
TAX - NEW YORK

Westchester Joint Water Works v. Assessor of City of Rye

Supreme Court, Appellate Division, Second Department, New York - September 17, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 06208

Taxpayer commenced tax certiorari proceeding challenging real property tax assessments on parcels. School district intervened. The Supreme Court, Westchester County, denied assessor's motion to dismiss proceedings on ground that notices of petition and petitions were not served upon school district's superintendent, but granted school district's motion to dismiss on same ground. Taxpayer appealed, and assessor cross-appealed.

The Supreme Court, Appellate Division, held that:

- City had standing, in tax certiorari proceeding challenging real property tax assessments, to seek dismissal based on taxpayer's failure to give notice of proceedings to superintendent of school district where parcel was located; and
- Tax certiorari proceeding challenging real property tax assessments was subject to dismissal based on taxpayer's failure, without good cause, to give notice of proceedings to superintendent of school district where parcel was located.

ZONING - OHIO

State ex rel. Ebersole v. Powell

Supreme Court of Ohio - September 19, 2014 - N.E.3d - 2014 -Ohio- 4078

Residents sought writ of mandamus to compel city council and city clerk to place proposed amendment to city charter on election ballot.

The Supreme Court of Ohio held that proposed amendment to city charter, which would have rendered a commission composed of five private citizens responsible for recommending a new comprehensive zoning and development plan to city council, was an unlawful delegation of legislative power, where city council would have been required to consider commission's recommendation and to adopt a final plan, final plan could make adjustments to commission recommendation only to extent that adjustments were consistent with commission's findings, and amendment did not set forth any standards to govern those findings.

RECORDS - OHIO

Mayfield Hts. v. M.T.S.

Court of Appeals of Ohio, Eighth District, Cuyahoga County - September 18, 2014 - N.E.3d - 2014 -Ohio- 4088

Homeowner filed a motion to seal the city's nuisance complaint and city's motion to compel inspection because they referred to homeowner's expunged convictions, and he also sought sanctions against the city for the release of his sealed criminal records. The Court of Common Pleas denied motion, and homeowner appealed.

The Court of Appeals held that trial court abused its discretion when it denied homeowner's motion to seal city's nuisance complaint and city's motion to compel inspection without holding a hearing or conducting an in camera inspection.

PUBLIC UTILITIES - PENNSYLVANIA

Metropolitan Edison Co. v. Pennsylvania Public Utility Com'n

United States Court of Appeals, Third Circuit - September 16, 2014 - F.3d - 2014 WL 4548859

Electric utility companies commenced action against Pennsylvania Public Utility Commission (PUC) and its commissioners in their official capacities, alleging violation of filed rate doctrine under Federal Power Act (FPA), confiscatory taking under Fourteenth Amendment, and federal pre-emption of Pennsylvania Electric Competition Act (ECA), and seeking declaratory judgment and injunctive relief to recoup from their customers more than $250 million in costs associated with "line losses," i.e., energy that was lost when electricity travels over power lines, and interest related to those costs.

The District Court held that companies' unsuccessful pursuit of relief in state proceeding precluded their effort to claim relief in federal court. Companies appealed.

The Court of Appeals held that:

- Companies waived issue for consideration on appeal of whether ECA as applied to them was pre-empted;
- Issue preclusion applied to bar claim alleging confiscatory taking;
- Prior review of PUC decision by Commonwealth Court of Pennsylvania regarding classification of line-loss costs for retail billing purposes was judicial in nature;
- Companies could not avoid application of issue preclusion bar on basis of application of alleged incorrect standard of review by Commonwealth Court in prior review of public utilities commission order;
- Congress did not divest state utility agencies or state courts of jurisdiction to hear cases requiring adjudication of scope filed rate doctrine;
- PUC in its classification of line-loss costs for retail billing purposes, and Commonwealth Court in its affirmation of that decision, had arguable basis for jurisdiction; and
- PUC in its classification of electricity line-loss costs for retail billing purposes, and Commonwealth Court in its affirmation of that decision, was not collateral attack on decision by Federal Energy Regulatory Commission.

EMINENT DOMAIN - PENNSYLVANIA

[Reading Area Water Authority v. Schuylkill River Greenway Assn.]

Supreme Court of Pennsylvania - September 24, 2014 - A.3d - 2014 WL 4745698

Water authority filed a declaration of taking to condemn drainage easement across landowners' property. The Court of Common Pleas sustained landowners' preliminary objections and dismissed the declaration of taking, and water authority appealed. The Commonwealth Court reversed and remanded. Landowners appealed.

The Supreme Court of Pennsylvania held that drainage easement was not for public use and thus could not be subject of taking by water authority.

Drainage easement across landowners' property was not for public use and thus, pursuant to Property Rights Protection Act (PRPA), could not be subject of taking by water authority, even though easement was to be located side-by-side with water easement and was intended for use by prospective purchasers of developer's adult-community residential development. Easement was to be acquired at developer's behest for sole use of developer, and at developer's sole cost, and there was no suggestion that easement was meant to be used for any purpose broader than servicing development.

