty and derivative structures, all of which would have to be separately analyzed. As used in this report (as was the case in the SEC release), "issuer" and "obligated person" are used somewhat interchangeably and often will include both the governmental entity and, where applicable, the obligated person.

2 "Material" once again is not defined in the Rule although a couple of examples are given. As some commentators have noted, this will no doubt lead to overreporting, and probably increased lawyer costs due to the recent Municipalities Continuing Disclosure Cooperation (MCDC) proceedings. As attorney Paul Maco, a former director of the SEC's Office of Municipal Securities, commented in a March 9, 2017, article in The Bond Buyer: "Many market participants view the often granular application of materiality displayed in the 71 issuer settlements announced last August as inconsistent with the application of materiality anticipated by experienced municipal finance lawyers, as illustrated by NABL's August 2014 MCDC Initiative Whitepaper Considerations for Analysis by Issuers of Materiality and Self Reporting and may question how the term will be applied in an enforcement context."

3 It is not clear whether the Commission is making a distinction between a monetary default, which should trigger a reporting requirement whether or not within a cure period under the loan documents, and a non-payment default, which would trigger a reporting requirement only after the cure period has expired. Because the Commission uses the term "default" and distinguishes that from "acceleration," it appears that the distinction may be intentional.

by Richard B. "Rick" Stephens, Michael L. "Mike" Wiener and David J. "Dave" Stevens

April 10 2017

Holland & Knight LLP

NABL Takes Complaints About SEC Disclosure Rule Proposal to OMB.

WASHINGTON – In a highly unusual move, bond lawyers have complained to the Office of Management and Budget that the Securities and Exchange Commission's recently proposed changes to its municipal disclosure rule greatly underestimate the burdens they will place on market participants and are too ambiguous to be approved without revisions.

The National Association of Bond Lawyers explained its concerns to OMB in a letter sent on Tuesday that also went to the SEC. The conclusions in the letter are partly based on the results of a survey NABL did of more than 70 of its members who were asked about the compliance burdens of the proposed rule.

Rick Weber, of counsel with Norton Rose Fulbright in Houston and the chair of the NABL ad hoc task force that produced the letter, said this is the first time he is aware of a group going to OMB to intercede with SEC muni rulemaking in his 40 years of practicing public finance.

"NABL has been critical of the SEC's burden estimates in the past, but we've voiced that criticism to the SEC only and, in deference to the SEC, not to OMB," he said.

Weber said there are two reasons NABL chose to write to OMB this time. One is President Trump's executive order from January aimed at reducing regulation and controlling regulatory costs that is binding on OMB and is expected to be a guidepost for independent agencies like the SEC.

"To some extent, we are utilizing that tool to be better heard," Weber said.

The second reason, he said, is that "the SEC has essentially ignored prior statements from knowledgeable industry participants that its prior cost estimates were far off and, notwithstanding that, they relied upon and repeated their prior estimates" in the recent Rule 15c212 proposal.

"The SEC's persistent failure to make realistic cost estimates led us to believe it was time to address the issue with OMB," Weber said.

The letter references the Paperwork Reduction Act, which charges the SEC with ensuring its rules that provide for "collection of information" are clear and unambiguous as well as avoid overburdening state and local governments and others. The SEC must submit their estimates of burden and other supporting information to OMB, which then has an opportunity to comment on the Paperwork Reduction Act aspects of the SEC proposal.

NABL wants OMB to comply with Trump’s executive order and tell the SEC that its proposed rule changes would impose ambiguous and overly burdensome collection of information requirements and are accompanied by cost estimates that are unrealistically low and should be assessed in light of current market practice.

If the SEC does not revise its rule to fix those concerns, NABL is asking OMB to disapprove the collection of information that the amendments contain.

The Office of Management and Budget can comment on the SEC’s Rule 15c212 proposal under the Paperwork Reduction Act.

NABL said it will comment separately on the substance of the SEC’s proposed rule changes closer to the May 15 comment deadline.

Other market groups agree with NABL’s stance that the SEC cost estimates for the rule are underestimated but said they are not planning to file similar requests with OMB.

The SEC is proposing to add two material events to the current muni disclosure Rule 15c212. It would require event notices to be filed for a broad range of “financial obligations,” if material, including, guarantees and monetary obligations resulting from a judicial, administrative or arbitration proceeding. It would also require such notices to be filed for actions and events related to financial obligations that “reflect financial difficulties” such as the modification of terms.

The SEC estimates that issuers would require two hours to prepare and file notices for each new event. It projected underwriters would require about 12 minutes per offering to compare issuer certifications of events to filed notices of the events. Those numbers were drawn from prior time estimates that NABL said do not account for the qualitatively different compliance obligations the new events will bring.

The commission estimates that of the 20,000 issuers that file event notices annually, only 2,000 would be required to file these new notices under the new amendments, meaning issuers would take a total of 4,000 hours to comply. It also estimated that 250 underwriters would take an average of 30 minutes to give notice of the amendments to those who will be affected by them and an additional 10 hours a year to comply with the amendments. The SEC’s total burden estimate for the market is 6,500 hours a year.

NABL wrote that its results, which incorporate Municipal Securities Rulemaking Board market data from 2016, finds that total burden estimate of 6,500 hours a year should be 2,417 times higher, coming in at about 15.71 million hours. That estimate is largely made up of the roughly 14.2 million hours of work NABL estimated brokers will need to do when obtaining and reviewing filings in connection with each secondary muni market transaction something the SEC completely left out of its calculations. The SEC estimate also does not consider the burdens participants will face in determining what is considered material, what new policies and procedures for compliance should look like, and the true work dealers must take to independently judge an issuer’s compliance with its disclosure duties, NABL said.

The lack of consideration of materiality concerns is particularly problematic, according to the group, because recent enforcement actions like those under the SEC’s Municipalities Continuing Disclosure Cooperation initiative have made issuers and underwriters take very conservative views about what materiality means. That could lead to issuers filing notices for almost every financial obligation and in turn force dealers to wade through the high volume of documents during their due diligence.

The use of materiality, which the SEC has continually avoided defining, also means the rule is unnecessarily ambiguous, NABL said.

The Bond Buyer

By Jack Casey

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Groups Urge MSRB to Drop Idea of Requiring CUSIPs for Private Placements.

WASHINGTON – Most municipal market groups are urging the Municipal Securities Rulemaking Board to abandon what they say is a dangerous proposal to require dealers to obtain CUSIP numbers for private placements.

But the groups have different views on another proposal to require non-dealer municipal advisors acting as financial advisors in a competitive sale to get CUSIPs.

The comments, made in letters sent to the MSRB, respond to changes the self-regulator proposed to its Rule G-34 on obtaining CUSIP numbers.

While many of the market groups believe the MSRB's inclusion of placement agents under G-34 is a change, the MSRB has said it is more a clarification because it has always believed that G-34 applies to private placements.

The Securities Industry and Financial Markets Association and Bond Dealers of America both stressed that it is important that any changes the MSRB makes are done prospectively because many participants would see them as new requirements.

"Failure to do this will create chaos and confusion in the market, which will not further any goal of the MSRB," wrote Mike Nicholas, BDA's chief executive officer.

Leslie Norwood, managing director and associate general counsel with SIFMA, wrote that SIFMA and its members believe the MSRB should provide "a clear exemption from the requirements of Rule G-34 for dealers and municipal advisors in private placements, including direct purchases of municipal securities to a bank, its affiliates or subsidiaries, or any consortium thereof."

Susan Gaffney, executive director of the National Association of Municipal Advisors, said NAMA believes the MSRB should have an exemption from the proposed requirements when the private placement is executed with a single purchaser.

Emily Brock, director of the Government Finance Officers Association's federal liaison center, said GFOA would agree with such an exemption.

The exemption also makes sense, some groups said, because placement agents may not be able to register with the Depository Trust and Clearing Corp., a requirement under G-34, because they never purchase the securities.

Gaffney said that the MSRB should also clarify that CUSIPs are only required for "clearly identifiable securities."

"This would avoid general confusion that exists in the marketplace related to the definitions of bank loans, private placements, direct placements, etc.," Gaffney wrote. Norwood requested that the MSRB clarify that private placements of loans would be exempt from the proposed requirements.

BDA takes a somewhat different tack and asks the MSRB to revise its proposed definition of underwriter so that the requirement for an underwriter to obtain CUSIPs would not be triggered if there are five or fewer purchasers of the munis who are sufficiently sophisticated. Such a change would still allow the purchasers to request a CUSIP if they wanted, BDA said.

A number of groups expressed concern that the proposed changes and clarifications could adversely impact the market by presenting a host of challenges, including discouraging banks from pursuing private placements and discouraging issuers from engaging placement agents and municipal advisors.

"A major and overriding concern of the GFOA is that the proposed rulemaking could dampen the bank loan and direct purchase markets, putting issuers in the unfavorable position of either not using a financing structure that is in their best interest, or having to pay more for those financings," Brock wrote.

Other commenters, including NAMA, the National Association of Health and Educational Facilities Finance Authorities, and the American Bankers Association, also said they are concerned that making CUSIPs a necessity in private placements would drive banks that are only interested in holding loans away from the municipal market. Some market participants, including banks, see CUSIPs as an indicator that an instrument is a security. Dealer groups said they are worried that the CUSIP requirement would take bank business away from dealers, which have a regulatory incentive to call something a security instead of a loan.

SIFMA and BDA lauded the portion of the changes that gives non-dealer MAs acting in competitive deals the same responsibility to apply for CUSIPs that dealer-MAs have in competitive deals under the current rule. However, NAMA said it isn't necessary and questioned why the winning underwriter in the deal couldn't continue getting the CUSIPs.

Norwood wrote in SIFMA's comment letter that dealers would welcome the change because those bidding on competitive transactions are currently forced to each get CUSIP numbers for the transaction in case they win, whereas under the changes, the participating MA would only have to get one set of CUSIP numbers.

Gaffney also wrote that the requirement for MAs is concerning because it could move those MAs closer to carrying out dealer activities.

She added that the MSRB did not include explanations for things like the processes for applying for CUSIPs in competitive transactions when an issuer doesn't have an MA and when an issuer uses multiple MAs on a transaction.

The National Federation of Municipal Analysts, along with others, expressed some concern that the changes would hurt transparency in the market when efforts have been made in the past to get participants to voluntarily disclose information about things like private placements.

NFMA said a new CUSIP requirement could result in fewer voluntary notices being filed or linked to already outstanding debt. Other commenters urged the MSRB to wait for the Securities and

Exchange Commission's changes to 15c2-12 to help transparency over things like private placements.

The Bond Buyer

By Jack Casey

Published April 03 2017, 4:39pm EDT

NFMA Response to the MSRB's Request for Comment on Draft Amendments to and Clarifications of MSRB Rule G-34.

On March 31, the NFMA issued a response to the MSRB's Request for Comment on Draft Amendments to and Clarifications of MSRB Rule G-34, on Obtaining CUSIP Numbers.

To read the comment letter, click here.

SIFMA Submits Comments to the MSRB on Draft Amendments to Rule G-34 on Obtaining CUSIP Numbers.

On March 31, SIFMA provided comments to the Municipal Securities Rulemaking Board (MSRB) on Rule G-34. The draft amendments to MSRB Rule G-34 clarify the application of the rule to private placement transactions and expand it to include non-dealer municipal advisors when advising on new issue municipal securities sold in a competitive offering. Leslie Norwood, managing director and associate general counsel with SIFMA, wrote that SIFMA and its members believe the MSRB should provide "a clear exemption from the requirements of Rule G-34 for dealers and municipal advisors in private placements, including direct purchases of municipal securities to a bank, its affiliates or subsidiaries, or any consortium thereof."

SIFMA Comment Letter

Arizona Broker-Dealer Settles Charges it Underwrote Fraudulent Muni Bonds.

Lawson Financial settles with SEC over due diligence in nursing home financings

Lawson Financial Corp., a now-defunct municipal bond underwriter in Phoenix, Ariz., has settled with the Securities and Exchange Commission over charges related to muni bond offerings the firm underwrote that turned out to be fraudulent.

Also charged with failing to conduct reasonable due diligence were the firm's CEO, Robert Lawson, and then-underwriter's counsel John T. Lynch Jr., who also was charged with failing to disclose that he was not actually authorized to practice law, as represented to investors in bond offering documents.

In February, the Arizona Republic reported that Mr. Lawson settled with the Financial Industry

Regulatory Authority Inc. over similar charges, resulting in the firm withdrawing its Finra membership and being forced to close.

The SEC's order found that Lawson Financial failed to conduct reasonable due diligence when underwriting bond offerings to purchase and renovate nursing homes and senior living facilities. The offerings were managed by Christopher F. Brogdon of Atlanta, who was later charged by the SEC with fraud and faces a court order to repay $85 million to investors.

The SEC charged that Lawson Financial failed to ensure that Mr. Brogdon and his related borrowers complied with their continuing disclosure undertakings, which generally prohibit underwriters from purchasing or selling municipal securities unless the issuer or obligated person has committed to providing continuing disclosure information, such as annual financial materials and operating data.

Mr. Lawson and his firm agreed to pay disgorgement of nearly $200,000, as well as penalties of nearly $200,000 for the firm and $80,000 for Mr. Lawson, who will be barred from the securities industry for three years. The firm and Mr. Lawson neither admitted nor denied the SEC's findings. Lawson Financial, which would have been eligible for more lenient remedies under the SEC's Municipalities Continuing Disclosure Cooperation Initiative, paid a penalty that was approximately double what the firm would have paid under the initiative, the SEC said in a release.

"Underwriters are critical gatekeepers relied upon by investors to ensure that accurate information is being provided in municipal bond offering documents," said Andrew M. Calamari, director of the SEC's New York Regional Office. "Lawson Financial failed to confirm that continuing disclosure obligations were being met by the Brogdon-controlled borrowers, allowing Mr. Brogdon's nursing home investment scheme to continue."

Investment News

Apr 6, 2017 @ 1:23 pm

[SEC Sanctions Muni Underwriter For Repeated Fraudulent Offerings.]

Municipal bond offerings have, in recent years, become a staple of SEC enforcement. While the Commission has limited authority in the area, a series of actions have been brought under the fraud provisions. Likewise, the Commission has conducted a very successful initiative which encouraged those involved in the offerings to self-report in return for decreased sanctions.

The Commission's newest action in this area centers on a key provision in these offerings – the obligation to update the financial information in the offering materials. In the Matter of Lawson Financial Corporation, Adm. Proc. File No. 3-17901 (April 5, 2017).

Respondents in the proceeding are Lawson Financial, a registered broker dealer, and its founder, CEO and CCO, Robert Lawson. Since the firm was founded in 1984 it has conducted over 200 conduit municipal bond offerings. Between 2010 and 2014 the broker-dealer conducted 13 conduit offerings – those where a municipal entity serves as the issuer but the funds raised are passed to anounther who is obligated for the repayments. Those offerings were for the projects of Christopher Brogdon, who had been building nursing homes, assisted living facilities and retirement housing for twenty-five years using similar offerings.

During the underwriting process for the bonds, the underwriters are required to determine that an issuer or the person obligated has executed a Continuous Disclosure Agreement. That agreement provides that the obligated person on the bonds will provide annually financial information and event notices to the MSRB. That information gives brokers and dealers a reasonable basis on which to recommend the purchase of the bonds. The agreements in the Brogdon offerings were typically between the Bank of Oklahoma and the Brogdon-controlled borrowers.

In connection with the thirteen underwritings conducted during the four year period here Lawson Financial, through Mr. Lawson, and a person identified as Bank A – John T. Lynch, Jr. (see below) – were charged with conducting the appropriate due diligence on Mr. Brogdon and his offerings. They did not. Despite becoming aware of numerous red flags – the brokerage firm had no due diligence check list and virtually no relevant procedures — relating to the failures of the borrowers to comply with their Continuous Disclosure Agreements, the series of offerings continued.

For example, in 2010 the broker underwrote two Brogdon bond offerings. The brokerage firm and Banker A or Mr. Lynch assisted in preparing the draft official preliminary and final official statements. The final official statements included a summary description of the provisions in the Continuous Disclosure Agreement. Despite the fact that the borrower failed to comply with those obligations, the next offerings in the series proceeded with the pattern repeating over the period and throughout the offerings. The Order alleges violations of Securities Act Sections 17(a)(2) and (3) and Exchange Act Section 15(c).

To resolve the proceeding each Respondent consented to the entry of a cease and desist order based on the Sections cited in the Order. The firm also consented to the entry of a censure and Mr. Lawson was barred from the securities business with a right to apply for re-entry after three years. Respondents will also, on a joint and several basis, pay disgorgement of $178,750 along with prejudgment interest. The broker will pay a civil penalty of $198,326.06. Mr. Lawson will pay a penalty of $80,000. The Commission may establish a fair fund. See also In the Matter of John T. Lynch, Jr., Adm. Proc. File No. 3-17902 (April 5, 2017)(proceeding naming as Respondent Banker A who supposedly served as underwriter's counsel during the offerings but in fact was an attorney but not a member of any bar; resolved with a cease and desist order based on Securities Act Sections 17(a)(2) and (3) and Exchange Act Sections 10(b) and 15(c), the payment of disgorgement of $20,000, prejudgment interest of $2,338 and a penalty of $22,338; he is also denied the privilege of appearing or practicing before the Commission as an attorney; further proceedings will be held to determine if a bar from the securities business is appropriate).

by Thomas Gorman | Dorsey & Whitney LLP

4/6/2017

Senators Reintroduce Bipartisan Bill to Provide Financial Stability to Muni Bonds.

