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## **Incoming NABL President Details Group's Agenda.**

The National Association of Bond Lawyers is working on projects aimed at shedding more light on the varying strength of general obligation bond pledges, as well post-issuance tax and disclosure compliance, NABL president-elect Allen Robertson said in a recent interview.

Robertson, an attorney at Robinson Bradshaw & Hinson in Charlotte, N.C., will become NABL's new president Wednesday afternoon at the group's meeting in Chicago. He will replace Scott Lilienthal, a partner at Hogan Lovells US LLP in Washington, D.C.

The projects are part of NABL's ongoing efforts to provide education about tax, securities and bankruptcy issues in the wake of major Securities and Exchange Commission and Internal Revenue Service regulatory and enforcement actions and market events.

The project on GO bonds, he said, is "in large part because of a recent spate of Chapter 9 bankruptcies and some of the ways that GO bonds and/or revenue bonds have been treated or proposed to be treated in those Chapter 9 cases."

Investors in Detroit's GO debt have been grappling with the prospect of getting back only a fraction of their money following the Motor City's bankruptcy filing in July. GO bondholders often assume the debt they hold will be the most senior obligation of a municipality, but not all GO bonds are actually created equal.

"We know, from state to state, that we have GOs that are backed up by the taxing power and some that are not, and even within the ones backed by the taxing power, sometimes it's an unlimited pledge of the taxing power and sometimes it's a limited pledge of taxing power," Robertson said. "We think that finding the right examples from various states - it might be four or six or eight or 10 examples - we can help point out the various characteristics that GOs might have."

"We're not going to undertake a 50-state survey," he added. "But we want to provide enough examples to help our members and others who would read the paper to get a flavor for that. To get a sense of the range of the possibilities" of how they might be treated in bankruptcy filings.

The project is headed up by Dee Wisor, a partner at Sherman & Howard LLC in Denver. Robertson says he hopes the project will be completed before next year's Tax and Securities Law Institute is held in March.

NABL is also working on post-issuance compliance initiatives, because the IRS and SEC have been emphasizing, in audits and enforcement cases, the importance of issuers having policies and procedures for complying with the tax and securities laws, he said.

"We are working with the [Government Finance Officers Associations], at their suggestion, on a joint project to explore bond tax post-issuance compliance procedures," Robertson said. "The goal of that project will be to analyze everything that we've heard and read from the IRS on that topic and try to explore it and make as much sense of it as we can for the benefit of both GFOA members, that is

issuers, and NABL members who are bond lawyers.”

The idea is for the project to produce, not a checklist, but a paper that can be used to craft a set of procedures tailored to a specific issuer, “recognizing there’s going to be differences in the resources and the ability of various issuers to undertake post-issuance compliance,” he said.

Kimberly Betterton, with Ballard Spahr LLP in Baltimore, is heading up the project, which is just getting started, according to Robertson.

#### Post-Issuance Disclosure

NABL will be making a similar effort on post-issuance disclosure on the securities law side, he said, aiming to provide an educational resource that could prove useful for bond lawyers and their issuer clients.

“When you look at recent SEC enforcement actions, one of the themes that comes out of those is that many problems in the enforcement cases presumably could have been avoided if the issuer had disclosure policies in place that it followed,” Robertson said. “And we know that’s one of the ways the SEC has resolved enforcement cases in recent years is by requiring the development of disclosure policies and engaging consultants to help develop those policies and monitor them.”

That project, which is being led by Dan Deaton, with Nixon Peabody LLP in Los Angeles, has been underway for some months and should be done sooner than the post-issuance tax law compliance project, he said.

Asked about NABL’s other key areas of focus, Robertson said, “On the tax front, our number one task will be to continue to monitor any proposed changes to the muni bond interest exclusion, whether that would be a possible outright appeal or a proposal to cap the exclusion.”

President Obama has proposed capping the value of tax exemption at 28% cap repeatedly, though market participants have warned that would effectively impose a tax on tax-exempt bonds.