MUNICIPAL CORPORATIONS - PENNSYLVANIA

[Southeastern Pennsylvania Transp. Authority v. City of Philadelphia]

Supreme Court of Pennsylvania - September 24, 2014 - A.3d - 2014 WL 4745777

Southeastern Pennsylvania Transportation Authority (SEPTA) brought action against city and city commission on human relations, seeking injunctive and declaratory relief, alleging that commission was prohibited from exercising jurisdiction over SEPTA under city fair practices ordinance.

The Supreme Court of Pennsylvania held that:

- Whether SEPTA was a Commonwealth agency was not determinative of whether it was subject to jurisdiction of city, and
- SEPTA was not required to exhaust administrative remedies prior to initiating suit.

Whether Southeastern Pennsylvania Transportation Authority (SEPTA) was an agency of the Commonwealth was not determinative of whether SEPTA was subject to municipality's authority, and thus subject to city's fair practices ordinances and jurisdiction of city human relations commission, rather, because the legislature authorized the creation of both entities, and set the limits of each entity's authority, the court's task was to determine, through an examination of the relevant statutes, which entity the legislature intended to have preeminent powers.

IMMUNITY - TEXAS

[San Antonio Water System v. Smith]

Court of Appeals of Texas, San Antonio - September 24, 2014 - S.W.3d - 2014 WL 4723123

Beatriz Smith sued the San Antonio Water System (SAWS) for injuries she sustained when she fell into a hole on a sidewalk. SAWS filed a plea to the jurisdiction, asserting it did not receive notice of the claim against it as required by the Texas Tort Claims Act. The trial court denied the plea.

The Court of Appeals affirmed, holding that:

- SAWS is not a "governmental unit" entitled to notice under the Act separate and apart from notice to the City of San Antonio; and
- Smith presented sufficient evidence to raise a fact question as to whether the City of San Antonio had actual notice of Smith's injury claim.

Dealers Want SEC to Delay Consideration of SMMP Changes.

WASHINGTON – Dealer groups are making a final push for changes to the Municipal Securities Rulemaking Board's proposed best execution rule, warning the Securities and Exchange Commission that it should hold off on any changes to how firms interact with sophisticated municipal market professionals until the MSRB can solicit comments on them.

Securities Industry and Financial Markets Association managing director and associate general counsel David Cohen made his group's case in a letter filed with the commission Monday. Cohen told The Bond Buyer that SIFMA believes the MSRB has taken a thoughtful approach to developing its Rule G-18 on Best Execution of Transactions in Municipal Securities, which would require dealers to use "reasonable diligence" when handling orders and executing municipal security trades for retail investors to "obtain a price that is as favorable as possible under prevailing market conditions."

But changes to the MSRB's definition of SMMPs, to whom dealers would owe only a duty to deal fairly, would be costly and warrant market commentary, Cohen said.

The proposed changes did not appear in the MSRB's first best execution draft floated in February. The MSRB's SMMP definition has been harmonized for the past two years with the Financial Industry Regulatory Authority's rule governing institutional accounts. Dealers could get a single letter from an SMMP stating that it will exercise independent judgment in evaluating dealer recommendations. The letter could satisfy both FINRA and MSRB requirements. But the new definition requires further affirmations from an SMMP customer, such as a statement that it has access to "established industry sources" of information, such as the MSRB's EMMA system and rating agency reports as well as other "material information."

That would require new letters and a costly overhaul of dealers' automated systems, Cohen said.

"It is unclear what the MSRB's rationale is for these changes," he wrote to the SEC. "The record does not reflect any commenters, SMMP or other, requesting such a change or suggesting that SMMPs were not protected adequately."

The SEC should decline to approve the D-15 changes until the MSRB seeks comment on that section specifically, Cohen told The Bond Buyer. "There should be an opportunity for a thoughtful discussion," he said.

SIFMA suggested keeping affirmations harmonized with FINRA requirements and adding language to the SMMP definition that requires a dealer wishing to treat a customer as sophisticated to have "a reasonable basis to believe is capable of evaluating investment risks, and market value, and execution quality independently."

Bond Dealers of America chief executive officer Mike Nicholas wrote the commission that the expanded customer affirmation under D-15 is of little value, but said his group continues to remain somewhat confused about how dealers' obligations under the new rule would differ from their current obligations. BDA is very concerned about how regulators will approach enforcement of the rule, he said.

Dealers have said from the start that "best execution" is an equity market concept, and Nicholas told the SEC that the term "best execution" should be swapped for "execution diligence" in some instances. SIFMA has previously suggested its own "execution with diligence" standard.

The SEC must approve the MSRB proposals before any can take effect.

THE BOND BUYER
BY KYLE GLAZIER
SEP 29, 2014 4:52pm ET

[MSRB Makes Kroll Bond Ratings Available to the Public through its EMMA Website.]