On April 5, Senators Mike Rounds (R-SD) and Mark Warner (D-VA), both on the Senate Banking Committee, reintroduced a bipartisan bill to allow banks to count municipal securities as level 2B high-quality liquid assets. The legislation would rewrite a regulation that requires banks to hold high-quality liquid assets (HQLA) that can be converted to cash, and would therefore make it easier for banks to count municipal debt towards this buffer.

Bill Introduced in Congress April 5, 2017

[The SEC's Proposed Changes To Rule 15c2-12 Could Have Far-Reaching Impact On Issuers And Obligors Of Municipal Securities: Foley & Lardner]

Introduction

On March 1, 2017, the Securities and Exchange Commission ("SEC") issued Release No. 34-80130 (the "Release") proposing several amendments to its Rule 15c2-12 (the "Rule") that would add two new events to the list of events that must be included in the continuing disclosure undertakings of municipal issuers or obligors of municipal bonds.

- The first additional event, in general, is the incurrence of "financial obligations, if material, or agreeing to covenants or other provisions that affect security holders, if material," and
- The second reportable event is the occurrence of one or more of the following events under the terms of such a financial obligation: "default, event of acceleration, termination event, modification of terms or other similar events under the terms of a financial obligation of the obligated person," if the event reflects financial difficulties.

The compliance date of the proposed amendments would be no earlier than three months after any final approval of the proposed amendments, should the SEC adopt the proposed amendments in final form.

Many participants in the municipal securities market have called for greater transparency surrounding issuer's or obligor's bank loans or direct purchases of municipal securities ("direct placements"), but the scope of the proposed amendments is far broader than simply requiring disclosure of such direct placements.

Under the Release, the term "financial obligation" is very broadly defined and includes, in addition to a debt obligation such as a direct placement– leases, guarantees, derivatives or monetary obligations arising from a judicial, administrative or arbitration proceeding. Coupled with the qualifier "if material," which the SEC has not clarified in the context of the Rule, issuers and obligors may feel compelled to disclose a great deal of information. The use of the term "lease," which the Release defines as including both capital and operating leases, could open the door to reporting a significant number of obligations, especially in certain market sectors, as discussed below. Similarly, in the second proposed additional event, the use of the term "default" intentionally captures events earlier in time than when an "event of default" is declared and, if such default "reflects financial difficulties," the event must be disclosed and the context provided.

This Client Alert will provide background concerning the Rule and describe the terms and scope of the proposed amendments to the Rule. It then will examine some of the issues that these proposed amendments raise in the context of the municipal market. Lastly, it will suggest some strategies for participants in the municipal market to address the challenges posed by these proposed amendments. Note that the SEC will accept comments during a 60 day period that begins on the date of publication in the Federal Register, although comments on the underlying financial impacts are due to the Office of Management and Budget ("OMB") within 30 days. Given the breadth of the proposed amendments, as well as the potential for a significant amount of work created for issuers and obligors, comments to both the SEC and OMB are likely to be helpful.

Background

The SEC has indirectly regulated disclosure by issuers and obligors of municipal securities pursuant to the Rule by requiring that the broker-dealers underwriting an issue of bonds obtain a written undertaking from the issuer or obligor to provide certain annual financial data and timely notice of certain events that primarily relate to the offered securities to the Municipal Securities Rulemaking Board's ("MSRB") Electronic Municipal Market Access ("EMMA") website. In addition, in connection with the issuance of the municipal securities, an underwriting broker-dealer must reasonably determine that the issuer or obligor has complied with its prior continuing disclosure undertakings, or accurately disclosed in its Official Statement relating to such securities any failures to comply with such undertakings, within the past five years.

Since 2009, issuers and obligors have increasingly used direct placements as substitutes for publicly offered municipal securities. Direct placements can be beneficial to issuers and obligors for several reasons, including the lack of a requirement to provide the purchaser or lender with an official statement and generally lower transaction costs. Although many such transactions are issued pursuant to the same underlying legal documents as the issuer's or obligor's outstanding bonds, many others include additional covenants or other provisions for the benefit of the purchaser or lender, often set forth in a separate continuing covenants agreement or a similar instrument. Currently, there is no regulation which requires either an issuer or obligor or a broker-dealer to post direct placement documentation on EMMA.

A number of market participants, particularly municipal analysts and rating agencies, have called for issuers and obligors to provide disclosure through EMMA regarding these direct placements, since the additional debt has the potential to materially alter the analysis of the issuer's or obligor's financial condition. Further, because in certain instances the additional terms and financial covenants agreed to by the issuer or obligor could have a material impact on the rights of the holders of outstanding publicly held bonds, these commentators have also sought to have these terms and financial covenants disclosed. A number of issues and obligors have voluntarily provided the requested information regarding such direct placements to EMMA. However, the SEC has noted that many other issuers and obligors have not made such information regarding direct placements available on EMMA, leading to a lack of information in the market regarding these securities or, in some cases, information "asymmetry" among various market participants.

In addition to information regarding direct placements, the SEC states that some market participants have called for issuers and obligors to provide information to EMMA regarding derivatives, such as interest rate swaps, and capital and operating leases, that is not currently required to be disclosed under the Rule.

The Proposed Amendments

Accordingly, in order to address the lack of publicly available information regarding direct placements and other "financial obligations," the SEC has proposed to amend the Rule to require timely disclosure of "financial obligations of the obligated person, if material" and of any agreement that includes "covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the obligated person, any of which affect security holders, if material." In addition, the proposed amendments would require issuers and obligors to provide timely notice of a "default, event of acceleration, termination event, modification of terms or other similar events under the terms of a financial obligation of the obligated person, any of which reflect financial difficulties." These amendments would apply to continuing disclosure undertakings for municipal securities issued after the effective date of the proposed amendments, and would not be retroactive, in general. The amendment does not provide the elements that would need to be included in a notice filed with EMMA.

Unpacking the Proposed Amendments

Scope of "financial obligations" that must be disclosed. The clear focus of the Release and the proposed amendments to the Rule is provision of continuing disclosure relating to direct placements, but the scope of the proposed amendments is significantly broader than direct placements. The term "financial obligation" is defined to include a "(i) debt obligation, (ii) lease, (iii) guarantee, (iv) derivative instrument, or (v) monetary obligation resulting from a judicial, administrative, or arbitration proceeding." Further, these terms are interpreted broadly in the Release, For example, the Release provides that the term "lease" is intended to include an operating lease or a capital lease, while a "guarantee" is intended to capture a contingent financial obligation of the issuer or obligor to secure the obligations of a third party or of the issuer or obligor itself. Thus, an extremely wide range of obligations, if material, would need to be disclosed to EMMA by issues and obligors if the amendments are adopted, as proposed.

Impact of "materiality" qualifier. A second area of concern is the use of materiality to qualify those events that must be disclosed. This qualification ideally would limit the amount of disclosure that must be provided only to events where there is a substantial likelihood that a reasonable investor would consider such information important in making an investment decision, based on the Basic v. Levinson standard of materiality. However, as was evidenced by the SEC's recent Municipal Securities Disclosure Cooperation ("MCDC") initiative, there is a lack of clear guidance regarding what is material to an investor in the municipal market, leading to a conservative view of materiality and what one market participant has termed "hyper disclosure".

Determining which events are "material" to a reasonable investor could be difficult and, if the SEC does not later concur with the issuer's or obligor's analysis, the consequences can be severe. Thus, use of the materiality standard (without further guidance) to qualify the events that must be disclosed gives rise to the concern that issues and obligors will be required to provide detailed summaries of its direct placements, leases, swaps, for example, or to post in full redacted copies of the underlying documentation, in order to comply with the Rule.

Particular impact on certain municipal sectors. A corollary concern is that for certain sectors of the municipal market, this approach could give rise to a flood of information in an attempt to meet the requirements of the Rule, while not actually providing real insight into the issuer's or obligor's actual financial situation. For example, most airports structure their arrangements with the parties doing business at the airport, such as airlines, rental car companies and concessionaires, through leases. The sheer volume of leases to which a large airport is a party could overwhelm participants in the municipal market, as it is likely that such issuers and obligors will choose to simply post redacted versions of the relevant documents. Similarly, many healthcare systems both own medical office buildings and lease space to third parties, as well as lease other space themselves. The volume of such leases, especially for a large system, also could be substantial. This volume of data (and related workload to assemble such documentation) does not appear to be reflected in the economic analysis performed by the SEC in connection with the Release.

Events "reflecting financial difficulties." One of the themes of the Release is that, the timing of such financial difficulties disclosure under current law is often delayed because it is included in an annual filing, or such disclosure may not include the detail that would be required under the proposed amendments. In the Release, the SEC also notes that certain events that would indicate that the issuer or obligor was experiencing financial difficulties are not currently required to be disclosed under the Rule. Thus, the second added event of the proposed amendments would require an issuer or obligor to provide timely notice of any of the following events: "default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation of the obligated person, any of which reflect financial difficulties."

In the Release, the SEC first notes that the qualifying trigger that any of the events must "reflect financial difficulties" should allow issuers and obligors to distinguish between events that do not reflect financial difficulties, such as failure to comply with a covenant to provide notice of a change of address, compared to the failure to replenish a debt service reserve fund. The former is unlikely to be evidence that the issuer's or obligor's ability to pay its obligations when due has been compromised, while the latter could indeed be indicative of financial distress. However, this qualifier, like materiality, has not been clearly defined nor has the SEC provided guidance on how this standard should be interpreted. Note, also, that this requirement will apply to a listed event relating to any of the issuer's or obligor's financial obligations, not solely those entered into after the date of the amendment of the continuing disclosure undertaking required by the Rule, if amended as proposed.

Timing of disclosure of events. The use of certain terms in the proposed amendments will require issuers and obligors carefully to maintain up-to-date data on the status of all of their "financial obligations," as defined by the SEC. For example, use of the term "default," rather than "event of default," intentionally requires disclosure of an event at an earlier point in time than is generally required under the Rule currently, since an "event of default" typically accrues following some notice and cure period, while a "default" is the failure to act or the taking of a prohibited action. Thus, even if a default is cured before it amounts to an event of default, if the default itself reflected financial difficulties, it must be disclosed. This can be contrasted with an acceleration event or termination event, which are typically actions taken once an event of default has occurred, cure rights have been exhausted, and the counterparty has determined to exercise its remedies.

Similarly, a modification of terms is often a negotiated response to a situation which may or may not rise to the level of a default or which may result in the waiver of a default. For example, where an issuer or obligor fails to meet a financial covenant, such as a minimum debt service coverage ratio, but still has adequate financial resources to pay its operating expenses and debt service as and when due, it is not uncommon for the lender and issuer or obligor to agree to a temporary (or permanent) amendment of the covenant in exchange for certain actions, such as engaging a consultant to recommend methods to increase revenues or reduce expenses, or both. Under the proposed amendments to the Rule, any such amendment would need to be disclosed, along with the surrounding terms and conditions relating to the amendment, if such modification of terms "reflects financial difficulties."

A note about responsibilities of broker-dealers. Although most of the foregoing discussion relates to the potential impact on **issuers and obligors** of the proposed amendments to the Rule, the Rule requires **broker-dealers** to have a reasonable basis for concluding that the issuer or obligor has met its obligations under its continuing disclosure undertakings and that any material failures have been disclosed. Under the current list of events that must be disclosed pursuant to the Rule, the scope of a broker-dealer's inquiry is fairly limited and the due diligence necessary to comply with this requirement is relatively straight-forward (though not simple). Under the proposed amendments, broker-dealers would have a far greater scope of events that require disclosure and, therefore, a far more complex due diligence process will be necessary. This is especially critical because the SEC has indicated that simply relying on a certification of the borrower without additional inquiry is not sufficient to discharge the broker-dealer's duties under the Rule. Thus, broker-dealers will need to develop a significantly more robust due diligence process (or cause their counsel to review a wider array of documentation) in order to comply with the Rule if the amendments are adopted as proposed.

Steps to Prepare for the Amendments

As described above, the amendments to the Rule proposed in the Release could have a significant impact on the municipal market, especially upon issuers and obligors, but also on broker-dealers. Set forth below are several actions that issuers, obligors and broker-dealers may wish to consider undertaking in response to this proposal.

Review and Comment. First, the SEC has solicited comments on the proposed amendments to the Rule and on the Release, including comments to both the SEC and OMB on the economic analysis set forth therein. Issuers, obligors and broker-dealers may want to submit comments; for example comments regarding the scope of the proposed amendments, difficulties that parties anticipate in complying with the proposed amendments and suggestions for addressing those difficulties, and comments on the assumptions underlying the SEC's economic analysis. Given the new administration's recent Executive Order restricting the issuance of new regulations, comments on the economic impact of the proposed amendments may require the SEC to undertake a much more exhaustive analysis before the proposed amendments can be adopted. Further, examples of the potential difficulties that these amendments, as proposed, may cause issuers and obligors or broker-dealers may allow the SEC to tailor the proposed amendments more narrowly to achieve the SEC's stated goals, while limiting unintended and unnecessary collateral consequences.

Review Current Arrangements and Disclosure Policies. If the proposed amendments to the Rule are adopted, even in a more limited form, issuers and obligors will need to be prepared to gather and disseminate a considerably wider scope of information regarding their financial obligations than is currently the case. It would likely be prudent for issuers and obligors to review their existing disclosure undertakings and policies and consider what modifications may be necessary to comply with the Rule as amended. Further, because of the potentially broad scope of such requirements, the person or persons responsible for filing event notices with EMMA will need to develop processes and procedures for becoming aware of these additional events in a timely manner, evaluating whether they are material or reflect financial difficulties, and preparing and filing the required notices, generally within 10 business days of the occurrence of the event. It seems likely that the most important and difficult element of this new, wider inquiry will be setting up processes to ensure that the designated person receives timely notice of the new events that must be disclosed.

Similarly, broker-dealers will need to revise their due diligence processes to devise methods of determining whether any of the new listed events have occurred and, if so, whether they were material or reflect financial difficulties and, if so, were adequately and timely reported to EMMA.

Consider Disclosure Standards Under Federal Securities Laws; and What Must Be Included in an Events Notice. Another critical element that must be borne in mind by borrowers is that the requirements of Rule 10b-5, which requires that disclosure be accurate and complete, will apply to each of the event filings. Thus, simply filing a notice with EMMA that a certain event has occurred may not be sufficient, even if such a notice meets the requirements of the applicable continuing disclosure undertaking. Because many, if not all, of the new proposed events require a certain degree of analysis and context to determine whether they are material or reflect financial difficulties, additional disclosure necessary to provide the context of such a determination is likely to be necessary. Disclosure filed with EMMA is subject to the 10b-5 standard and therefore cannot contain any untrue statement of a material fact or omit to state any material fact necessary to make the statements therein, in light of the circumstances under which it was made, misleading.

Last Updated: March 23 2017

Article by Michael G. Bailey, David Y. Bannard, Laura L. Bilas, Heidi H. Jeffery and Dana M. Lach

Foley & Lardner

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

SIFMA Proposes 'Revocable Bids' in Draft Document for Issue Price Rules.

WASHINGTON – The Securities Industry and Financial Markets Association has released draft riders to model bond documents to make it easier for dealers and issuers to comply with issue price rules, including one that would allow revocable bids in competitive sales – a new concept in the municipal market.

SIFMA is seeking industry comments on the draft documents by April 12, hoping to finalize them soon after that to give market participants plenty of time to include them in their policies and procedures before the Treasury Department issue price rules take effect on June 7.

Draft riders are proposed for the three existing SIFMA versions of master Agreements Among Underwriters, the master Selling Group Agreement, the Retail Distribution Agreement, the Bond Purchase Agreement and the Notice of Sale.

"The issue price model documents will help reduce legal costs and regulatory risk while increasing legal certainty," said Leslie Norwood, managing director, associate general counsel and co-head of SIFMA's municipal securities division. "They are designed to make it easier for our members to assist their issuer clients in complying with the issue price rules."

"Part of our goal is to promote understanding of the expectations for all market participants and to promote transparency in the sales terms for issuers, underwriters, as well as financial advisors, to make sure there is no market disruption for transactions that sell on or after … June 7," she added.

Issue price is important because it determines the yield on bonds and whether an issuer is complying with arbitrage rebate or yield restriction requirements. It also determines whether the subsidy payments for direct-pay bonds such as Build America Bonds are appropriate.

Under existing rules that have been in place for years, the issue price of each maturity of bonds that is publicly offered is generally the first price at which a substantial amount, defined as 10%, is reasonably expected to be sold to the public.

But tax regulators became concerned that some dealers were "flipping" bonds — selling them to another dealer or institutional investor who then sold them again almost simultaneously — with the prices continually rising before the bonds were eventually sold to retail investors. They found that some "reasonably expected" issue prices for bonds were not representative of the prices at which the bonds were actually sold.