Also, he said, “We are already trying to work with legislative and regulatory officials on some guidance about what constitutes a political subdivision” that can issue tax-exempt debt.

The question stems largely from a dispute between the IRS and the Village Center Community Development District, a Florida retirement community empowered by state law to collect fees and issue bonds. In May, the IRS chief counsel issued a [technical advice memorandum] that concluded the CDD does not qualify as a political subdivision, and therefore could not issue tax-exempt bonds, because its board is, and will always be, controlled by the developer rather than publicly-elected officials.

NABL and others, including some lawmakers, have suggested the TAM may depart from existing rulings and guidance and could adversely affect similar types of structures and bond transactions around the country. Both Sen. Bill Nelson, D-Fla., and Rep. Rich Nugent, R-Fla., have urged the Treasury to reconsider its decision.

An IRS official told Nelson that the Treasury was not considering further guidance on whether CDDs are political subdivisions. However, the Treasury and IRS recently added this project to their regulatory priorities for 2013-2014.

Robertson said NABL’s efforts will focus on bringing clarity to the question. “We hope to do something there one way or the other constructive to, from our point of view, come back to what we

thought was a fairly well understood view of the law on that topic," he said.

## Issue Price

NABL is also studying proposed changes to the arbitrage rules released by Treasury and the IRS, particularly those regarding issue price, which is used to determine compliance with arbitrage rebate and yield restriction requirements. Under the current rules, the issue price for each maturity of bonds publicly offered is the first price at which a substantial amount of the bonds is reasonably expected to be sold to the public, with substantial defined as 10%.

The proposed rules eliminate the reasonable expectations standard and require issuers to look at the actual prices at which their bonds sold. They also expand a substantial amount to mean 25% instead of 10%.

"I think we're trying to understand them and how they would work," Robertson said. "Again, our role would be to try to help provide objective and technical analysis. Where we see issues that could be problems, or issues with administrability, we want to point those out."

"You know, we've been able to, based on the reasonable expectations test, determine yield for arbitrage purposes at the time of pricing, which is typically, in a fixed-rate deal, two to three weeks before closing," Robertson said. "With the proposed regulations, it may well be the case that we will not know the final yield on the pricing date. And in fact, we may not know the final yield on the closing date. It's possible we might not know the yield for some time thereafter."

NABL's new president did not set out to be a bond lawyer. After graduating from the University of North Carolina with an economics degree, Robertson graduated magna cum laude from Harvard Law School and began a career in corporate bankruptcy law after joining Robinson Bradshaw in 1989.

"I know I had no idea, no thought of being a bond lawyer at all," he said. "We had real need for additional help in the bankruptcy area when I showed up in the fall of '89, and I had done some projects in that area in the summers here and so sort of got volunteered into that practice. For four years it was really all I could do."

Robertson represented both debtors and creditors, and shifted into leveraged lending work, representing banks providing loans to non-investment grade companies. He said that work was a natural fit for a bankruptcy attorney, but it was not long before another necessity at the firm pulled him into municipal finance.

"One of our partners here in the summer of '94, said 'Gosh, we need a lending person to help us representing banks who provide letters of credit for variable rate demand bonds in the muni market.' So I started to shift over to do that as a lending lawyer and then it quickly morphed into being underwriters' counsel, then bond counsel," he said.

Muni bond work is a "happier set of circumstances" than bankruptcy, Robertson said.

"Obviously in the litigation context and the bankruptcy context, your interactions with your fellow lawyers are much more guarded. You know, you have to be very careful about anything you say, anything you might reveal," he said. "When you work on transactions, you still have to keep your client's confidences and you are negotiating points, but often you're trying to get to a common goal. And there's just much more of a sense of camaraderie there."

Robertson added that he finds bond work rewarding because the impact it makes on a community

can be very real.

“Working on public facilities, public projects, with governmental units and with charitable organizations, it has sort of an appeal to it.”

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