The Municipal Securities Rulemaking Board (MSRB) announced today that its Electronic Municipal Market Access (EMMA®) website now provides free public access to public finance ratings from Kroll Bond Rating Agency (KBRA).

View the full press release.

Dealers: Transparency Proposals Very Costly.

WASHINGTON – The Municipal Securities Rulemaking Board could accomplish many of its transparency goals more cheaply by providing more information itself than by requiring dealers to provide it, the Securities Industry and Financial Markets Association told the MSRB Friday.

SIFMA associate general counsel and co-head of municipal securities Leslie Norwood penned a lengthy comment letter in response to the MSRB's latest round of proposals aimed at enhancing post-trade muni market data through a new central transparency platform, or CTP. The MSRB is considering requiring dealers to disclose a variety of new information in their electronic trade reports, such as flagging trades: executed on alternative trading systems; using non-transactio--based compensation agreements or; originating as conditional trade commitments.

While SIFMA said it appreciates the MSRB's deliberate approach to the CTP, and its decision not to seek changes to reporting deadline requirements, it warned that some of the proposals would require costly overhauls of dealers' automated systems without offering enough market value to justify those costs.

"We're certainly pleased that they're being methodical," Norwood told The Bond Buyer. "Transparency is important to everybody in the market."

One of the biggest changes the MSRB is proposing is the requirement to indicate which trades result from conditional trade commitments. CTCs occur when dealers solicit, accept, and conditionally allocate orders prior to the signing of the bond purchase agreement. The prices agreed upon in a CTC may not reflect market conditions at the time of the formal award of the bonds. Because trades cannot officially be executed until the bond purchase agreement is signed and the bonds are formally awarded to the underwriter, CTCs appear on EMMA the same day as the day the bonds are issued and initially sold. There is no current means of distinguishing between CTCs and bonds sold the same day they were issued.

“SIFMA and its members recognize that the marketplace may benefit from an MSRB indicator denoting that the post-trade pricing information for a transaction reflects pricing under a conditional trading commitment,” Norwood wrote. “The indicator, however, would be operationally very difficult to implement and may be misleading because it’s an indication only of the client’s interest at that specific point in time.”

It would also be very expensive, she added, estimating that the required system overhauls could cost hundreds of thousands of dollars per dealer.

Norwood said that other CTP proposals, such as an indicator of when an alternative trading system was used on a transaction, could easily be handled by the MSRB itself to achieve the same end without pushing the associated cost onto dealers.

“The MSRB proposes that for those ATS’ that take a principal position between a buyer and seller, the ATS and the dealers that transact with the ATS would be required to include the ATS indicator on trade reports,” Norwood noted. “SIFMA feels that this is unnecessary and unduly burdensome, as the MSRB already knows what ATS firms take a principal position between a buyer and a seller, and can flag trades with those entities as ATS trades, just like it flags trades currently between dealers and municipal securities broker’s brokers.”

Bond Dealers of America chief executive officer Mike Nicholas told the MSRB that his group has some concerns with how new indicators could mislead investors with information not indicative of market conditions or irrelevant to improving transparency.

“While the use of a venue indicator, and specifically an ATS indicator, may provide for higher quality research and analysis of market structure by providing information about the extent to which ATS’ are used and may complement the existing indicator disseminated for transactions involving a broker’s broker as the MSRB suggests, this information is not likely to result in any significant or real transparency benefit to the investor and dealers should not be required to report such information,” Nicholas wrote.

BDA said it supports requiring dealers to indicate which transactions occurred under non-transaction-based fee agreements because it could help investors account for differences compared to trades with transaction fees built in, but asked the MSRB to work with the industry in setting an appropriate implementation date on such a requirement.

Darren Wasney, program manager at the Financial Information Forum, a group that addresses the implementation issues that arise from securities orders, told the MSRB that the CTC indicator should be incorporated but without requiring dealers to report the date and time of the CTC agreement. The MSRB should instead define a CTC as any trade report executed on the first day of trading in a new issue that is a result of an order formed more than a specified number of hours in the past, Wasney wrote.

THE BOND BUYER

BY KYLE GLAZIER
SEP 26, 2014 2:55pm ET

S&P: Pennsylvania GO Debt Rating Lowered To 'AA-' On Weakened Financial Position and Increased Expenditure Pressures.

The downgrade reflects our view of the state's diminished financial flexibility and growing expenditure pressures due to inaction on pension reform and limited revenue growth.The GO rating reflects what we view as Pennsylvania's diverse economic base, which is recovering from the Great Recession, but is projected to experience below-average job and population growth during the next five years; good wealth levels, with personal income per capita at 103% of the nation in 2013; and moderate debt profile. Pennsylvania, however, expects debt levels to rise and exceed the rate of current debt retirement due to its planned issuance to fund aging infrastructure and provide economic stimulus. The economy continues to improve gradually, in our opinion, but not enough to alleviate some of the fiscal pressures the state is facing related to growing pension costs.