So they adopted a new general rule under which the issue price will be the price at which the first 10% of a maturity of bonds is actually sold to the public. If 10% of a maturity is not sold, a special rule can be used under which the issue price is the initial offering price (IOP) as long as the underwriters hold the IOP for five business days after the sale date.

The five-day “hold-the-offering-price” requirement is designed to prevent pricing abuses such as flipping. The lead underwriter must certify the IOP to the issuer, as well as provide documentation, such as the pricing wire. Each underwriter in a syndicate must agree in writing that it will not offer or sell the bonds at a price higher than the IOP for five business days after the sale date.

There is an exemption from the new issue price rules for competitive sales under which an issuer may treat the reasonably expected IOP of the bonds to be the issue price if the issuer obtains a certification from the winning underwriter bidder as to the reasonably expected IOP upon which it based its bid. But this exemption is conditioned on, among other things, the issuer receiving at least three bids from separate underwriters and awarding the bonds to the bidder who offers the highest price or lowest interest cost.

Issuers have the option of using any of these rules up until the closing (issue) date for their bond transactions.

It is in its draft riders to the Notice of Sale for competitive transactions that SIFMA introduces the concept of revocable bids because the exemption to the issue price rules for these deals is contingent on the issuer’s receiving at least three bids for the bonds.

“This is really the most novel part of our documents,” said Norwood. “This is a new concept to the industry where we are trying to assist issuers to get the best possible price within the set of new rules but also have all of the participants understand the terms of the sale.”

There are two draft riders for Notices of Sale, one for revocable bids and one for non-revocable bids.

Under the draft rider to the Notice of Sale called Alternative 1, the bids are revocable. The general idea is the issuer expects to get at least three bids for the bonds but the underwriter doesn’t want the risk that the issuer won’t get the bids it needs for the competitive sale exemption and therefore wants an “out” from its bid.

“This is the least costly alternative if three bids are obtained and the sale qualifies for the competitive sale exemption,” said Norwood.

In this case, if the issuer gets fewer than three bids for the bonds, it goes to the underwriters and asks whether they want to confirm or revoke their bids. If the underwriters revoke their bids, the sale fails. If the underwriters confirm their bids, they do so only after understanding whether the issuer wants them to hold bonds at the IOP for five business days or until 10% of the bond maturities are sold.

Under the draft rider to the Notice of Sale called Alternative 2, the bids would not be revocable. Here, the bidding underwriters know they can’t revoke their bids, so they are put on notice, and they price in the risk that they may be asked to hold the IOP for five days.

“This is the most like current notices of sale,” said Norwood. “There will be a higher cost for irrevocable bids because of the risk the underwriter may have to hold them at the IOP for five days.”

These standardized Notices of Sale should “facilitate the understanding of sales terms and help issuers obtain as many bids as possible on the bid date in competitive deals,” said Norwood, who noted dealers are more likely to bid with easy to understand and standardized documents.

Draft riders are proposed for SIFMA’s three versions of AAUs, which are agreements between the managing underwriters and syndicate members. One is an electronic master AAU for negotiated deals published in 2002 and another is an electronic master for competitive deals issued that same year. The third is a paper AAU that can be used on a per-transaction basis.

The draft riders essentially say that if underwriters don't sell up to 10% of a maturity, they must promptly report that to the managing underwriter and that if the managing underwriter decides that syndicate members must hold the IOP of the bonds for five business days, the syndicate members will abide by that. The draft makes clear that if any underwriter fails to comply with the hold-th--price rule, it alone will be liable for that, and not the other underwriters.

Draft riders are proposed for retail distribution agreements, which are agreements between underwriters and retail distributors, in negotiated deals. Basically, retail distributors have the same responsibilities as underwriters under these riders.

Riders are proposed for selling group agreements, which are for the group of dealers selling the bonds.

SIFMA is also proposing inserts for bond purchase agreements between issuers and underwriters. Typically issuers have their own bond purchase agreements so that's why SIFMA's providing an insert. In the draft, SIFMA says the model issue price certificate, which is being drafted by the National Association of Bond Lawyers and may be issued next week, will be attached to the bond purchase agreement.

"We want to encourage and facilitate early discussions between issuers and underwriters about the expectation of how the issue price will be determined," said Norwood. Often underwriters will pre-sell or get indications of interest for bonds, letting them know if they can sell 10% of a maturity on the sale date or not in negotiated deals, she noted.

The Bond Buyer

By Lynn Hume

March 29, 2017

NAMA Wants MSRB to Withdraw Proposed Muni Advisor Advertising Rule.

WASHINGTON – The National Association of Municipal Advisors is urging the Municipal Securities Rulemaking Board to withdraw its proposed rule on MA advertising.

If it does not abandon the rule, the MSRB must make a slew of changes to it, said NAMA, many of which dealer groups and other MAs are also requesting.

NAMA and the other groups and market participants made their comments to the MSRB on its proposed new Rule G-40 on MA advertising, as well as proposed revisions to its existing Rule G-21 on dealer advertising to align it with the Financial Industry Regulatory Authority's Rule 2210 on communications with the public.

The MSRB released the proposals in mid-February, saying the new requirements would reinforce protections for investors and issuers as well as standardize requirements for dealers and MAs. Susan Gaffney, NAMA's executive director, said in the group's comment letter, that the goal of protecting the public and potential MA clients is already covered in the MSRB's Rule G-17 on fair dealing, which makes the "present proposal unnecessary." Gaffney also wrote that G-40, which would carry many of G-21's provisions over to MAs, fails to differentiate between the "products" that underwriters and investment advisors offer to retail customers and the "services" that MAs generally provide to their issuer clients.

If the MSRB decides to pursue the rule, Gaffney said, one of the "significant changes" that would have to be made would be bifurcating the rule to separately cover products and services to "better acknowledge different types of advertising." The bifurcation would be necessary because "the clear majority of MAs … only conduct professional services advertising" instead of product advertising.

Rule G-40, as proposed, would be substantially similar to Rule G-21 but specific language would be altered so it is aligned with MA practices. It would apply to advertisements by non-solicitor and solicitor MAs and would define advertisement as any promotional literature distributed or made generally available to a municipal advisory client by an MA. Similarly to the amended G-21, G-40 would exclude certain documents from the definition of advertisement such as official statements, preliminary prospectuses, and registration statements.

NAMA is asking that "general information exclusions" listed in Securities and Exchange Commission guidance on the MA Rule be exempted from the definition of advertising. Such exclusions would include things like: information regarding a person's professional qualifications or prior experience; general market and financial information; and factual information describing various types of debt financing structures.

The MA group is also asking that requests for proposals and qualifications be excluded from the definition along with client lists, testimonials, and case studies in certain forms. Public Financial Management and PFM Financial Advisors echoed those requests in a separate comment letter saying much of that information does not include commentary or clients' opinions but instead gives examples of the types of work that an MA has done in serving its clients.

Both PFM and NAMA said that the MSRB should eliminate the "content standards" section of proposed Rule G-40, which requires advertisements to be based on fair dealing and good faith, because that principle is already in Rule G-17.

NAMA is additionally asking that the proposed rule, which would allow an MA to say it is registered with the MSRB, also allow an MA to indicate it is registered with the SEC.

The MSRB needs to give clear guidance on how the proposed rule would apply to MA firm websites and social media platforms, NAMA said.

The Securities Industry and Financial Markets Association and Bond Dealers of America overlapped somewhat with the MAs in their comment letters, but both dealer groups focused the majority of their letters on what they said was the MSRB's failure to properly harmonize G-21 with FINRA Rule 2210.

SIFMA said it is pleased that the MSRB is leveling the regulatory playing field between dealers and MAs, but requested a full harmonization between G-21 and Rule 2210 as well as a clarification that application of G-21 and G-40 to dealers would be based on a firm's activities and not just on its registration as a dealer.

Leslie Norwood, managing director and associate general counsel with SIFMA, suggested that the MSRB incorporate Rule 2210 in G-21 by reference to alleviate dealer concerns about the burdens that would come from complying with differing requirements in the muni and corporate space. She also included numerous changes and considerations for the MSRB if it decides to more fully harmonize the two rules short of incorporating 2210.

One necessary area for change according to Norwood and Mike Nicholas, chief executive officer of BDA, is to abandon the "one-size-fits-all" definition of advertisement in Rule G-21 in favor of the three categories FINRA uses for communication: institutional, retail, and correspondence. That breakdown would allow firms to establish uniform procedures for communicating with the different sectors of the market and include requirements, like principal approval, needed to accompany each, the groups said.

Both dealer groups also laid out certain exceptions from the rule they said were necessary, including: private placement memoranda and limited offering memoranda; testimonials; investment analysis tools; and illustrations.

The Bond Buyer

By Jack Casey

March 27, 2017

BDA Comment Letter: MSRB Request for Comment on Amendments to MSRB G-21 and Advertising Standards for Municipal Advisors (MSRB G-40).

The MSRB has released a request for comment on proposed amendments to MSRB G-21 standards applicable to dealers and to establish proposed MSRB G-40, an advertising standard for municipal advisors.

BDA's comment letter is here.

BDA Comment Letter Summary

- BDA urges the MSRB to harmonize MSRB G-21 with FINRA 2210, which has different requirements for retail, institutional, and correspondence communication
- BDA urges MSRB to exempt institutional communications and correspondence from the proposed principal approval requirement of G-21
- BDA urges MSRB to exempt municipal advisor advertisements from the proposed principal approval requirement of proposed MSRB Rule G-40
- BDA states that the proposed testimonial prohibition in both G-21 and G-40 is unwarranted and not harmonized with FINRA 2210
- BDA urges MSRB to exclude free writing prospectuses from the proposed definition of "correspondence"

BOND DEALERS OF AMERICA

MARCH 27, 2017

Senate Bill Would Allow SEC to Impose Higher Securities Law Fines.

WASHINGTON — The Securities and Exchange Commission would be able to impose much higher penalties on individuals and entities that violate securities laws under bipartisan legislation proposed on Thursday in the Senate.

The bill, called the Stronger Enforcement of Civil Penalties Act of 2017, was introduced by Sens. Jack Reed, D-R.I., Chuck Grassley, R-Iowa, Patrick Leahy, D-Vt., and Heidi Heitkamp, D-N.D. It was referred to the Senate Banking Committee.

Under the bill, individuals charged with the most serious securities law violations would face a penalty that would be the greater of: $1 million; three times the monetary gain; or the losses incurred by the victims of the violation, according to a description released by the senators. Entities charged with those serious violations would face a penalty that is the greater of: $10 million; three times the monetary gain; or the losses the victims of the violations incurred.

The SEC would also be able to triple its fines against recidivists that have committed criminal or civil securities fraud within the previous five years.

Grassley said he welcomes the increased penalties for repeat offenders that the bill would provide.

“That step should help change the dynamic of business as usual,” he said. “A penalty should mean something, and it should get the recidivists’ attention.”

The SEC can currently only penalize violators in cases up to $181,071 per offense for individuals and $905,353 for institutions, according to the release on the bill. The SEC can also calculate penalties to equal the amount of ill-gotten gains if the enforcement action is filed in federal court, but cannot do so if it is filed in an administrative proceeding. The legislation would allow the SEC to assess the penalties for cases in both federal court and administrative proceedings.

“This bill strives to make potential and current offenders think twice before engaging in misconduct by increasing the maximum civil monetary penalties permitted by statute, directly linking the size of the maximum penalties to the amount of losses suffered by victims of a violations, and substantially raising the financial stakes for repeat offenders of our nation’s securities laws,” the senators said in their joint release.

Reed said that “investors deserve real protection, and the law needs to change to ensure the punishment fits the crime.”

“This bill gives the SEC more tools to demand meaningful accountability from Wall Street,” he said.

The maximum penalties under the bill for each second tier violation of securities laws would be the greater of $100,000 or the total monetary gain for individuals and the greater of $500,000 or the total monetary gain for entities. First tier violations, the least serious of the three tiers, would be the greater of $10,000 or the total monetary gain for individuals and the greater of $100,000 or the total monetary gain for entities.

The bill would also give the SEC authority to pursue civil penalties for violations of prior injunctions obtained under the securities laws. Each violation of an injunction or order would be deemed a separate offense, but in the event of a continuing failure to comply, each day of continued failure would be considered a separate offense.

The Bond Buyer

By Jack Casey

March 30, 2017

Senate Repeals Labor Dept. Municipal Retirement Plan Rule.

WASHINGTON — A divided U.S. Senate on Thursday killed a regulation that had exempted city-run retirement savings plans for low-income workers from strict pension protection laws.

Utah Republican Orrin Hatch, the resolution's sponsor, has said he expects the Senate to soon repeal a related rule on state-operated retirement plans.

That resolution may face a tougher time than the one on municipal plans, which barely passed in a 50-49 vote. States are farther along establishing retirement programs for people who do not have workplace savings plans, and Republicans who advocate for states' rights are more skeptical of the resolution.

The House of Representatives has already passed both resolutions.

Thursday's vote marked the 12th time the Republican-controlled Congress has successfully killed an Obama-era regulation through the use of an obscure 1996 law known as the Congressional Review Act.

The law lets Congress repeal a newly minted rule through simple majority votes in the House and Senate, and a signature from the president. A "substantially similar" rule can never be enacted in its place.

The Labor Department rule was finalized after May 2016, putting it into the window of time set by the law when Congress can repeal it. Using the resolutions, Republicans have sent rules spanning a variety of areas to the chopping block in hopes of loosening regulation they say constricts economic growth.

Thursday's resolution and its near-twin for state plans counters the trend by maintaining regulatory requirements.

Toward the end of President Barack Obama's tenure, his Labor Department exempted both state and city-run retirement plans from the 1974 Employee Retirement Income Security Act, or ERISA, a law designed to protect workers' savings with detailed compliance requirements.

Private-sector workers whose employers do not offer 401(k) or other retirement benefits, and who often have low incomes, are automatically enrolled in the plans being launched in states such as California, Illinois and Oregon.

States say the ERISA exemption lets employers pass workers' money into plans without footing compliance costs.

They also say Wall Street wants to block the plans because they create competition.

But the Investment Company Institute, a mutual funds trade group, the U.S. Chamber of Commerce and others in financial services say the exemptions shortchange workers from important federal pension protections that other workers receive.

By REUTERS

MARCH 30, 2017, 4:27 P.M. E.D.T.

(Reporting by Sarah N. Lynch; Editing by Tom Brown and Bill Rigby)

SIFMA Statement on Senate Passage of CRA Resolution on Municipal Retirement Plans.

Washington, DC, March 30, 2017 – SIFMA today issued the following statement from Lisa Bleier, SIFMA managing director and associate general counsel on Senate passage of on H.J. Res. 67 to override the Department of Labor's (DOL) regulation regarding savings arrangements established by state political subdivisions for non-governmental employees:

"We commend the Senate for passing the resolution to protect private-sector retirement savers. The DOL's regulation could leave workers saving for retirement without important protections including survivors benefits, spousal benefits, children's benefits and inter-state portability. Under this guidance, cities could have created plans that restrict options and limit plan customizability while prohibiting an employer match, which is crucial to maximizing retirement savings.

"While we agree that more must be done to encourage Americans to save for retirement, exempting municipal plans from providing important protections for workers is not the solution. This resolution ensures that retirement savers have the same high-level protections and options available to workers under private plans. We urge the President to sign this resolution without delay."

Release Date: March 30, 2017

Contact: Carol Danko, 202-962-7390, cdanko@sifma.org

Reminder: Comments on Draft Amendments to MSRB's Rule on CUSIP Numbers Due Next Friday, March 31.

Read the Request for Comment.

BDA Comment Letter to DOL on Proposed 60-Day Delay to Applicability Date of the Fiduciary Duty Rule.

The Department of Labor proposed a 60-day delay to the applicability date of the fiduciary duty rule. Comments on the 60-day delay were due by Friday, March 17th.

The comment letter, submitted by the BDA, is here. Please feel free to reach out to jvahey@bdamerica.org with any comments or questions.

BDA Comment Letter Summary

- BDA expresses support for the 60-day delay and recommends a longer, 180-day delay

- BDA notes that the Labor Department's economic cost-benefit analysis overstates benefits to investors because the analysis is based on mutual fund fees and not commissions and markups and markdowns from bond trades, which are less expensive than mutual fund fees
- BDA reminds the Labor Department of the existing investor protections of the broker-dealer regulatory regime

DOL Temporary Enforcement Memorandum

On March 10th, the DOL published a Temporary Enforcement Memorandum, which provides guidance on how the DOL plans to enforce the rule if the proposed rule to delay the applicability date is not adopted or is not adopted until after the April 10 applicability date.

1. In the event the Department issues a final rule after April 10 implementing a delay in the applicability date of the fiduciary duty rule and related PTEs, the Department will not initiate an enforcement action because an adviser or financial institution did not satisfy conditions of the rule or the PTEs during the "gap" period in which the rule becomes applicable before a delay is implemented, including a failure to provide retirement investors with disclosures or other documents intended to comply with provisions of the rule or the related PTEs.