View the Program: "What Municipal Analysts Need to Know about Governmental Accounting" -- Oct. 24, NYC

Join SIFMA and MAGNY and instructor Dean Mead from the GASB for "What Municipal Analysts Need to Know about Governmental Accounting" on Oct. 24 at the SIFMA Conference Center in New York City. This session will provide in-depth instruction on the rules that state and local governments follow when accounting for and reporting their finances in audited financial reports. Registration includes a free copy of "An Analyst's Guide to Government Financial Statements," 2nd Edition, which will serve as the text for the session.

Moody's Sees Continued Public Pension Funding Gaps.

Despite strong investment returns and reform measures, public pension funds are losing ground in dealing with unfunded liabilities, Moody's Investors Service said in a report issued Thursday.

Between 2004 and 2012, Moody's calculated that the pension systems' unfunded liabilities tripled to an estimated $1.99 trillion, with a compound annual growth rate of 17.7% for the period, in part because of inadequate sponsor contributions.

The contribution shortage will continue to grow as public plan sponsors shift to a new pension accounting and disclosure regime from the Governmental Accounting Standards Board, Moody's warned. Since it emphasizes investment returns over annual contributions, "the resulting funding disincentive is at the core of the public-sector pension asset-liability gap," said Al Medioli, senior credit officer, in a statement about the report.

Another factor, Mr. Medioli said, "is that it is inherently difficult to recover an overall asset position after the double-digit losses seen during the recession. Annual returns may be strong, but incremental gain is small relative to pre-downturn levels because the investment base is so much smaller." Liabilities also face pressure from shifts to riskier asset allocations and an aging population, Moody's said in the report.

Keith Brainard, research director of the National Association of State Retirement Administrators, questioned Moody's choice of time frame to analyze. "It seems selective and not updated," Mr. Brainard said in an interview. "A better time frame would be one that begins to reflect two important variables: improving investment markets and the effect of the pension reforms that virtually every state has enacted."

"We are on the verge of improving pension funding levels. That improvement we expect to be sharp," Mr. Brainard said.

BY HAZEL BRADFORD | SEPTEMBER 25, 2014 3:51 PM | UPDATED 3:55 PM

— Contact Hazel Bradford at hbradford@pionline.com | @Bradford_PI

SCOTUS May Weigh In On Right To Arbitration.

WASHINGTON – Issuers battling dealer firms over the right to seek arbitration to settle disputes over auction rate securities are planning to take their case to the Supreme Court now that a federal appeals court has ruled against them.

Two dealer firms are disputing the issuers' rights to arbitration in separate cases, which have been combined. Citigroup brought its suit against the North Carolina Eastern Municipal Power Agency in 2013, while Goldman Sachs sued the Golden Empire Schools Financing Authority of Kern County, Calif. in 2012. Both firms sought to prevent the issuers from seeking arbitration after it was determined the charges could not be brought before the courts.

The U.S. District Court for the Southern District of New York ruled in favor of the two firms. The issuers appealed.

The U.S. Court of Appeals for the Second Circuit in Manhattan ruled in favor of the underwriters last month, finding that financing documents barred the issuers from being heard by a Financial Industry Regulatory Authority arbitrator, but decided last week to withhold issuing a mandate for 90 days in order to give Golden Empire and NCEMPA a chance to appeal to the nation's highest court. The issuers have each indicated they plan to appeal to the Supreme Court. When the mandate is issued the jurisdiction of the appeals court will end, ending the case if the Supreme Court does not decide to hear it.

FINRA Rule 12200 states that FINRA members and their customers must arbitrate a dispute if a customer requests it. Attorneys for both Goldman and Citi argued that the claims of both NCEMPA and Golden Empire were time-barred by statutes of limitation from being brought in court, and that the documents signed by both parties specified that "all actions and proceedings" arising from the transaction be brought in U.S. district court in New York.

NCEMPA is seeking arbitration in connection with a 2004 issuance of auction-rate securities, complaining that Citi advised it to issue the securities and then "abandoned" the ARS market in 2008 causing it to suffer financial losses. The issuer said that it never waived its right to arbitration and that "actions and proceedings" do not include arbitration under the laws of New York where Citi is based and the suit was brought.

NCEMPA further argued that the governing law clause appeared in only one of a number of documents related to the transaction, which should be insufficient to invalidate a broader arbitration right under FINRA rules.

Golden Empire also wants arbitration related to ARS and is making the same claims. It also said it never waived its right to arbitration.

The appeals court agreed that the clauses in the underwriter contracts superseded the issuers' right to FINRA arbitration, but noted that similar cases have had very mixed results on appeal. The Ninth Circuit in California has held that a forum selection clause supersedes the FINRA rule, while the Fourth Circuit in Richmond, Va. has held that it does not.

The Second Circuit relied on its own precedent in a similar non-muni case, noting that the clause in question is "all inclusive and mandatory" and thus supersedes the FINRA rule.

Decisions by the courts of appeal are binding only in the states covered by their jurisdictions, which means that identical cases could continue to be decided differently depending on which court hears it. A Supreme Court decision would create binding legal precedent over all U.S. courts.

THE BOND BUYER
BY KYLE GLAZIER
SEP 24, 2014 2:00pm ET

MSRB Reminds Dealers of September 30, 2014 Effective Date for Amendments to Rules G-3, G-7 and G-27.

The Municipal Securities Rulemaking Board (MSRB) reminds municipal securities dealers that amendments to MSRB Rule G-3, on professional qualifications, become effective on September 30, 2014. The amendments narrow the activities permitted of Limited Representatives – investment company and variable contracts products (Series 6 representatives) exclusively to sales to and purchases from customers of municipal fund securities (such as interests in 529 college savings plans); eliminate the Financial and Operations Principal (FINOP) classification, qualification and numerical requirements; and clarify in supplementary material that the term "sales" as used in Rule G-3 includes the solicitation of sales of municipal securities. In order to clarify MSRB rules and to conform other rules to the amendments, the MSRB has made several technical amendments to Rule G-3 and non-substantive conforming amendments to MSRB Rules G-27 and Rule G-7.

Read the August 4, 2014 MSRB Regulatory Notice.

Deloitte: A fresh Look at M&A's Role in Power and Utilities.

Deloitte Center for Energy Solutions
Evaluating M&A through a changing utility lens
A fresh look at M&A's role in power and utilities

Marketplace dynamics are transforming the power and utilities industry, reshaping business models and prompting companies to re-evaluate their strategies. As the lens through which power and utility companies view their strategic options shifts, merger and acquisition (M&A) stands out as one of the more compelling and expedient strategies for delivering value and managing strategic risks to the business. The new lens reveals expanded opportunities for win-win scenarios that benefit both customers and shareholders.

Read Evaluating M&A through a changing utility lens: A fresh look at M&A's role in power and utilities to learn:

- How macroeconomic drivers have affected M&A for power and utility companies.
- How power and utility companies can leverage M&A to mitigate enterprise risks, take advantage of new opportunities, and deliver more value to customers.
- What important benefits, in addition to cost savings, can arise from successful M&A transactions.
- How utility companies can work with regulators to develop new constructs in the face of the industry's inevitable transformation.

Download the report to learn more about how M&A can help companies execute critical elements of corporate strategy, while simultaneously benefitting customers and shareholders.

New Bank Rule Would be Costly for Cities, States.

A new financial regulation meant to ensure that banks are able weather a panic would have an unpleasant side effect — making it more expensive for cities and states to fund projects.

The liquidity coverage rule, finalized by bank regulators in early September, would require banks to hold enough safe, liquid assets, such as Treasury bonds, that would be sellable even in a crisis to fund their operations for at least 30 days. Part of the 2010 Dodd-Frank financial reform law, the regulation is meant to prevent a repeat of 2008, when investment bank Lehman Brothers found itself unable to meet its creditors' demands and failed.

But by excluding municipal bonds from the definition of assets considered safe and making them less attractive to banks, some lawmakers and financial industry leaders say, the federal government may have unnecessarily raised the cost of doing business for cities and states, which rely heavily on issuing bonds for projects such as highways and schools.

"If there's less demand for bonds, obviously you end up paying higher interest rates," said Richard Ellis, state treasurer for Utah and president of the National Association of State Treasurers. "I don't know if you can quantify the impact" of the rule, Ellis said, "but it will mean less projects to fund."

Local governments and industry groups had been vocal about the potential harm that the rule would do while it was being considered by officials at the Federal Reserve, the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation. They noted that some municipal bonds were at least as liquid as the corporate bonds included in the proposed rule.

When the agencies finalized the rule, Fed Governor Daniel Tarullo acknowledged those concerns and said that the Fed staff would look into amending the rule to include municipal bonds as high-quality liquid assets. It's not clear when a fix would be proposed, although implementation of the rules begins in January for the biggest banks and will be completed by 2017.

Treasurers have at least one powerful advocate pushing for the change — New York's Chuck Schumer, a member of the Senate Banking Committee and the No. 3 Democrat in the Senate.

After confronting Tarullo over the treatment of municipal bonds in a September congressional hearing, Schumer wrote a letter to the regulators saying “it is hard to understand how all three federal regulators finalized … with such glaring inconsistencies. … The broad exclusion of all municipal bonds from counting as [high-quality liquid assets] under the current rule makes no sense on the merits and could have disastrous side effects, so I hope the regulators will heed our call and reconsider it quickly.”

Regulators likely will revisit the topic and categorize some segment of the roughly $3.6 trillion municipal bond market as liquid, speculated Michael Decker, co-head of municipal securities at the Securities Industry and Financial Markets Association. “We’re convinced that there would be a negative effect” on state finances if the rule is kept as is, Decker added.

Some analysts believe that the regulators got it right — that municipal securities are not as liquid as high-quality corporate bonds or Treasury securities, and that leaving them out of the liquid assets category will not harm small governments’ finances.