2. In the event the Department decides not to issue a delay in the fiduciary duty rule and related PTEs, the Department will not initiate an enforcement action because an adviser or financial institution, as of the April 10 applicability date of the rule, failed to satisfy conditions of the rule or the PTEs provided that the adviser or financial institution satisfies the applicable conditions of the rule or PTEs, including sending out required disclosures or other documents to retirement investors, within a reasonable period after the publication of a decision not to delay the April 10 applicability date. The Department will also treat the 30-day cure period under Section IX(d)(2)(vi) of the BIC Exemption and Section VII(d)(2)(v) of the Principal Transactions Exemption as available to financial institutions that, as of the April 10 applicability date, did not provide to retirement investors the disclosures or other documents described in Section IX(d)(2)(vi) of the BIC Exemption and Section VII(d)(2)(v) of the Principal Transactions Exemption.

Bond Dealers of America

March 21, 2017

Clayton Would Make Enforcement of Individuals a Priority.

WASHINGTON – Jay Clayton would continue the trend seen in municipal bond cases of taking enforcement actions against individuals, if confirmed as Securities and Exchange Commission chair by the Senate.

Speaking to members of the Senate Banking Committee at his confirmation hearing on Thursday, Clayton, a lawyer with Sullivan & Cromwell in New York who has represented large investment banking firms like Goldman Sachs, said that he believes individual accountability in enforcement cases is a key to effective commission oversight.

"Individual accountability is extremely important, not only to get rid of bad actors but [to set] a tone for the industry," he said, adding that individual prosecution in the white collar area is a "wonderful deterrent."

Clayton told committee members that he is “100% committed to rooting out any fraud and shady practices” in the financial system and that he recognizes “that bad actors undermine the hard-earned confidence that is essential to the efficient operation” of the capital markets.

Clayton’s focus on individual enforcement, though not specifically directed at the municipal market, echoes muni-related statements and actions of SEC officials, including former chair Mary Jo White and former director of enforcement Andrew Ceresney. The majority of the muni-related cases the SEC has pursued against firms and issuers in recent years have included actions against individuals who the commission alleges played key roles in the violations.

During White’s and Cerseney’s tenure, the SEC for the first time, used the “control person liability” section of the federal securities laws in a municipal case and Ceresney, in a speech last year, said muni market participants shouldn’t be surprised if they see it used again. The control person liability section of the Securities and Exchange Act of 1934 allows the SEC to hold public officials responsible for violations based on their control of the municipal entity that engaged in the fraud. The SEC used it in two 2014 actions, one against the former mayor of Allen Park, Mich. and the other against the mayor of Harvey, Ill.

Mark Zehner, deputy director of the SEC enforcement division’s public finance abuse unit, told muni market participants at a conference at the end of October that they should expect to continue seeing enforcement actions against investment bankers and issuers involved in federal securities law violations. He said the focus on individuals stems from a concern before his unit was created in 2010 that the muni market wasn’t getting the enforcement division’s intended message about the importance of complying with federal securities laws.

“You should expect that, whenever we are looking at the work of an investment banking firm, it’s not going to simply be with respect to the firm,” Zehner said at the time, adding that considering actions against individuals is no longer a trend but a given.

Senators on the committee generally complimented Clayton on his stated devotion to strictly enforcing the law, but some Democrats like Sen. Elizabeth Warren, D-Mass., questioned whether his past involvement with major Wall Street firms may hinder the SEC’s enforcement abilities.

Warren raised the possibility that there would be a split between the SEC commissioners in an enforcement decision from which Clayton would have to recuse himself because of past ties to the parties involved. That would lead to a firm or individual avoiding enforcement, Warren said.

Clayton downplayed the problems that might result from any recusals and said that they would not impact his focus on individual accountability.

Republicans on the committee generally complimented Clayton on his past experiences and focused on his plans to promote capital formation. Senators also asked several times about potential regulatory rollbacks given Trump’s past speeches and executive orders aimed at reducing regulations.

While Clayton avoided direct comments about deregulation, he said he has “a real problem with regulations that are unnecessarily complex” and that reducing complexity and creating clarity in rulemakings is very important.

The Bond Buyer

By Jack Casey

March 23, 2017

[Foley & Lardner: New Regulations on Issue Price of Tax-Exempt Bonds.]()

On December 9, 2016, the Department of the Treasury and Internal Revenue Service (IRS) published final regulations on the definition of "issue price," for purposes of the arbitrage rules that apply to tax-exempt bonds. A copy of the new regulations can be reviewed here.

These new issue price regulations will significantly change the practices, agreements, and certifications relating to the sale of tax-exempt bonds.

June 7, 2017 Applicability Date. The new regulations apply to bonds sold on or after June 7, 2017. Accordingly, this delayed effective date will provide an opportunity for the municipal bond industry to develop approaches to respond to the new rules before they need to be applied.

Why Were New Rules Needed? The existing regulations have been in place for decades and appear to have generally worked well for issuers. The new regulations were motivated by a perception at the IRS that the existing rule based on reasonable expectations may result in abuses and is not readily administrable. Whether that is really the case is highly questionable. Nonetheless, one of the underlying themes of the new regulations is a lack of trust in rules that rely on reasonable expectations.

More Complicated Rules. The new regulations are more complicated than the existing final regulations. The existing final regulations basically provide for two different rules to establish the "issue price" of bonds sold for money: separate rules for (1) bonds for which a "bona fide public offering" is made and (2) bonds for which a bona fide public offering is not made. The first rule is generally favorable and workable for issuers because it permits the issue price to be established on the date a bond purchase contract is entered into on the basis of reasonable expectations.

The new regulations retain parts of the general framework of the existing final regulations, but are more complicated. The new final regulations provide for four different rules to establish the issue price of bonds sold for money: (1) a special rule for bonds sold in a "competitive sale"; (2) a special rule for bonds offered to the public pursuant to agreements of underwriters to hold the offering price; (3) a general rule, if the issuer chooses not to use one of the special rules described above (or is unable to qualify for one of the special rules); and (4) a rule for private placements. (Although rules (3) and (4) could be viewed as different applications of the same rule). An issuer does not need to apply the same rule for all bonds of the same issue.

The rules in the new regulations are in one way more flexible than the existing regulations, because they allow an issuer to choose which rules to apply (when bonds could qualify for more than one rule). With this additional flexibility, however, also comes additional complexity.

Maturity-by-Maturity Rules. The new final regulations provide that the issue price of bonds that do not have the same credit and payment terms is determined separately. For example, suppose a bond issue has 12 different maturities of serial bonds and two term bonds (and, for all bonds of each maturity, the credit and payment terms are the same). In a typical case, the issue price of each maturity needs to be separately determined.

This appears to be a mere rephrasing of the same rule in the existing final regulations (which refer to establishing the issue price of "substantially identical" bonds). This rule has important ramifications under the new regulations, as described below.

The General Rule. The new final regulations provide that, unless the issuer applies a special rule, the issue price of bonds issued for money is the first price at which a substantial amount of the bonds is sold to the public. 10 percent is a substantial amount.

This general rule is similar to the rule in the existing regulations, except that it refers only to actual sales, and does not permit the use of reasonably expected sale prices. The main reason for the "reasonable expectation" rule in the existing final regulations is to permit an issuer to establish its tax plan on the sale date (that is, the date of bond purchase contract is signed), which is generally in advance of the closing date. The general rule does not accommodate the practical need to resolve important tax compliance matters on the date the bonds are priced.

The following "special rules" are basically intended to permit an issuer to establish the issue price of bonds on the sale date, but yields this desired result only under limited circumstances.

Special Rule for Competitive Sales. For bonds issued for money in a competitive sale, an issuer may treat the reasonably expected initial offering price to the public as of the sale date as the issue price of the bonds if the issuer obtains a certification of the bonds' reasonably expected offering price to the public as of the sale date upon which the price in the winning bid is based. The winning bid must be the highest price/lowest interest cost bid. The new regulations contain a number of detailed requirements to qualify as a "competitive sale" which appear to be intended to assure that a bona fide bidding process is followed. Probably the most important (and troublesome) of these is a requirement that the issuer receives bids from at least three underwriters who have established industry reputations for underwriting new issuance of municipal bonds.

The special rule for competitive sales is helpful, but its specific requirements (particularly the three-bid requirement) appear to be unduly rigid, particularly because issue price ordinarily needs to be separately determined for each maturity. For example, if the issuer does not receive three bids for one maturity of a bond issue, the issue price of that maturity will need to be determined using one of the other permitted methods. The need to establish issue price using a "back up" method may, in some cases, substantially complicate the agreements and documentation relating to competitive sales.

Special "Hold the Offering Price" Rule. The issuer may treat the initial offering price to the public as of the sale date as the issue price if the following requirements are met: (1) the underwriters offered the bonds to the public for purchase at a specified initial offering price on or before the sale date (as established by specific certifications and documentation) and (2) each underwriter agrees in writing that it will neither offer nor sell the bonds to any person at a price that is higher than the initial offering price during a required period. The required period starts on the sale date and ends on the earlier of the close of the fifth business day after the sale date or the date on which the underwriters have sold a substantial amount of the bonds to the public at a price no higher than the initial offering price to the public.

This new rule presumably will become the preferred method for establishing issue price in negotiated sales, but will require new practices that may not always be easy to implement. In particular, new covenants in bond purchase contracts, agreements among underwriters, and retail distribution contracts would be required, and care must be taken to obtain specific and rigorous certifications.

Also, although not entirely clear, it appears that another method must be used if an underwriter does not comply with such a written agreement and in fact sells bonds at a price higher than the initial offering price during the required period.

Clarified Definition of an "Underwriter" and the "Public." The existing regulations have long provided that the issue price of bonds issued for money is the first price at which a substantial amount is sold to the "public." Under the existing regulations, the "public" does not include "bond houses, brokers, or similar persons or organizations acting in the capacity of underwriters and wholesalers." Under the existing regulations, the scope of this exception was not clear. The new regulations simply suggest, to some degree, that the public does not include "underwriters," and otherwise clarify the exception.

The new regulations define "underwriter" by reference to whether there is a direct or indirect contract with the issuer to participate in the initial sale of the bonds. Under the new regulations an underwriter is (1) any person who agrees pursuant to a written contract with the issuer (or with the lead underwriter to form an underwriting syndicate) to participate in the initial sale of the bonds to the public and (2) any person who agrees pursuant to a written contract directly or indirectly with such a person to participate in the initial sale of bonds to the public (for example, a retail distribution agreement between a national lead underwriter and a regional firm under which the regional firm participates in the initial sale of the bonds to the public).

Although the new regulations do not apply before June 7, 2017, it is possible that this generally favorable new definition of "underwriter" will be viewed as a clarification of the standard in the existing regulations, and inform certifications and other practices prior to June 7, 2017.

Private Placements. The new regulations provide that if a bond is issued for money in a private placement to a single buyer that is not an underwriter or a related party to an underwriter, the issue price of the bond is the price paid by the buyer. It is not clear whether this is merely an example of the general rule, or is intended as a separate rule. In any event, however, the rule is similar to the treatment under the existing regulations.

Questions Not Answered. Although the new regulations are much more detailed than the existing regulations, they do not address many important questions relating to issue price. Perhaps most importantly, the new regulations apply only for purposes of the arbitrage and rebate rules that concern investments related to tax-exempt bonds. The new regulations do not answer whether they should apply for purposes of other tax-exempt bond rules, including rules relating to how bond proceeds are required to be used. One example is the rule that generally prohibits the use more than two percent of the proceeds of an issue of tax-exempt bonds (other than governmental bonds) to be used to pay costs of issuance. As a practical matter, however, most bond counsel will also look to these new regulations for purposes of complying with rules other than arbitrage.

Towards Implementation. The new regulations are doubtless more complex than the existing regulations, and will require new practices, contractual covenants, certifications and documentation. Although the new regulations are more favorable than the regulations proposed in 2013 and 2015, they appear to contain certain glitches that may be problematic. In particular, the rigidity of the three-bid requirement for the special rule for competitive sales will likely be problematic. In a different time, the Treasury and IRS might be expected to act on cleaning up the glitches before the effective date. In light of the restrictions on new regulations imposed by the new Administration, however, it would seem unlikely that corrective regulations could be published before June 7, 2017.

Article by Michael G. Bailey, David Y. Bannard, Laura L. Bilas, Dana M. Lach, Emily F. Magee & Mark T. Schieble

Friday, March 24, 2017

Foley & Lardner LLP

SIFMA: SEC Approves Move to Shorter T+2 Settlement Cycle for Munis and Other Securities.

On March 22, the U.S. Securities and Exchange Commission (SEC) Acting Chair Piwowar and Commissioner Stein voted unanimously to approve changes to SEC Rule 15c6-1 that facilitate a move to a T+2 settlement cycle for most securities including munis. On behalf of the T+2 Industry Steering Committee, DTCC, ICI and SIFMA commended the SEC for finalizing the rule changes. "The SEC's action marks a critical milestone and the last major hurdle in the T+2 effort. Moving forward, robust planning and coordination among the industry and regulators will be essential to meet the T+2 target date of September 5, 2017." said Kenneth E. Bentsen, Jr., SIFMA president and CEO.

SEC Press Release
T+2 Industry Steering Committee Statement
SIFMA Comment Letter to MSRB on Notice 2015-22 (December 2015)
SIFMA Comment Letter to SEC on MSRB Rules G-12 and G-15 (April 2016)

SEC Seeks Comment on Proposed Amendments to Municipal Securities Disclosure Rule.

Read the Proposed Amendments and the Request for Comment.

SEC Proposes Expansive New Continuing Disclosure Requirements Regarding Private Debt and Other Financial Obligations.

On March 15, 2017, the Securities and Exchange Commission ("Commission" or "SEC") published in the Federal Register for comment proposed amendments to Rule 15c2-12 (the "Rule") under the Securities Exchange Act of 1934 ("Exchange Act") that would amend the list of event notices required under the Rule in a manner that, if such amendments are finalized in their proposed form, would likely require issuers of, or "obligated persons" on, publicly offered municipal bonds to provide detailed ongoing disclosure of any new debt, derivatives and other "financial obligations."

The Rule requires that a broker, dealer, or municipal securities dealer (collectively, "dealers") acting as an underwriter in a primary offering of municipal securities reasonably determine that an issuer or an obligated person has undertaken, in a written agreement or contract for the benefit of holders of the municipal securities, to provide to the Municipal Securities Rulemaking Board ("MSRB") through the MSRB's Electronic Municipal Market Access ("EMMA") system, prompt notice of specified events. The proposed amendments would amend the list of such event notices to include;

> (i) incurrence of a financial obligation of the obligated person, if material, or agreement [by the obligated person] to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the obligated person, any of which affect security holders, if material; and
>
> (ii) default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation of the obligated person, any of which reflect financial difficulties.

The proposed amendment provides a broad definition of "financial obligation" which includes: a (i) debt obligation, (ii) lease, (iii) guarantee, (iv) derivative instrument, or (v) monetary obligation resulting from a judicial, administrative, or arbitration proceeding. The "financial obligation" definition excludes traditional municipal bonds which are already covered by the Rule.

In the release accompanying the proposed amendments, the SEC noted that if new financial obligations or new material covenants, events of default or remedies impacted an issuer's or obligated person's liquidity and creditworthiness, the credit quality of the issuer's or obligated person's outstanding debt could be adversely affected which could impact an investor's investment decision or other market participant's credit analysis. Such changes to credit quality could also affect the price of the issuer's or obligated person's existing bonds. Items the SEC referenced as potentially material include debt service coverage ratios, rate covenants, additional bond tests, contingent liabilities, events of default, remedies and priority payment provisions (including structural priority such as balloon payments, for example).

The Commission's accompanying release stated that the event notice of incurrence of a material financial obligation generally should include a description of the material terms of the financial obligation. According to the release, examples of such material terms include the date of incurrence, principal amount, maturity and amortization, and interest rate, if fixed, or method of computation, if variable (and any default rates); the release states that disclosure of other terms may be appropriate as well, depending on the circumstances.

Unless the proposed amendments are pared back following the comment period, they are likely to result in the required disclosure by issuers or obligated persons of municipal bonds subject to the Rule of virtually all new loan agreements with banks or other private lenders, privately placed municipal bond indentures or loan agreements, swap agreements, real estate leases, and material judgments or arbitration rulings, as issuers and obligated persons are unlikely to shoulder the administrative burden and legal risk associated with determinations of which obligations, and which terms of such obligations, are "material" and which are, and will remain in hindsight, clearly immaterial. Similarly, for expense and risk reasons, it is more likely that full legal documents will be disclosed versus substantially redacted or summarized versions.

The proposed amendments do not appear to require disclosure of the termination or satisfaction of financial obligations previously disclosed on EMMA as material events; accordingly they may result in the accumulation over time on EMMA of a variety of lengthy loan agreements, indentures, swap agreements and the like with no clear way for bondholders or brokers accessing EMMA to determine whether the relevant obligations and the related agreements continue in effect. Such overdisclosure may limit the pool of investors with respect to the obligations of the issuer or obligated person, in that brokers responsible under MSRB Rule G-47 for conveying to customers all material information about the security accessible on EMMA may opt not to do so for securities with EMMA postings that include unwieldy amounts of raw legal documents.