In a note written in response to the final rule, Wells Fargo’s Brian Jacobsen wrote that the impact of the rule on the municipal bond market would be “negligible” and that “banks have already prepared for these regulatory changes, so a lot of the market adjustment has probably already taken place.”

Others, however, warn that the rule could cause trouble over time.

“Even though in the near term the impact would be masked … when it could manifest itself is when you have a considerable downturn and municipals will continue to sell off for a considerable period because some of the liquidity providers — the big banks – may not be as quick to pick up munis as other assets that would help their liquidity ratios,” said John Dillon, managing director at Morgan Stanley Wealth Management.

Dillon said that, while most municipal bonds are held by individual investors interested in their tax-exempt interest payments and are not liquid, there are enough widely traded municipal bonds to be included in the rule.

Leaving them out, he said, would ultimately hurt taxpayers. “Higher borrowing costs in munis, for whatever reasons, would just mean mom and pop — the residents of every state — paying more for their borrowing,” Dillon said. “It really does have a trickle-down effect.”

WASHINGTON EXAMINER

BY JOSEPH LAWLER | SEPTEMBER 22, 2014 | 5:00 AM

Junk Bonds Prove September Treasure as Defaults Ebb: Muni Credit.

The riskiest municipal bonds are beating the market for the longest stretch in 20 months as investors bet a strengthening economy will keep defaults at the lowest in five years.

Speculative-grade debt gained 0.9 percent through Sept. 25, more than any other rating class, Bank of America Merrill Lynch data show. If that holds, it would mark the third-straight month that junk-bond returns have topped those of the broad market, which is little changed in September.

Defaults are set to be the fewest since 2009, according to data from Municipal Market Advisors.

Industrial development bonds, the type of debt that represents the most failures to pay in the $3.7 trillion market, have been buoyed by rising capital-goods orders and employment gains. Land-backed debt, also prone to default, is benefiting from the highest level of new-home sales in more than six years.

"A combination of an improving economy helping credit risk and the opportunity for credit spreads to improve suggests high-yield could be a good place to put money right now," said Dan Solender, who oversees $16 billion as director of munis at Lord Abbett & Co. in Jersey City, New Jersey.

The U.S. economy expanded in the second quarter at the fastest pace since the last three months of 2011. Companies stepped up investment and households increased spending, the Commerce Department said Sept. 26. Gross domestic product grew at a revised 4.6 percent annualized rate, up from a previous estimate of 4.2 percent.

Following Money

Investors have added to high-yield muni mutual funds in each of the past 10 weeks, the longest stretch since the period through July 2, Lipper US Fund Flows data show. Those funds have gotten about half of 2014 inflows as individuals seek extra yield with interest rates near generational lows.

The demand has depressed yields on 10-year revenue bonds rated BBB, the lowest investment-grade tier, compared with AAA munis. The 0.95 percentage point spread is near the lowest since at least 2012, data compiled by Bloomberg show.

The penalty could decrease further. Before 2008, the average spread was 0.52 percentage point, Bloomberg data show.

"Spreads can probably go tighter — the economy has been growing and default statistics are rather low," said Lyle Fitterer, who oversees $34 billion of munis at Wells Capital Management in Menomonee Falls, Wisconsin. "Inflows have been positive, there's been limited issuance within the sector and there's just limited yield out in the marketplace."

Defaults Decline

Forty-one muni issuers defaulted for the first time in 2014 through Sept. 24, down from 45 last year and 67 in 2012, according to MMA, a Concord, Massachusetts research firm. The figure probably won't reach 2013's total of 65, the lowest since at least 2009.

Investors are also returning to high-yield funds as the likelihood of mass selling ebbs, said Solender and John Miller at Nuveen Asset Management.

Detroit is reaching settlements in its record bankruptcy, including an agreement with holdout Syncora Guarantee Inc., while Puerto Rico's cash-strapped power authority, Prepa, has hired New York-based turnaround firm AlixPartners LLP. That signals to investors that the market's biggest distressed situations are contained, Miller said.

"Their potential to have a contagion effect on the market has gone way down," said Miller, co-head of fixed income in Chicago at Nuveen, which manages $97 billion of munis.

Few Options

Ten-year Puerto Rico general obligations yield 6.32 percentage points more than AAA munis, Bloomberg data show. That's more than six times as much as benchmark BBB revenue bonds, signaling that investors including hedge funds are demanding an outsized penalty for securities from the island.

High-yield buyers avoiding Puerto Rico have had to turn to BBB rated debt because few issuers have offered speculative-grade or unrated bonds this year, said Jim Colby at Van Eck Securities Corp. He runs a $1.2 billion exchange-traded fund focused on junk-grade munis, the largest of its kind.

Willing Cash

Any high-yield bond sale "would find a lot of willing cash ready to support it," Colby said in a telephone interview. Individuals added $262 million to high-yield muni funds in the week through Sept. 24, the most in a month, Lipper data show.

"There continue to be positive inflows into our space and we see precious few new issues to take up the slack," he said.

Investors put in $7.6 billion of orders last month for Detroit's $1.8 billion of water and sewer bonds, which had junk ratings from Moody's Investors Service, according to the city. Issuers from California to New York found buyers this month amid the year's largest wave of bond offerings.

Munis broadly rebounded in the second half of September and may avert their first monthly loss of the year. The gains in 2014 have flummoxed investors and strategists. Some predicted interest rates would rise, when instead they have declined.

Federal Reserve Chair Janet Yellen has warned investors that the central bank may raise interest rates sooner than they currently project. Even in such a situation, riskier debt may prove a good bet, Miller said.

"High-yield helps provide more income and cushion returns should there be further interest-rate increases," Miller said. "There's an attractive income stream, and credit is broadly still on an improving trajectory."

Bloomberg

By Brian Chappatta Sep 28, 2014 5:46 PM PT

To contact the reporter on this story: Brian Chappatta in New York at bchappatta1@bloomberg.net

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A New Breed of Muni Bond Is Financing Climate Change Adaptation.

If Scott Stringer has his way, New York will soon be the nation's largest municipal player in the burgeoning green bond market. On Wednesday, Stringer, the city comptroller, proposed a new program for issuing municipal bonds specifically dedicated to financing climate-friendly projects. Announced during UN Climate Week, Stringer's proposal came a few days after Mayor Bill de Blasio unveiled a plan to cut the city's greenhouse gas emissions by 80 percent by 2050.

Internationally, interest has grown in green bonds as cities like New York embark on record numbers of big-ticket infrastructure projects aimed at boosting resilience to climate change.

In New York alone, the tab on the planned projects will exceed $27 billion over the coming years. In 2014, worldwide green bonds issuance is expected to nearly quadruple last year's total, and in another Climate Week announcement, several major investment banks such as Zurich, Barclays and Aviva made promises to invest in the bonds and help strengthen the market.

New York isn't the first city to see opportunity in green bonds. In July, the District of Columbia Water and Sewer Authority issued a $350 million, 100-year certified green bond. The $2.6 billion project will all but rid the city of combined sewer overflows, or treat wastewater from multiple pipes and tunnels that would have otherwise flowed altogether into the city's rivers. Investors placed orders for about $1.1 billion worth of bonds, with about $100 million coming from those specifically focused on green bonds, the Wall Street Journal reported. George Hawkins, general manager of the water authority, told the Journal that the robust reception from Wall Street was unusual; the green bond "brought more investors to the table" than a regular bond might have.

D.C. Water and Sewer CFO Mark Kim believes that green bonds could be great for other utilities. D.C. Water and Sewer will certainly be issuing more. "Our intent is to finance all remaining capital expenditures for the Clean Rivers Project with a green bond," Kim says.

Green bonds have been slow to catch on. The World Bank sold the first green bonds in 2008 as part of its efforts to encourage climate change adaptation and mitigation, but the bonds didn't pick up steam in America until 2013. Experts say total bond issuance is on track to reach $40 billion by year's end, a pool of money that will in large part go to strengthening infrastructure, including water systems, electrical grids and transportation networks.

What green bonds bring to the table is a not a new order, but rather a new label for reaching investors interested in climate-friendly projects. Matt Fabian, a managing director of Municipal Market Advisors, points out the processes for a muni green bond and any other muni bond are identical.

"A lot of [municipal bonds] are already green," adds Fabian. "The fact that they're financing green projects doesn't mean that the bond itself is any stronger or, from a default or price change perspective, will perform differently. … You don't want to cheapen it and call it a gimmick, but it is a way of increasing the marketing of that bond."

As green bonds — sometimes called climate bonds — become more popular, some observers worry that they will fall prey to Wall Street greenwashing. There are no standardized regulations limiting the projects that can be marketed for financing under the green bond label. Instead, it's entirely up to the issuers and investors to seek a third-party reviewer, like the Oslo-based Center for International Climate and Environmental Research (CICERO), Paris-based Vigeo or other firms that assess environmental impact, for certifications. In January of this year, a coalition of banks including J.P. Morgan, HSBC, Bank of America, Goldman Sachs and Morgan Stanley backed "Green Bond Principles," a set of voluntary guidelines for selecting investments. A Climate Bonds Initiative report reveals that 39 percent of green bonds are issued with no third-party reviewer at all.

While issuers and consultants mull over establishing proper criteria, cities have the freedom to use the broad definition for a wide range of investment opportunities. Fabian says once interest rates rise again, green bonds could prove themselves most useful. "It could be that they're used more in the future as good political cover for financing that otherwise needs to happen."