Issuers and obligated persons may also deem the requirement to publicly disclose otherwise private transactions adverse to their business interests. Currently, for example, an issuer or obligated person may negotiate different covenants and different covenant levels with different private lenders, without each lender necessarily having access to the covenants of the other lenders. If the amendments require the issuer or obligated person to disclose on EMMA the coverage, days cash on hand, interest rates and other material terms of its private loan arrangements, the result over time may be for each new lender to require, in effect, most favored nation status with covenants and other terms at least as tough as the toughest terms previously agreed to by the applicable issuer or obligated group. Reasonable minds may disagree on whether that should "come with the territory" when an issuer chooses to access the public municipal market, but to date such public disclosure of the details of private transactions has not been required.

The second new event notice, for the occurrence of a default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation of the issuer or obligated person, presents a different judgment call for issuers and obligated persons, as such disclosure is only required if the event "reflects financial difficulties." Some of the examples cited in the release for subsequent events include monetary or covenant defaults that might result in acceleration of the debt, swap events, such as rating downgrades, which might require the posting of collateral or the payment of a termination payment and changes to the contract rights of the counterparties to financial obligations. Again, it is unlikely that entities subject to such requirements would expend much legal capital on parsing through whether a swap termination event, or even an amendment of loan documents, "reflects financial difficulties", and the tendency is likely to be towards overdisclosure.

There are additional ambiguities in the proposed amendments. According to the accompanying release, the amendments will only be applicable to continuing disclosure agreements executed after the amendments are finalized, but it is unclear, for example, whether an issuer or obligated person that executes a continuing disclosure agreement governed by the amended Rule will be required to disclose all previously incurred material "financial obligations", or whether only "financial obligations" incurred following the execution of such an agreement will be subject to such disclosure. The accompanying release does indicate that the required notice of default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation which reflect financial difficulties would apply with respect to financial obligations previously incurred.

Unlike many of the existing events for which event notices are currently required under the Rule, which occur rarely, incurrence of financial obligations occurs regularly for many issuers and obligated persons. Accordingly, these amendments arguably would constitute the broadest expansion to date of the Rule's continuing disclosure requirements. They are sure to generate many comments from affected parties before they are finalized.

by Charles E. Carey

Friday, March 17, 2017

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

[SEC's Proposed Disclosure Amendments Criticized as too Costly, Burdensome.]

PALM BEACH GARDENS, Fla. – The Securities and Exchange Commission's proposed amendments to its Rule 15c2-12, which would create numerous new disclosure obligations for issuers, received more criticism on Thursday as market participants noted a lack of specificity in them and the burdens and costs that they would impose on issuers.

Members of the bond community made their comments during various panels and speeches at The Bond Buyer and Bond Dealers of America National Municipal Bond Summit here.

Ben Watkins, Florida's director of bond finance, during a luncheon speech that touched on regulation generally, as well as the amendments, said that the regulators don't "fully appreciate the costs and burdens they impose on the market."

"From my perspective, the regulatory creep is like kudzu in the South in the summer, it continues perpetually," he said, specifically singling out the SEC's Municipal Advisor Rule, the Municipalities Continuing Disclosure Cooperation initiative, and the recently proposed 15c2-12 amendments.

He added that investment banks "are now an elaborate front for compliance departments" because "they're not free to bank anymore" given the regulations imposed in recent years.

"So much time, effort, and energy goes into compliance that that diverts resources that would otherwise be available to deliver intellectual capital and solutions to the issuer community and for the benefit of the market as a whole," Watkins said.

The proposed amendments to 15c2-12 are designed to achieve a goal most municipal participants have supported – helping rating agencies, analysts and others obtain information about bank loans, private placements and other alternatives to publicly offered tax-exempt bonds that issuers and borrowers are increasingly using that fall outside the current 15c2-12 disclosure requirements.

The first new material event notice category would require an issuer or borrower to file a notice if they incur a financial obligation that is material or a financial obligation has an agreement to covenants, events of default, remedies, priority rights or similar terms "any of which affect securities holders, if material." The SEC has consistently declined to define materiality, contending it's based on facts and circumstances, but the Supreme Court has said a fact is material if there is a substantial likelihood that a reasonable investor would consider it important.

Financial obligations are defined as "a debt obligation, lease, guarantee, derivative instrument or a monetary obligation resulting from a judicial, administrative or arbitration proceeding."

The second new material event category would require a notice to be filed for certain actions or events related to the financial obligation that "reflect financial difficulties" such as a default, event of acceleration, termination event, or modification of terms.

Underwriters would have to reasonably determine that an issuer or borrower has agreed to provide notice of such events in its continuing disclosure agreement (CDA). The proposed amendments, if adopted would apply to CDAs entered into in connection with primary offerings occurring on or after the compliance date for the amendments.

Watkins said that it would be best for the SEC to be specific and "give clear and narrow rules that people can follow rather than saying 'all material financial obligations.'"

The broad definition of material financial obligations puts everyone in the position of wondering what the SEC is talking about and what they need to do, Watkins said.

“You spend your time, effort, energy, and money focused on that rather than complying with the rule,” he added.

Jessica Kane, director of the SEC’s Office of Municipal Securities, said on a panel before Watkins’ speech that the new amendments would use the definition of materiality in the same way it is used in the 14 event notices that are already included in 15c2-12. She added that the determination of what is material is something that an issuer or obligated person is in the best position to make based on the relevant elements and circumstances at the time.

Kane said that the SEC expects materiality “is a concept that issuers are familiar with and know how to apply.”

Guy Yandel, executive vice president and co-manager of George K. Baum & Company’s muni division, participated on Kane’s panel and said he thinks the issue of materiality would be “a little different” in the two new event notices if they were approved.

“In all of the 14 previous events, we could counsel our clients that they shouldn’t try to make a materiality call, they should just say what they did,” Yandel said. “With these, it’s a little more difficult because if you were to try to do that, you’d be uploading garbage contracts that municipalities enter into and I don’t think that is the intent.”

He added that means issuers are no longer going to be able to fall back and say ‘we’re just going to disclose everything’ but will instead have to make a materiality determination.

Kane encouraged industry comments on the proposed amendments at various times during the panel and specifically pointed out that the amendments’ proposing release asks a number of questions about whether the definition of financial obligations is the right definition with the right scope.

Watkins said the Government Finance Officers Association will be commenting on the proposal, adding that, in his view, voluntary industry initiatives and best practices coupled with collaborative efforts among stakeholders is “the best way to go” and should precede regulation and enforcement.

However, the SEC and others like financial analysts are still concerned about a lack of information despite past collaboration, GFOA best practices, and other efforts from market participants and regulators to increase voluntary bank loan disclosure.

Bill Oliver, industry and media liaison for the National Federation of Municipal Analysts, said during a separate panel on Thursday that he thinks the SEC generally did “a pretty good job in terms of defining concerns that credit analysts have in terms of disclosing financial obligations that have an impact on how you calculate debt ratios and also the effect on existing bondholders.”

NFMA sent a letter to the SEC in August 2016 urging changes to Rule 15c2-12, including expanding the list of material events to include bank loans and other debt obligations.

The Bond Buyer

By Jack Casey

March 16, 2017

MSRB Seeks to Establish Continuing Education Requirements for Municipal Advisors.

The Municipal Securities Rulemaking Board (MSRB) today filed with the Securities and Exchange Commission amendments to MSRB Rule G-3, on professional qualification requirements.

The proposed amendments would establish continuing education (CE) requirements for municipal advisors and would require implementation of a continuing education training program for individuals qualified as municipal advisor representatives. The proposed amendments seek to avoid unnecessary regulatory overlap with existing CE requirements for municipal securities dealers, which may also act as municipal advisors.

The filing also includes accompanying amendments to MSRB Rule G-8, on books and records to be made by brokers, dealers and municipal securities dealers and municipal advisors.

Read the SEC filing.

FINRA Hits Santander with $175K Fine for Charging Customers Unfair Muni Bond Prices.

FINRA slapped Santander Securities with a $175,000 fine for allegedly selling municipal bonds to customers at unfair and unreasonable prices.

The regulator charged that the pricing in at least 12 transactions were not reasonable, taking into consideration factors such as the judgement of the broker or the dealer as to the fair market value of the securities, according to the settlement the firm reached with FINRA.

FINRA charged that Santander Securities sold municipal bonds to clients at unreasonable prices.
FINRA charged that Santander Securities sold municipal bonds to clients at unfair prices.
The unfair pricing occurred from July 2013 to September 2013, FINRA claimed.

"Santander Securities is pleased to have resolved this matter," said Nancy Orlando, a spokeswoman for Santander Bank. Orlando added that since 2013 the firm has enhanced its compliance, risk management, legal and control functions. "We take our compliance responsibilities very seriously, and are committed to providing excellent service to our customers," she said.

In addition to the $175,000 fine, the firm was ordered to pay restitution to the affected customers in the amount of $62,807 plus interest. The restitution does not preclude customers from pursuing their own actions, FINRA said in the settlement document.

Santander settled the charges without admitting or denying FINRA's findings.

Bank Investment Consultant

By
Margarida Correia

Published

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BOK Financial Sued Over Municipal Bond Deals.

The cases concern bond deals, including some settled last year with the SEC

BOK Financial is now facing two lawsuits over municipal bond deals, including some of the same bond deals that led to it to pay more than $1.6 million to settle charges from the Securities and Exchange Commission in September of last year.

Two groups of municipal bond investors are suing Tulsa-based bank holding company for aiding fraud, negligence and breaching its fiduciary duty in two separate, yet similar, lawsuits after its business partners in the bond deals, which financed purchasing or renovating senior living facilities, were charged with fraud.

The second civil suit, a class-action complaint, was filed in federal court Monday and is seeking in excess of $5 million in damages. The first lawsuit was filed in September in Tulsa County District Court and is seeking $5 million in damages.

In a statement Wednesday to the World on the second lawsuit, BOKF said, “We will vigorously defend the lawsuit and are confident we will prevail.”

Regarding the first lawsuit, the bank has said in SEC filings that it feels it has a valid defense and argued in court filings that the case should be put on hold and investors, including the plaintiffs, will be paid as part of a court-ordered payment plan.

In announcing the settlement, the SEC said the company failed in its “gatekeeper role” when it didn’t notify people who invested in the bonds that the manager of the bond offerings for the senior living facilities, Christopher Brogdon, was using emergency cash and not replenishing it.

As trustee for the bonds, the bank held the invested cash and was in charge of making sure the operators of the senior living facilities complied with the obligations of the debt, filings claim.

The most recent lawsuit alleges that three men, Brogdon, Todd Barker and Dwayne Edwards, used money from the bonds for unauthorized activities such as financing other projects and personal expenses, and that BOKF was required to alert investors and failed to do so.

BOKF said of the second lawsuit: “The only connection between BOKF and the two separate matters is that Mr. Brogdon sold the underlying assets to Mr. Edwards. The bank fulfilled all of its obligations as trustee for the Dwayne Edwards bonds in a timely fashion, provided prompt notices to the market and took prompt action to protect the bondholders. The lawsuit is without merit and misrepresents the facts in the Dwayne Edwards matter.”

Court filings allege that the bank’s primary point of contact with Brogdon was a former member of the bank’s corporate trust department and that employee knew of Brogdon’s actions but instead of notifying investors, chose to protect that the fees generated by Brogdon’s business. That employee was fired in 2015.

After the SEC settlement, the bank said in a statement: “The actions of a former employee in this matter are completely contrary to our guiding principles. Our board of directors and audit committee have worked with the SEC to create policies and procedures to prevent this from happening again."

BOKF doesn't expect that the first lawsuit will have an impact on its financial well-being according to SEC filings.

"Management has been advised by counsel that the Bank has valid defenses to the claims. The Bank expects the Court ordered payment plan will result in the payment of the bonds by the principals," the bank said in its latest 10-K. "Accordingly, no loss is probable at this time and no provision for loss has been made. If the payment plan does not result in payment of the bonds, a loss could become probable. A reasonable estimate cannot be made at this time though the amount could be material to the Company."

By Samuel Hardiman | Tulsa World

Posted: Thursday, March 16, 2017 12:00 am

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[Reminder: Comments on Draft Amendments To MSRB's Advertising Rules Are Due Next Friday, March 24.]

[Read the Request for Comment.]

[Lawyers Concerned About Burdens From SEC Disclosure Amendments.]

WASHINGTON – The SEC's proposed changes to its Rule 15c212 will create many new disclosure obligations that will be costly and burdensome for issuers, especially those that are smaller, said bond lawyers meeting here on Thursday.

The lawyers made their comments during the National Association of Bond Lawyers' Tax and Securities Law Institute here and discussed the recent amendments that would add two new events to the list of material events that issuers must report under 15c212.

The amendments are designed to achieve a goal most municipal participants have supported – helping rating agencies, analysts and others obtain information about bank loans, private placements and other alternatives to publicly offered tax-exempt bonds that issuers and borrowers are increasingly using that fall outside the current 15c212 disclosure requirements.

The first new material event notice category would require an issuer or borrower to file a notice if they incur a financial obligation that is material or a financial obligation has an agreement to covenants, events of default, remedies, priority rights or similar terms "any of which affect securities holders, if material."

Financial obligations are defined as "a debt obligation, lease, guarantee, derivative instrument or a monetary obligation resulting from a judicial, administrative or arbitration proceeding."

The second new material event category would require a notice to be filed for certain actions or events related to the financial obligation that “reflect financial difficulties” such as a default, event of acceleration, termination event, or modification of terms.

Underwriters would have to reasonably determine that an issuer or borrower has agreed to provide notice of such events in its continuing disclosure agreement (CDA). The proposed amendments, if adopted would apply to CDAs entered into in connection with primary offerings occurring on or after the compliance date for the amendments.

Timothy Stratton, a lawyer with Gust Rosenfeld in Phoenix, said the proposal may not sit well with the “thousands and thousands” of local government issuers who might use the alternatives to avoid disclosure obligations like those in the proposal.

“This kind of pulls the rug out from underneath some of that,” Stratton said about the proposal.

He added there is going to be “a real learning curve” for a lot of issuers that will not be immediately thinking about the financial obligations because they aren’t bonds.

“I think we’ve sufficiently gotten our issuers to disclose issues for bonds … but the transportation department and school district are not really going to be thinking about this when they sign the school bus lease,” he said. “That’s where I’m really concerned. It’s a laudable goal to say, ‘Yes, we’re going to put all this information out there for the bondholders,’ but I think we have to on the flip side say, ‘What’s the practical effect and impact on the issuers.'”

“We’re going to have to do a great deal of education out in the field with our clients, with our various state associations and others,” Stratton said.

The first new material event notice category would require an issuer or borrower to file a notice if they incur a financial obligation that is material or a financial obligation has an agreement to covenants, events of default, remedies, priority rights or similar terms “any of which affect securities holders, if material.”

The second new material event category would require a notice to be filed for certain actions or events related to the financial obligation that “reflect financial difficulties” such as a default, event of acceleration, termination event, or modification of terms.

Underwriters would have to reasonably determine that an issuer or borrower has agreed to provide notice of such events in its continuing disclosure agreement (CDA). The proposed amendments, if adopted would apply to CDAs entered into in connection with primary offerings occurring on or after the compliance date for the amendments.

Stratton said one of the concerns is that terms are supposed to be disclosed based on materiality.

The SEC has consistently declined to define materiality, but the Supreme Court has said a fact is material if there is a substantial likelihood that a reasonable investor would consider it important.

“I think that gives me and a lot of my fellow practitioners here a great deal of anxiety as we are advising clients moving forward,” Stratton said. “There are just so many terms and conditions in a number of these bank loans and that’s just talking about bank loans, not even thinking about swaps and derivatives transactions.”

Andrew Kintzinger, counsel with Hunton & Williams here, said that it seems to him that the proposal ends up “talking about extreme materiality or hyper-materiality” where issuers now feel they need to disclose a lot to avoid possible enforcement actions from regulators.

Kintzinger said the SEC's cost estimates for the proposal "are way off" and that "either issuers are going to pay a lot of money summarizing aspects of financial obligations or broker-dealers are going to spend a lot of time on EMMA reading full credit agreements."

Rebecca Olsen, deputy director of the SEC's Office of Municipal Securities, made clear the SEC's use of the materiality standard is not suggesting that issuers need to submit a release every time they enter into a contract. She offered clarifications on lawyers' questions throughout the discussion and consistently encouraged those present to share the comments and concerns they were voicing with the commission during the 60-day comment period.

"There will certainly be costs to doing this but there will be benefits to the market" such as "putting investors in a position to protect themselves by making informed investment decisions," Olsen said.

The Bond Buyer

By Jack Casey

March 9, 2017

The SEC's Proposed Changes to Rule 15c2-12 Could Have Far-Reaching Impact on Issuers and Obligors of Municipal Securities: Foley & Lardner

Introduction

On March 1, 2017, the Securities and Exchange Commission ("SEC") issued Release No. 34-80130 (the "Release") proposing several amendments to its Rule 15c2-12 (the "Rule") that would add two new events to the list of events that must be included in the continuing disclosure undertakings of municipal issuers or obligors of municipal bonds.

- The first additional event, in general, is the incurrence of "financial obligations, if material, or agreeing to covenants or other provisions that affect security holders, if material," and
- The second reportable event is the occurrence of one or more of the following events under the terms of such a financial obligation: "default, event of acceleration, termination event, modification of terms or other similar events under the terms of a financial obligation of the obligated person," if the event reflects financial difficulties.

The compliance date of the proposed amendments would be no earlier than three months after any final approval of the proposed amendments, should the SEC adopt the proposed amendments in final form.

Many participants in the municipal securities market have called for greater transparency surrounding issuer's or obligor's bank loans or direct purchases of municipal securities ("direct placements"), but the scope of the proposed amendments is far broader than simply requiring disclosure of such direct placements.

Under the Release, the term "financial obligation" is very broadly defined and includes, in addition to a debt obligation such as a direct placement– leases, guarantees, derivatives or monetary obligations arising from a judicial, administrative or arbitration proceeding. Coupled with the qualifier “if material,” which the SEC has not clarified in the context of the Rule, issuers and obligors may feel compelled to disclose a great deal of information. The use of the term “lease,” which the Release defines as including both capital and operating leases, could open the door to reporting a significant number of obligations, especially in certain market sectors, as discussed below. Similarly, in the second proposed additional event, the use of the term “default” intentionally captures events earlier in time than when an “event of default” is declared and, if such default “reflects financial difficulties,” the event must be disclosed and the context provided.

This Client Alert will provide background concerning the Rule and describe the terms and scope of the proposed amendments to the Rule. It then will examine some of the issues that these proposed amendments raise in the context of the municipal market. Lastly, it will suggest some strategies for participants in the municipal market to address the challenges posed by these proposed amendments. Note that the SEC will accept comments during a 60 day period that begins on the date of publication in the Federal Register, although comments on the underlying financial impacts are due to the Office of Management and Budget (“OMB”) within 30 days. Given the breadth of the proposed amendments, as well as the potential for a significant amount of work created for issuers and obligors, comments to both the SEC and OMB are likely to be helpful.

Background

The SEC has indirectly regulated disclosure by issuers and obligors of municipal securities pursuant to the Rule by requiring that the broker-dealers underwriting an issue of bonds obtain a written undertaking from the issuer or obligor to provide certain annual financial data and timely notice of certain events that primarily relate to the offered securities to the Municipal Securities Rulemaking Board’s (“MSRB”) Electronic Municipal Market Access (“EMMA”) website. In addition, in connection with the issuance of the municipal securities, an underwriting broker-dealer must reasonably determine that the issuer or obligor has complied with its prior continuing disclosure undertakings, or accurately disclosed in its Official Statement relating to such securities any failures to comply with such undertakings, within the past five years.

Since 2009, issuers and obligors have increasingly used direct placements as substitutes for publicly offered municipal securities. Direct placements can be beneficial to issuers and obligors for several reasons, including the lack of a requirement to provide the purchaser or lender with an official statement and generally lower transaction costs. Although many such transactions are issued pursuant to the same underlying legal documents as the issuer’s or obligor’s outstanding bonds, many others include additional covenants or other provisions for the benefit of the purchaser or lender, often set forth in a separate continuing covenants agreement or a similar instrument. Currently, there is no regulation which requires either an issuer or obligor or a broker-dealer to post direct placement documentation on EMMA.

A number of market participants, particularly municipal analysts and rating agencies, have called for issuers and obligors to provide disclosure through EMMA regarding these direct placements, since the additional debt has the potential to materially alter the analysis of the issuer’s or obligor’s financial condition. Further, because in certain instances the additional terms and financial covenants agreed to by the issuer or obligor could have a material impact on the rights of the holders of outstanding publicly held bonds, these commentators have also sought to have these terms and financial covenants disclosed. A number of issues and obligors have voluntarily provided the requested information regarding such direct placements to EMMA. However, the SEC has noted that many other issuers and obligors have not made such information regarding direct placements available on EMMA, leading to a lack of information in the market regarding these securities or, in some cases, information “asymmetry” among various market participants.

In addition to information regarding direct placements, the SEC states that some market participants have called for issuers and obligors to provide information to EMMA regarding derivatives, such as interest rate swaps, and capital and operating leases, that is not currently required to be disclosed under the Rule.

The Proposed Amendments

Accordingly, in order to address the lack of publicly available information regarding direct placements and other "financial obligations," the SEC has proposed to amend the Rule to require timely disclosure of "financial obligations of the obligated person, if material" and of any agreement that includes "covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the obligated person, any of which affect security holders, if material." In addition, the proposed amendments would require issuers and obligors to provide timely notice of a "default, event of acceleration, termination event, modification of terms or other similar events under the terms of a financial obligation of the obligated person, any of which reflect financial difficulties." These amendments would apply to continuing disclosure undertakings for municipal securities issued after the effective date of the proposed amendments, and would not be retroactive, in general. The amendment does not provide the elements that would need to be included in a notice filed with EMMA.

Unpacking the Proposed Amendments

Scope of "financial obligations" that must be disclosed. The clear focus of the Release and the proposed amendments to the Rule is provision of continuing disclosure relating to direct placements, but the scope of the proposed amendments is significantly broader than direct placements. The term "financial obligation" is defined to include a "(i) debt obligation, (ii) lease, (iii) guarantee, (iv) derivative instrument, or (v) monetary obligation resulting from a judicial, administrative, or arbitration proceeding." Further, these terms are interpreted broadly in the Release, For example, the Release provides that the term "lease" is intended to include an operating lease or a capital lease, while a "guarantee" is intended to capture a contingent financial obligation of the issuer or obligor to secure the obligations of a third party or of the issuer or obligor itself. Thus, an extremely wide range of obligations, if material, would need to be disclosed to EMMA by issues and obligors if the amendments are adopted, as proposed.

Impact of "materiality" qualifier. A second area of concern is the use of materiality to qualify those events that must be disclosed. This qualification ideally would limit the amount of disclosure that must be provided only to events where there is a substantial likelihood that a reasonable investor would consider such information important in making an investment decision, based on the Basic v. Levinson standard of materiality. However, as was evidenced by the SEC's recent Municipal Securities Disclosure Cooperation ("MCDC") initiative, there is a lack of clear guidance regarding what is material to an investor in the municipal market, leading to a conservative view of materiality and what one market participant has termed "hyper disclosure".

Determining which events are "material" to a reasonable investor could be difficult and, if the SEC does not later concur with the issuer's or obligor's analysis, the consequences can be severe. Thus, use of the materiality standard (without further guidance) to qualify the events that must be disclosed gives rise to the concern that issues and obligors will be required to provide detailed summaries of its direct placements, leases, swaps, for example, or to post in full redacted copies of the underlying documentation, in order to comply with the Rule.

Particular impact on certain municipal sectors. A corollary concern is that for certain sectors of the municipal market, this approach could give rise to a flood of information in an attempt to meet the requirements of the Rule, while not actually providing real insight into the issuer's or obligor's actual financial situation. For example, most airports structure their arrangements with the parties doing business at the airport, such as airlines, rental car companies and concessionaires, through leases. The sheer volume of leases to which a large airport is a party could overwhelm participants in the municipal market, as it is likely that such issuers and obligors will choose to simply post redacted versions of the relevant documents. Similarly, many healthcare systems both own medical office buildings and lease space to third parties, as well as lease other space themselves. The volume of such leases, especially for a large system, also could be substantial. This volume of data (and related workload to assemble such documentation) does not appear to be reflected in the economic analysis performed by the SEC in connection with the Release.

Events "reflecting financial difficulties." One of the themes of the Release is that, the timing of such financial difficulties disclosure under current law is often delayed because it is included in an annual filing, or such disclosure may not include the detail that would be required under the proposed amendments. In the Release, the SEC also notes that certain events that would indicate that the issuer or obligor was experiencing financial difficulties are not currently required to be disclosed under the Rule. Thus, the second added event of the proposed amendments would require an issuer or obligor to provide timely notice of any of the following events: "default, event of acceleration, termination event, modification of terms, or other similar events under the terms of a financial obligation of the obligated person, any of which reflect financial difficulties."

In the Release, the SEC first notes that the qualifying trigger that any of the events must "reflect financial difficulties" should allow issuers and obligors to distinguish between events that do not reflect financial difficulties, such as failure to comply with a covenant to provide notice of a change of address, compared to the failure to replenish a debt service reserve fund. The former is unlikely to be evidence that the issuer's or obligor's ability to pay its obligations when due has been compromised, while the latter could indeed be indicative of financial distress. However, this qualifier, like materiality, has not been clearly defined nor has the SEC provided guidance on how this standard should be interpreted. Note, also, that this requirement will apply to a listed event relating to any of the issuer's or obligor's financial obligations, not solely those entered into after the date of the amendment of the continuing disclosure undertaking required by the Rule, if amended as proposed.

Timing of disclosure of events. The use of certain terms in the proposed amendments will require issuers and obligors carefully to maintain up-to-date data on the status of all of their "financial obligations," as defined by the SEC. For example, use of the term "default," rather than "event of default," intentionally requires disclosure of an event at an earlier point in time than is generally required under the Rule currently, since an "event of default" typically accrues following some notice and cure period, while a "default" is the failure to act or the taking of a prohibited action. Thus, even if a default is cured before it amounts to an event of default, if the default itself reflected financial difficulties, it must be disclosed. This can be contrasted with an acceleration event or termination event, which are typically actions taken once an event of default has occurred, cure rights have been exhausted, and the counterparty has determined to exercise its remedies.

Similarly, a modification of terms is often a negotiated response to a situation which may or may not rise to the level of a default or which may result in the waiver of a default. For example, where an issuer or obligor fails to meet a financial covenant, such as a minimum debt service coverage ratio, but still has adequate financial resources to pay its operating expenses and debt service as and when due, it is not uncommon for the lender and issuer or obligor to agree to a temporary (or permanent) amendment of the covenant in exchange for certain actions, such as engaging a consultant to recommend methods to increase revenues or reduce expenses, or both. Under the proposed amendments to the Rule, any such amendment would need to be disclosed, along with the surrounding terms and conditions relating to the amendment, if such modification of terms “reflects financial difficulties.”

A note about responsibilities of broker-dealers. Although most of the foregoing discussion relates to the potential impact on issuers and obligors of the proposed amendments to the Rule, the Rule requires broker-dealers to have a reasonable basis for concluding that the issuer or obligor has met its obligations under its continuing disclosure undertakings and that any material failures have been disclosed. Under the current list of events that must be disclosed pursuant to the Rule, the scope of a broker-dealer’s inquiry is fairly limited and the due diligence necessary to comply with this requirement is relatively straight-forward (though not simple). Under the proposed amendments, broker-dealers would have a far greater scope of events that require disclosure and, therefore, a far more complex due diligence process will be necessary. This is especially critical because the SEC has indicated that simply relying on a certification of the borrower without additional inquiry is not sufficient to discharge the broker-dealer’s duties under the Rule. Thus, broker-dealers will need to develop a significantly more robust due diligence process (or cause their counsel to review a wider array of documentation) in order to comply with the Rule if the amendments are adopted as proposed.

Steps to Prepare for the Amendments

As described above, the amendments to the Rule proposed in the Release could have a significant impact on the municipal market, especially upon issuers and obligors, but also on broker-dealers. Set forth below are several actions that issuers, obligors and broker-dealers may wish to consider undertaking in response to this proposal.

Review and Comment. First, the SEC has solicited comments on the proposed amendments to the Rule and on the Release, including comments to both the SEC and OMB on the economic analysis set forth therein. Issuers, obligors and broker-dealers may want to submit comments; for example comments regarding the scope of the proposed amendments, difficulties that parties anticipate in complying with the proposed amendments and suggestions for addressing those difficulties, and comments on the assumptions underlying the SEC’s economic analysis. Given the new administration’s recent Executive Order restricting the issuance of new regulations, comments on the economic impact of the proposed amendments may require the SEC to undertake a much more exhaustive analysis before the proposed amendments can be adopted. Further, examples of the potential difficulties that these amendments, as proposed, may cause issuers and obligors or broker-dealers may allow the SEC to tailor the proposed amendments more narrowly to achieve the SEC’s stated goals, while limiting unintended and unnecessary collateral consequences.

Review Current Arrangements and Disclosure Policies. If the proposed amendments to the Rule are adopted, even in a more limited form, issuers and obligors will need to be prepared to gather and disseminate a considerably wider scope of information regarding their financial obligations than is currently the case. It would likely be prudent for issuers and obligors to review their existing disclosure undertakings and policies and consider what modifications may be necessary to comply with the Rule as amended. Further, because of the potentially broad scope of such requirements, the person or persons responsible for filing event notices with EMMA will need to develop processes and procedures for becoming aware of these additional events in a timely manner, evaluating whether they are material or reflect financial difficulties, and preparing and filing the required notices, generally within 10 business days of the occurrence of the event. It seems likely that the most important and difficult element of this new, wider inquiry will be setting up processes to ensure that the designated person receives timely notice of the new events that must be disclosed.

Similarly, broker-dealers will need to revise their due diligence processes to devise methods of determining whether any of the new listed events have occurred and, if so, whether they were material or reflect financial difficulties and, if so, were adequately and timely reported to EMMA.

Consider Disclosure Standards Under Federal Securities Laws; and What Must Be Included in an Events Notice. Another critical element that must be borne in mind by borrowers is that the requirements of Rule 10b-5, which requires that disclosure be accurate and complete, will apply to each of the event filings. Thus, simply filing a notice with EMMA that a certain event has occurred may not be sufficient, even if such a notice meets the requirements of the applicable continuing disclosure undertaking. Because many, if not all, of the new proposed events require a certain degree of analysis and context to determine whether they are material or reflect financial difficulties, additional disclosure necessary to provide the context of such a determination is likely to be necessary. Disclosure filed with EMMA is subject to the 10b-5 standard and therefore cannot contain any untrue statement of a material fact or omit to state any material fact necessary to make the statements therein, in light of the circumstances under which it was made, misleading.

Foley & Lardner LLP

Monday, March 13, 2017

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MSRB Publishes Designation Information Regarding Mandatory Participation

in Business Continuity and Disaster Recovery Testing.

To facilitate compliance with Securities and Exchange Commission Regulation Systems Compliance and Integrity (Regulation SCI), the MSRB adopted Rule A-18 on Mandatory Participation in Business Continuity and Disaster Recovery Testing on November 2, 2015. Pursuant to Section (b) of Rule A-18, the MSRB is notifying MSRB-registered entities of the criteria for designating participants for the MSRB's next mandatory functional and performance testing of the operation of its business continuity and disaster recovery plans.

Read the regulatory notice.

Dealers Say MSRB Minimum Denomination Rule Would Hurt Investors.

WASHINGTON – Dealer groups are still opposed to a proposed standalone minimum denomination rule from the Municipal Securities Rulemaking Board after several changes, arguing it would hamper liquidity and should be abandoned for altered suitability requirements.

Bond Dealers of America and the Securities Industry and Financial Markets Association made their comments about the proposed standalone Rule G-49 in letters sent to the Securities and Exchange Commission. The MSRB made several changes to the proposed rule before filing it with the SEC, most significantly by eliminating one exemption under the original proposal.

BDA, which is asking the commission to reject the proposed rule, said the muni industry would be better served if the SEC directed the MSRB to eliminate both its current and proposed minimum denomination requirements and instead draft an interpretive release to its Rule G-19 on suitability to appropriately regulate the concern at the center of the proposed rule – protecting investors.

"The real regulatory need here is that dealers need to be required to honor an issuer's determination of investor suitability in transactions where the authorized denominations are $100,000 or above," said BDA chief executive officer Mike Nicholas.

Nicholas added that "the greatest impediment to a fair market and the greatest source of investor harm" is the current MSRB minimum denomination regulatory framework under Rule G-15. The interpretive release BDA is asking for should be "narrowly constructed to address suitability concerns for transactions in municipal securities" with minimum denominations of $100,000 or more, Nicholas wrote.

Leslie Norwood, managing director and co-head of the municipal securities division for SIFMA, said SIFMA "is disappointed in the recent amendments to the MSRB's draft rule and feels strongly" that they do not serve their stated purpose. She also wrote that the MSRB's goals with the proposed rule could be effectively achieved by making consideration of liquidity as a result of a below-minimum denomination position a part of Rule G-19 suitability analyses.

"Assuming consideration of the liquidity of a below-minimum denomination position is handled in Rule G-19, there would be no need for Rule G-49 other than with respect to confirmation disclosure, a matter that would be best addressed in Rule G-15," Norwood wrote.

Rule G-49 would contain current requirements in Rule G-15 that prohibit dealers from engaging in transactions with customers in amounts below the minimum denominations of municipal securities set by issuers. It would also include two current exceptions to the prohibition as well as one more exception first proposed in April 2016. That exception would allow a dealer that has bought a customer's liquidated position in an amount less than the minimum denomination to sell those bonds to one customer with no prior holdings of the bonds and to any customers who already have positions in the bonds.

The standalone rule would also eliminate the current requirement in G-15 that a dealer, in some situations, must obtain a "liquidation statement" from a party that isn't its customer but rather the party from which the dealer purchased the securities. The liquidation statement must be obtained before the sale of securities to another customer and confirm that the original selling customer fully and completely liquidated its below-minimum position.

By taking away the liquidation statement, the MSRB felt that another safeguard was needed for an existing exception under G-15 that says a dealer can sell a below-minimum amount of a bond to a customer if the sale is a result of another customer liquidating his or her entire position in the bonds.

It proposed a new "safeguard" that would prohibit a dealer engaged in an interdealer trade from selling less than all of a below-minimum position that the dealer acquired either from a customer that fully liquidated its below-minimum position or from another dealer. That prohibition would satisfy the MSRB's goal by preventing the creation of additional below-minimum positions, the MSRB has said.

The other current exception to the MSRB's minimum denomination rule would not be affected by the liquidation statement changes. That exception allows dealers to buy munis below the minimum denomination from customers if the dealer determines, based on the customer's account information or written statement, that the customer is selling its entire position in the bonds.

SIFMA is asking the SEC to ensure that the MSRB's proposed "safeguard" is removed before the rule is approved because it would limit interdealer transactions and hurt liquidity. Norwood added that it would also create concerns about the timing of sales or keep a dealer from pursuing a transaction if, for example, the dealer is selling a below-minimum denomination position and finds a customer without prior holdings in the securities to buy a portion of the below-minimum amount but then can't locate customers with prior holdings to buy what's left over.

"The benefits of the elimination of the liquidation statement … are completely outweighed by the negative impacts of limiting interdealer transactions," Norwood wrote.

SIFMA also wants an amendment to the rule after determining that it can be read to prohibit breaking up a below-minimum position if the position is acquired from a customer but permits breaking up the position if it is acquired from a dealer.

"SIFMA and its members see no reason why there should be a prohibition on dealers selling the below-minimum denomination position to more than one customer if the position is acquired from a customer," Norwood wrote. She included two separate alternatives to the MSRB's current language that would clear up the group's concerns.

The letter also includes a number of examples that illustrate the group's point that prohibitions on breaking up positions acquired from customers and prohibitions on interdealer trades where the selling dealer breaks up its position could prevent transactions that would ultimately lower the number of minimum denomination positions in the market.

SIFMA is also asking that the MSRB require the filing of minimum denomination information on its

EMMA system on all transactions and to clarify what "entire position" means for a customer that has more than one account with a firm.

The Bond Buyer

By Jack Casey

March 6, 2017

Ex-NY Area Development Official Pleads Guilty in Landmark Municipal Bond Case.

(Reuters) – A former suburban New York development corporation director pleaded guilty to defrauding investors on Tuesday, marking what prosecutors said was believed to be the first-ever conviction for federal securities fraud in connection with municipal bonds.

Aaron Troodler, 42, former executive director of the Ramapo Local Development Corp in Ramapo, New York, pleaded guilty to securities fraud and conspiracy before U.S. District Judge Cathy Seibel in White Plains, New York, according to prosecutors.

Troodler is scheduled to be sentenced on Sept. 18. The securities fraud charge carries a maximum sentence of 20 years.

Joseph Poluka, an attorney for Troodler, declined to comment.

Troodler was charged last April along with Christopher St. Lawrence, Ramapo's elected supervisor. U.S. Attorney Preet Bharara at the time said the case was the first criminal securities fraud case over municipal bonds.

Prosecutors said Ramapo and the development corporation, which was established and owned by the town, together sold more than $150 million of bonds while Troodler and St. Lawrence concealed the town's deteriorating finances.

The town's financial woes were largely due to a $58 million minor league ballpark project, prosecutors said. The park, originally called Provident Bank Park and now Palisades Credit Union Park, is home to the Rockland Boulders.

Although Ramapo residents rejected a plan to guarantee bonds used to finance the park in a 2010 referendum, and St. Lawrence told residents that no public money would be used to pay for the project, Ramapo ended up paying more than half the cost, according to prosecutors.

Troodler and St. Lawrence falsified the town's finances to help sell the bonds, including by putting millions in fake receivables on its books, prosecutors said.

St. Lawrence is scheduled to go to trial in April. He and Troodler also face civil claims by the U.S. Securities and Exchange Commission.

The probe of the finances of Ramapo, which is 28 miles northwest of New York City and had 126,595 residents as of the 2010 census, began with a whistleblower complaint, according to Bharara.

The Federal Bureau of Investigation searched Ramapo's municipal offices in May 2013 after an audit by New York's state comptroller criticized the funding of the stadium and the cost to taxpayers.

By REUTERS

MARCH 7, 2017, 6:24 P.M. E.S.T.

(Reporting By Brendan Pierson in New York; Editing by Tom Brown)

SEC Takes First Step on Disclosure of Bank Loans to States, Localities.

States and municipalities looking to fund projects have been turning to loans from banks for cheaper finance in recent years

WASHINGTON—The Securities and Exchange Commission took a first step toward shedding light on loans from banks to states and localities that are increasingly being used to finance infrastructure projects, rather than issuing debt in public markets.

The SEC on Wednesday unanimously voted to propose new requirements that state and local governments disclose the details of the bank loans, helping to illuminate a corner of the nearly $4 trillion municipal-bond market where there is currently no consistent reporting.

States and localities looking to fund projects such as roads, schools and bridges are turning to bank loans for cheaper financing in recent years. Such loans total roughly $40 billion to $50 billion in annual issuance, according to consulting firm Municipal Market Analytics. Bank loans are cheaper than issuing debt in the public markets in part because they don't require a rating, which can cost a municipality tens of thousands of dollars, and typically don't carry the same disclosure requirements.

Investors currently "may have limited access, or substantially delayed access, to information about these nonpublic financings," SEC commissioner Kara Stein, a Democrat, said ahead of the vote.

Wednesday's uncontroversial proposal is among a handful of measures the SEC is able to advance despite its depleted ranks. The agency is operating with two commissioners, three fewer than its full complement, in the early days of the Trump administration.

Jay Clayton, President Donald Trump's pick to head the agency on a full-time basis, is awaiting Senate confirmation. The SEC's acting chief is Republican Commissioner Michael Piwowar. The other current commissioner is Ms. Stein.

Unlike publicly traded corporations, borrowers in the municipal-bond market are exempt from requirements to file documents with the SEC before they sell bonds and file updates on a regular basis. As a result, the SEC regulates municipal-debt disclosures only indirectly through banks, prohibiting them from underwriting the bonds unless the issuer enters into private disclosure agreements with investors.

Wednesday's move expands an existing list of "material events" that municipal borrowers agree to disclose on a continuing basis after the issuance of their debt.

Under the proposal, the list would expand to include a requirement to disclose the terms of any bank loans or other financial obligations borrowers may have entered into with a bank outside the public markets. In addition to bank loans, the requirement would also encompass the details of any swaps contracts municipalities enter into to, for instance, hedge against interest-rate changes.

States and localities would also have to disclose if they default, terminate or accelerate the payment of these financial obligations.

Currently, the list encompasses more than a dozen events ranging from payment delinquencies to ratings changes.

The SEC will seek public comment on Wednesday's proposal for 60 days. After the comment period, the agency would have to vote on the measure before it could go into effect.

In addition to the bank-loan proposal, the SEC separately voted to collect public feedback on whether to update its disclosure requirements for bank holding companies for the first time in more than 30 years, though the agency stopped short of proposing specific changes.

The SEC also voted on a third proposal aimed at requiring the use of the so-called inline XBRL format for corporate financial data and certain mutual fund information.

Yet another measure the SEC finalized is aimed at making it easier for investors to find access exhibits to corporate filings, requiring companies to include a hyperlink to each exhibit in the filing's exhibit index.

THE WALL STREET JOURNAL

By ANDREW ACKERMAN

Updated March 1, 2017 2:50 p.m. ET

Write to Andrew Ackerman at andrew.ackerman@wsj.com

SEC to Propose Issuer Disclosures on Bank Loans, Private Placements.

WASHINGTON – The Securities and Exchange Commission is set to propose changes that would require issuers and borrowers to disclose information about the growing number of alternative financial obligations to municipal bonds, such as bank loans, private placements, swaps, guarantees and leases.

Acting Chairman Michael Piwowar, a Republican, and Commissioner Kara Stein, a Democrat, voted on Wednesday to propose adding two new material events to the list of events that must be disclosed by issuers and borrowers under the SEC's muni disclosure Rule 15c2-12. The proposed amendments could be on the SEC's Wednesday or Thursday this week and published in the Federal Register next week. There will likely be a 60-day comment period after that, sources said.

While muni issuers and borrowers must contractually agree to disclose financial and operating data at least annually as well as notices of material events when they occur in order for firms to underwrite and sell their bonds under Rule 15c2-12, other financial obligations fall outside of that disclosure regime.

In many cases, credit analysts and other market participants either have no information about bank loans, private placements and swaps or do not have information on a timely basis, even though these obligations can affect the issuer's indebtedness, creditworthiness and liquidity.

Currently the SEC has 14 specified material events as well as a requirement for issuers to disclose if they have failed to meet their disclosure filing requirements within the last five years. These two amendments would make 16 specified events.

The proposed amendments also set forth a definition for the term "financial obligation."

The first amendment would require issuers and borrowers to file material event notices when they enter into certain financial obligations, if they are material. They must all file such notices if for those obligations they adopt agreements to covenants, events of default, remedies, priority rights or similar terms of obligations that could affect security holders, if material.

The second one would require material event notices to be filed when certain events are triggered such as acceleration of the debt, terminations, modifications, or other actions or terms indicating financial difficulties.

In discussing the proposals at the commission meeting, Piwowar noted that issuers' use of alternatives to publicly offered municipal bond financings, such as bank loans, have more than doubled since the financial crisis. Bank loans increased to $153 billion in 2015 from $67 billion in 2010, he said.

Both he and Jessica Kane, director of the SEC's Office of Municipal Securities, said that these alternative financial obligations can impact an issuer's indebtedness, creditworthiness and liquidity, creating risks for its existing muni bondholders.

Market participants said these disclosures are needed, but that they want to see the details of what the SEC is proposing.

"We have asked the SEC previously to require the disclosure of bank loan and private placement terms that could affect outstanding bondholders so in that respect we're happy with today's commission action," said Michael Decker, managing director and co-head of the municipal division for the Securities Industry and Financial Markets Association. "We need to look at the details of the proposal to ensure it's comprehensive and workable. We'll be looking at the rule from the perspective of dealer due diligence and whether dealers can efficiently determine when issuers are in compliance with previous disclosure agreements."

Ernie Lanza, senior counsel at Clark Hill and former Municipal Securities Rulemaking Board general counsel, said, "The definition of financial obligation is important to see what scope of arrangements will be covered and whether [the term] is well-defined or open to interpretation."

Jessica Giroux, general counsel and managing director of Bond Dealers of America, said, "Since the market has continued to see challenges in the area of disclosure, we support the concept of these amendments to improve market transparency. Once the rule text is available, our membership will review the details and will submit a comment letter to the SEC."

Emily Brock, director of the Government Finance Officers Association's federal liaison center, said GFOA called for issuers to disclose bank loans in its best practice "Understanding Bank Loans" but has concerns about mandating such disclosures.

"We recognize that bank loans, which are an important financing tool in a government's financing toolkit, may be executed in an environment that is not as transparent as the public bond market," she said. "For that reason, the GFOA remains engaged in independent and municipal market coalition efforts to improve voluntary disclosure of bank loans and have significant concerns with the process and procedural effect of mandatory disclosure. We plan to issue comments on these particular rule amendments to 15c2-12."

The Bond Buyer

By Lynn Hume

March 1, 2017

SEC Proposes Rule Amendments to Improve Municipal Securities Disclosures.

Washington D.C., March 1, 2017 — The Securities and Exchange Commission (SEC) today voted to propose rule amendments to improve investor protection and enhance transparency in the municipal securities market.

Rule 15c2-12 under the Securities Exchange Act of 1934 requires brokers, dealers, and municipal securities dealers that are acting as underwriters in primary offerings of municipal securities subject to the Rule, to reasonably determine, among other things, that the issuer or obligated person has agreed to provide to the Municipal Securities Rulemaking Board (MSRB) timely notice of certain events. The amendments proposed by the SEC today would add two new event notices:

> – Incurrence of a financial obligation of the issuer or obligated person, if material, or agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the issuer or obligated person, any of which affect security holders, if material; and
>
> – Default, event of acceleration, termination event, modification of terms, or other similar events under the terms of the financial obligation of the issuer or obligated person, any of which reflect financial difficulties.

"Today the SEC took steps to empower investors by improving their access to current information about the financial obligations incurred by municipal issuers and conduit borrowers," said SEC Acting Chairman Michael S. Piwowar.

These proposed amendments would provide timely access to important information regarding certain financial obligations incurred by issuers and obligated persons that could impact such entities' liquidity and overall creditworthiness.

The public comment period will remain open for 60 days following publication of the proposing release in the Federal Register.

* * *

FACT SHEET
SEC Open Meeting
March 1, 2017

Action

The Commission will consider whether to propose amendments designed to better inform investors and other market participants about the current financial condition of issuers of municipal securities and obligated persons. Specifically, the proposed amendments would facilitate timely access to important information regarding certain financial obligations incurred by issuers and obligated persons, which could impact an issuer's or obligated person's liquidity and overall creditworthiness and create risks for existing security holders.

Highlights

The proposed amendments to Exchange Act Rule 15c2-12 would amend the list of event notices that a broker, dealer, or municipal securities dealer acting as an underwriter in a primary offering of municipal securities subject to the Rule must reasonably determine that an issuer or obligated person has undertaken, in a written agreement for the benefit of holders of municipal securities, to provide to the Municipal Securities Rulemaking Board within ten business days of the event's occurrence.

Specifically, the proposed amendments would add two new events to the list included in the Rule:

Incurrence of a financial obligation of the issuer or obligated person, if material, or agreement to covenants, events of default, remedies, priority rights, or other similar terms of a financial obligation of the issuer or obligated person, any of which affect security holders, if material; and

Default, event of acceleration, termination event, modification of terms, or other similar events under the terms of the financial obligation of the issuer or obligated person, any of which reflect financial difficulties.
The proposed amendments also would set forth a definition for the term "financial obligation."

Background

Adopted in 1989, Rule 15c2-12 is designed to address fraud and manipulation in the municipal securities market by prohibiting the underwriting of municipal securities and subsequent recommendation of those municipal securities by brokers, dealers, and municipal securities dealers for which adequate information is not available.

What's Next

The Commission will seek public comment on the proposed amendments to Rule 15c2-12 for 60 days following publication in the Federal Register.

MSRB Statement on SEC Proposal to Improve Bank Loan Disclosure.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) today endorsed the Securities and Exchange Commission (SEC) for proposing regulatory changes to improve the content and timeliness of disclosure of information about bank loans and other alternative financings entered into by issuers of municipal securities. At its March 1, 2017 open meeting, the SEC voted to advance a proposal to amend Rule 15c2-12 under the Securities Exchange Act of 1934 to include two required event disclosures related to bank loans.

"The MSRB is very pleased at the SEC's action on bank loan disclosure," said MSRB Executive Director Lynnette Kelly. "The MSRB has supported improved disclosure as a way of addressing risks posed to municipal bondholders of additional financial obligations of a bond issuer and their impact on its outstanding debt." These risks include terms and conditions of alternative financings that may require the acceleration of debt repayment if the borrower encounters financial stress or the dilution of a bondholders' security position if a bank loan is on parity with or senior to other outstanding debt.

Since 2012, the MSRB has advocated for voluntary bank loan disclosure by municipal securities issuers through its Electronic Municipal Market Access (EMMA®) website. "We strongly encourage state and local governments to voluntarily disclose information about bank loans and other alternative financings on EMMA," Kelly said. "These disclosures can provide bondholders, potential investors and other market participants access to key information useful in assessing their current holdings of municipal securities or in making investment decisions."

Read more about bank loan disclosures and the resources the MSRB makes available to municipal securities issuers seeking to make voluntary disclosures.

Date: March 1, 2017

Contact: Jennifer A. Galloway, Chief Communications Officer
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MSRB Draft Rules Would Clarify CUSIPs Needed for Private Placements.

WASHINGTON – The Municipal Securities Rulemaking Board has drafted rule amendments that would clarify that dealers must obtain CUSIP numbers for private placements, including direct purchases when the dealer is acting as a placement agent.

The draft amendments to Rule G-34 on "CUSIP Numbers, New Issue and Market Information Requirements" would also subject non-dealer municipal advisors to CUSIP requirements when acting as financial advisors for munis sold in competitive offerings.

Additionally, the amendments would also remind dealers that they have to obtain CUSIP numbers for secondary market securities.

The board is requesting public comments on the draft amendments, which include definitional and technical changes as well, and has asked for the comments to be submitted by March 31.

The MSRB said it will decide whether to proceed with, or reconsider, the draft amendments based on the comments.

"It's important that we clarify and remind dealers of their obligations under Rule G-34, and that we require all municipal advisors to follow the same obligations on new issue transactions," MSRB Executive Director Lynnette Kelly said Thursday. "Great clarity and consistency of regulations on obtaining CUSIP numbers will improve market efficiency and transparency."

In its 21-page release, the board said, that it "believes that these draft amendments will provide a range of benefits, including reducing investor risk and regulatory uncertainty. However, the draft amendments may impose some costs on firms or require them to revise certain business practices."

The board asked commenters for estimates of the costs of the amendments, but said it "assumes that [the costs] will be significantly less than the benefits that will accrue over time to investors as well as the market as a whole."

The release said the MSRB drafted the amendments after learning that there have been industry questions about the application of CUSIP number requirements for private placements of municipal securities. Some industry participants, such as banks in direct purchase transactions, do not appear to believe that CUSIP numbers are required with respect to muni securities, the board said. There also appears to be some uncertainty regarding the application of CUSIP Number requirements for secondary market securities, where the characteristics of a muni issue have been altered such as through a remarketing or the purchase of insurance on part of the issue.

In addition, the MSRB has been worried about a regulatory imbalance between dealer and non-dealer municipal advisors since the adoption of Dodd-Frank Act, which put non-dealer MAs under federal regulation for the first time. It has become industry practice in competitive offerings, in some cases, for the issuer to let the dealer financial advisor obtain the CUSIP numbers for the bonds so they can be readily sold after the bonds are awarded. Some issuers appear to have tried to go around dealers and used non-dealer MAs to avoid getting CUSIP numbers. The MSRB amendments would impose on non-dealer MAs the same requirements as dealer MAs in competitive offerings to obtain CUSIP numbers.

The release asks commenters to answer several questions such as whether the proposed amendment to the definition of "underwriter" in G-34 is sufficient to clarify that CUSIP numbers are needed in private placements as well as public offerings. Is there another more effective way to achieve this result? the board asked.

The MSRB asked if the industry understands that mode changes in a remarketing do not require a new CUSIP number as long as the entire maturity of a particular CUSIP number changes in the same way?

The board also asked whether issuers would forgo working with either dealers or non-dealer MAs in certain circumstances to avoid the CUSIP numbering requirements.

The Bond Buyer

By Lynn Hume

March 1, 2017

MSRB Seeks Comment on Draft Amendments to and Clarifications of Rule on CUSIP Numbers.

Read the Request for Comment.

Hawkins Advisory: Municipal Market Regulatory Update.

This Hawkins Advisory describes the proposed amendments to Rule 15c2-12 and provides a summary and analysis of SEC municipal enforcement actions over the last year.

[Read the Advisory.]

[Will President Trump's Regulation Cuts Reduce Ongoing Disclosure For Bond-Financed Projects? Holland & Knight]

HIGHLIGHTS:

- President Donald Trump's recent executive order entitled "Core Principles for Regulating the United States Financial System" directed the Treasury Secretary to consult with financial regulators, including the U.S. Securities and Exchange Commission (SEC), as to whether or not existing regulations "promote the core principles" outlined in the order, including, among others, the directive to "make regulation efficient, effective, and appropriately tailored."
- Participants in the municipal bond industry are hoping that the push for more "efficient" and "appropriate" regulations might lessen the regulatory burden under the Dodd-Frank Wall Street Reform and Consumer Protection Act of issuing municipal bonds.
- A significant part of the cost of issuance involves the elaborate disclosure that must be provided to investors, often on a quarterly basis and often for as long as a single bond of a particular issuance remains outstanding.

President Donald Trump on Feb. 3, 2017, signed an executive order entitled ["Core Principles for Regulating the United States Financial System,"] which directed the Treasury Secretary to consult with financial regulators, including the U.S. Securities and Exchange Commission (SEC), as to whether or not existing regulations "promote the core principles" outlined in the order. Those principles include, among others, the directive to "make regulation efficient, effective, and appropriately tailored."

One of the targets of this order is the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), enacted in 2010 in the wake of the 2008 recession. Among its many impacts, Dodd-Frank resulted in more abundant and elaborate disclosure regulations imposed by the Municipal Securities Rulemaking Board (MSRB) and the SEC on municipalities and their conduit borrowers – i.e., developers and nonprofit charitable organizations. Participants in the municipal bond industry are hoping that President Trump's push for more "efficient" and "appropriate" regulations might lessen the regulatory burden, and therefore the cost, of issuing municipal bonds. A significant part of the cost of issuance involves the elaborate disclosure that must be provided to investors, often on a quarterly basis and often for as long as a single bond of a particular issuance remains outstanding.

A Brief History of Continuing Disclosure for Muni Bonds

Municipal securities generally are exempt from the regulatory and reporting requirements of the Securities Act of 1933 and the Securities Exchange Act of 1934. In the late 1980s, following significant turmoil in the municipal bond industry that included the default of $2.45 billion in tax-exempt revenue bonds issued by the Washington Public Power Supply System, the SEC adopted Rule 15c2-12 under the 1934 Act.

Rule 15c2-12 generally obligates bond underwriters to obtain from an issuer, and to review and distribute to investors, a preliminary official statement (POS) describing the securities being offered. The issuer must deem the POS final as of its date, except for certain information that may be added upon the consummation of the bond sale, such as the aggregate principal amount and interest rates. The underwriter is also obligated to provide a complete, final official statement to all investors within seven business days following the bond closing.

Since its Jan. 1, 1990, effective date, Rule 15c2-12 has been amended several times. For instance, in 1994, in response to growing concerns among investors about the adequacy of secondary market disclosure, the SEC amended Rule 15c2-12 to prohibit underwriters from purchasing municipal securities unless the issuer signed a written agreement to provide ongoing disclosure, including financial information and notices of material events. This obligation extends to “obligated persons” (i.e., persons or entities responsible for paying any of the underlying revenues securing the bonds). For obligated persons, however, the obligation generally may be terminated when the entity’s financial responsibility falls below a certain threshold. For instance, in California, developer-landowners who borrow proceeds from an issuance of Mello-Roos bonds – i.e., bonds secured by special taxes levied within a community facilities district – generally may terminate their continuing disclosure obligation once their special tax obligation falls below 20 percent of the total tax levy for a given fiscal year.

How Did Dodd-Frank Impact Continuing Disclosure?

Dodd-Frank imposed additional fiduciary duties on municipal securities issuers and underwriters, and it extended the regulatory umbrella to cover financial advisors. It also augmented the regulatory authority of the MSRB and the SEC. Several new municipal securities regulations and enforcement initiatives were implemented as a result of Dodd-Frank, including the Municipalities Continuing Disclosure Cooperation Initiative (MCDC Initiative).

The MCDC Initiative, implemented in 2014, represented the SEC’s first step in a plan to tighten its regulatory reigns on municipal securities in compliance with Dodd-Frank. The MCDC Initiative provided issuers and underwriters the opportunity to self-report any instances of material omissions or misstatements in prior offering documents. In return for this self-reporting, the SEC agreed to mitigate penalties for such disclosure violations. Under the MCDC Initiative, the SEC charged 71 issuers for selling municipal securities with deficient disclosure relating to compliance with ongoing disclosure requirements under Rule 15c2-12. The SEC settled those actions without requiring admissions of guilt but requiring that the parties agree to cease future violations as well as establish policies and procedures that will ensure such violations do not occur in the future.

What Will a Dodd-Frank Overhaul Mean to Continuing Disclosure?

At this point, it is impossible to predict how President Trump’s efforts to streamline financial regulation will impact continuing disclosure obligations for municipal securities. Now that issuers, developers and nonprofits have instituted procedures for disseminating information to the bond market, and investors have become accustomed to receiving such information, an effort to reduce that data flow may potentially be met with resistance. Moreover, disclosure of salient information to the marketplace is equally as appropriate for municipal issuers as it is for corporate issuers. Nevertheless, it remains to be seen if President Trump, who seems to favor a more laissez-faire approach to regulating private businesses, will establish an environment in which private companies – the so-called “obligated persons” – might be relieved of some of their current continuing disclosure burden.

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Article by Douglas A. Praw and Robert M. Haight Jr.

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The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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The MSRB's Electronic Municipal Market Access (EMMA®) website provides access to municipal trade data and disclosure documents associated with municipal bond issues. These materials are available at no charge on our EMMA website or on a subscription basis in real-time for a fee. Municipal market trade data are available at no cost to academic researchers.

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Academic Research Data
To support academic research about the municipal securities market, the MSRB makes municipal securities trade data available to universities and other research institutions in two ways.

First, the MSRB makes trade data available through a partnership with Wharton Research Data Services (WRDS), a service of the Wharton School of the University of Pennsylvania, which provides electronic access to data across finance, marketing and economic disciplines to over 400 institutions globally. Contact WRDS for more information on accessing academic research data.

Second, the MSRB makes available to academic researchers its Academic Historical Transaction Data Product, which comprises post-trade municipal securities transaction data collected through the Real-Time Transaction Reporting System (RTRS). The Academic Historical Transaction Data Product is available to researchers at institutions of higher education for a fee of $500 per year, plus a one-time set up fee of $500. One-year data sets can be requested for consecutive 12-month periods. The data product enables researchers to draw conclusions about patterns of trading in the municipal market by distinguishing transactions executed by different dealers through the use of anonymized identifiers. List offering price and takedown transactions (in general, primary market transactions) are excluded from the data. Contact MSRB Support at 202-838-1330 or MSRBSupport@msrb.org for more information.

The Coming Transparency Wave: GASB 77

In 2017, there will be a convergence of factors that will raise the awareness, profile and scrutiny of economic development activities undertaken by state and local governmental entities. Specifically, Governmental Accounting Standards Board (GASB) Statement 77 requires state and local governments to disclose the revenue forgone through tax abatements, a common, but not exclusive, form of business attraction and retention incentive. While Statement 77 is only now being implemented by governments, the Trump Administration's workforce, tax and trade policies have placed intense focus and widespread publicity on new investments by companies, which often have significant tax abatements approved. The extensive data required to be disclosed by Statement 77, along with national media attention on each new announcement by the White House, will drive greater demand for transparency and accountability from governments on the use of tax abatements and their impact on other programs and priorities.

BACKGROUND OF STATEMENT 77

Statement 77 requires state and local governments to disclose, as a note to the financial statements, the amount of lost revenue they have incurred as a result of entering into tax abatement agreements. Statement 77 not only requires the approving government to disclose its own lost revenue, but all taxing authorities (school districts, cities, states and counties) impacted by the abatement are required to disclose their lost revenue irrespective of the approving body. Governments are required to disclose the actual lost revenue from all outstanding agreements, aggregated by program. And finally, the disclosure must be calculated based on an accrual basis of accounting for the fiscal year. The calculation of the revenue forgone can be complex alone, but with the accrual basis being applied, the difficulty is magnified.

TIMING AND COMPLEXITIES

The prevalent belief is Statement 77 appears to be straightforward, but governments may experience timing difficulties and unexpected complexities as they start to gather the information needed to calculate the revenue lost from tax abatements. These may include the following:

1. Coordination will be needed among multiple agencies to assemble the myriad information required to be disclosed, including economic development agencies, property assessors, treasury departments, community housing agencies, port authorities, convention authorities, natural resources agencies, etc.
2. Coordination will be needed among all of the governmental units that have been impacted by agreements approved by the reporting government. Conversely, if other governmental units have approved abatements that impact the reporting government's tax revenue, it will be necessary to identify those governments and work with them to gather the requisite information for the reporting government's disclosure.
3. Some agreements have been outstanding for many years. The relevant information may not be readily available for the reporting unit to gather, review and analyze, thus delaying the ability to include the information in the disclosure.
4. Many jurisdictions do not currently calculate the actual lost revenue from their approved abatements. Rather, they project the total lost revenue from estimates made at the time of the original application. Care must be taken to ascertain that the information submitted by various agencies is the actual lost revenue from the current year's activities, based on actual capital expenditures, job creation, etc. Estimates from the original application are not sufficient for this disclosure.

5. The disclosure is required to be made on an accrual basis of accounting. Identification of cash versus accrual adjustments that will be needed could be difficult. For example, an abatement recipient could claim the abatement on a calendar-year basis, the reporting government could have one fiscal year or other impacted governments could have different fiscal year-ends.

Statement 77 forces state and local governments to identify the true impact of approved abatement agreements on tax revenue. Timing can be the biggest challenge, with most governments already in their affected fiscal year for disclosures.

TRANSPARENCY TRENDING IN 2017

Statement 77 had been in process well before President Trump was elected and had been eagerly awaited, primarily by several watchdog groups. Now, with President Trump's mission to encourage businesses to expand operations in the United States a topic of daily news articles, tax abatements have become a frequent discussion item in newspapers across the country. The announcement by then President-Elect Trump of the $7m incentives package used to entice Carrier to retain part of its manufacturing operations in Indiana received immense media attention and resurrected many discussions and perspectives on the use of incentives. Public officials were scrutinized and forced to justify the deal negotiated.

As businesses are pressured to increase investments and job creation in the United States, the demand for incentives is expected to increase. These projects, including the incentives' packages, will continue to receive extensive press coverage, questioning whether these companies should receive such incentives packages. The expanded press coverage, along with the newly required financial statement disclosures, will increase the pressure on public officials to justify the lost revenue from economic development programs, and may deter or otherwise make economic development efforts difficult. The information disclosed by Statement 77 will be widely disseminated and compared readily.

NOW IS THE TIME TO PREPARE

As mentioned, many government units are in their fiscal year for Statement 77 disclosures. As public attention increases the profile of economic incentives, state and local governments should be prepared to address the scrutiny that will fall on their economic development programs. First, governments and economic development organizations should assess how effective their economic development programs are. For example, are the programs accomplishing their stated purpose? If not, what changes should be made to make the programs more effective? Second, governments and economic development organizations need to substantiate the benefits they receive from the programs; to that end, consider an economic analysis of programs to assess the return on investment. And third, clear, complete and accurate documentation and support should be prepared to be in compliance with Statement 77. All calculations should be readily supported because the numbers will be analyzed, scrutinized and widely reported by the media and watchdogs. An organized and comprehensive approach to complying with disclosures and managing public scrutiny of incentive programs will empower all governments to face the coming media wave head on.

NASACT

by: Daniel P. Domenicucci and Javi Borges

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Morgan Stanley Fined Over Excessive Pricing of Munis.

WASHINGTON – Morgan Stanley has agreed to pay $170,284 over Financial Industry Regulatory Authority findings that the firm sold municipal securities, including some from Puerto Rico, to customers at prices that were not fair or reasonable.

The firm will pay $115,000 of the $170,284 as a FINRA fine and the remaining $55,284 as restitution to its customers. Morgan Stanley was responsible for a total of $57,159 in restitution but has already paid some to address the violations, FINRA said.

The transactions FINRA found took place from July 1, 2013 through March 31, 2014, according to the settlement document. The findings are the result of reviews that FINRA's fixed income investigations staff carried out.

Morgan Stanley consented to the settlement without admitting or denying the findings. Christine Jockle, a spokesperson for the firm, said the settlement "involves a very small number of municipal bond trades from 2013 and 2014."

"Morgan Stanley is committed to providing fair and reasonable prices to its clients for their municipal bond transactions," she said. "The firm has agreed to improve its prices for these trades, and has enhanced its processes around reviewing bond trade prices for its wealth management clients."

FINRA found that from Oct. 1, 2013 through Dec. 31, 2013, Morgan Stanley purchased munis in 14 pairs of transactions for its own account from a customer or sold munis for its own account to a customer at aggregate prices, including markups or markdowns that were not fair and reasonable. The determination that the aggregate prices were not fair or reasonable took a variety of factors into consideration, including: the best judgment of the dealers as to the fair market value of the securities at the time of the transactions and of any securities exchanged or traded in connection with the transactions; the expenses involved in carrying out the transactions; the fact that the dealers are entitled to a profit; and the total amount of the transactions.

The firm's actions, which led to percentage profits of between 3.03% and 5.89%, violated Municipal Securities Rulemaking Board Rules G-17 on fair dealing and G-30 on prices and commissions, FINRA said.

Morgan Stanley also violated the MSRB rules in six muni transactions from July 1, 2013 through Dec. 31, 2013, and 13 from Jan. 1, 2014 through March 31, 2014, according to the settlement documents. The transactions included bonds issued by the Puerto Rico Sales Tax Financing Corp., the commonwealth of Puerto Rico, and the Puerto Rico Electric Power Authority.

Additionally, FINRA found that Morgan Stanley violated Rules G-17 and G-30 through two muni transactions from Jan. 1, 2014 through March 31, 2014 when the firm purchased or sold munis as agent for a customer for an excessive commission or service charge. The agent activity violated a separate portion of Rule G-30 than the other violations. The two transactions involved bonds from Puerto Rico's Highway and Transportation Authority and the Puerto Rico Aqueduct and Sewer Authority.

This isn't the first time Morgan Stanley has been hit with FINRA fines for unfair prices. In August 2013, the firm was fined $1 million for charging unfair prices, some of which violated G-30. In October 2011, it was fined $1 million, of which $650,000 was related to unfair markups and markdowns.

The Bond Buyer

By Jack Casey

February 22, 2017