Bank of America claims its $500 million, three-year green bond, issued in November 2013, was the first U.S. corporate green bond ever. It helped fund LED streetlights in Oakland and Los Angeles. American municipal green bonds are a tad older. In June 2013, Massachusetts sold $100 million in bonds to help clean its rivers, improve wastewater management, boost clean energy and more. (Massachusetts sold another $350 million in bonds last week.) There's little doubt that a more robust market for green bonds would make it easier for local governments and city agencies to finance infrastructure projects like these that until now have relied on conventional bonds or politically risky tax hikes.

Massachusetts received more bids than it could accept during its $350 million green sale. The state estimates a $1 billion demand.

BY CASSIE OWENS | NEXT CITY | SEPTEMBER 26, 2014

Real Estate Munis Coveted in Riskless Return Chase.

Debt backed by real estate is the best-performing part of the $3.7 trillion municipal market this year when factoring in price swings as housing foreclosures ebb.

Land-backed munis, known as dirt bonds, earned 10.3 percent this year through Sept. 23, beating the 7.7 percent advance for all munis, according to S&P Dow Jones Indices. After accounting for volatility using Bloomberg's risk-adjusted return calculator, the real-estate securities have gained 7.5 percent, exceeding the 5 percent advance for the whole market.

Debt repaid from land districts, mostly in Florida and California, is profiting as the housing market strengthens amid a recovering economy, said John Miller, co-head of fixed-income at Nuveen Asset Management LLC in Chicago. Foreclosure filings have averaged about 111,000 the past three months, down from a peak of 367,000 in 2010, according to RealtyTrac Inc.

"You have a more stable and steady improvement in the demand for new homes that are constructed today within these districts," said Miller, who helps manage $94 billion of munis, including $4.9 billion of dirt bonds. "There's good income coming from the bonds with relatively low volatility."

Fee Backing

Munis backed by real-estate projects are issued to help finance construction and are repaid with assessment fees charged to homeowners.

The housing crisis that deepened during the recession caused some developments financed with munis to fall into payment default. Of the 448 active municipal defaults as of Sept. 10, in which issuers hadn't made full payments, about half were for land-secured debt, according to Municipal Market Advisors, a research firm based in Concord, Massachusetts.

The bulk of distressed land-backed munis came to market from 2005 to 2007 for home developments in Florida called community development districts, Miller said. Many of the securities have reworked payment schedules to revive construction, he said.

"The bonds were restructured in some way," Miller said. "The development restarted and it's no longer as much distressed."

The entire housing market is on the upswing. New homes sold in August at the fastest clip since 2008, Commerce Department figures showed yesterday.

Backyard Buyer

For Jason Diefenthaler at Wasmer, Schroeder & Co. Inc. in Naples, Florida, the development districts are often a car-ride away. The firm oversees $3.5 billion of munis. Its $63 million High Yield Municipal Fund, has 7.5 percent of assets in land-backed debt, Diefenthaler said.

“We have a lot of these deals in our backyard,” Diefenthaler said. “We have the ability to hop in our car, call the developer, go over get a site visit and talk to the finance team to see where sales are going.”

Land-backed securities are gaining as investors seek riskier debt for higher yields compared with top-rated munis, Diefenthaler said. Yields on benchmark 10-year munis maturing in 10 years, at 2.25 percent yesterday, fell to the lowest since May 2013 this month, data compiled by Bloomberg show.

High-yield munis, a category including land-backed debt, have gained 13.2 percent this year, S&P data show.

Roll Tide

“What we’ve had is really a rising-tide scenario,” for high-yield munis, Diefenthaler said.

Wasmer Schroeder prefers developments in wealthier areas along Florida’s coasts, he said. The state’s community development districts fold assessment fees into property-tax bills, making it more likely that homeowners will make full payments, he said.

“Your repayment mechanism is really very tax-like,” Diefenthaler said.

Wasmer Schroeder in April bought dirt bonds sold by the Midtown Miami Community Development District, he said. The district sold $91.8 million of unrated, tax-exempt bonds to refinance debt it sold in 2004 to help fund parks, roadways and parking facilities, according to bond documents.

Nuveen held about $42 million of the bonds as of Aug. 31, Bloomberg data show.

The performance of the bonds since their sale five months ago underscores the demand for the category. Debt maturing in May 2037 traded with an average yield of 4.88 percent on May 21, down from 5.25 percent when it was sold April 22.

“That was tremendously oversubscribed,” Diefenthaler said of the deal. “We got a fraction of the bid that we put in.”

Bloomberg

By Michelle Kaske Sep 24, 2014 5:00 PM PT

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Ballard Spahr: SEC Enforcement Round-Up, 2014 to Date.

To date, 2014 has seen the Securities and Exchange Commission (SEC) continue its trend of the past several years of heightened enforcement in the municipal securities and public pension plan markets. This year has been remarkable, however, for the SEC's significant efforts to compel greater disclosure, and impose far more rigorous disclosure obligations, than is required either under current federal legislation or in practice. Unquestionably, the most meaningful enforcement event has been the SEC's Municipalities Continuing Disclosure Cooperation Initiative (MCDC Initiative), announced on March 10 and intended to address what the SEC perceives as widespread noncompliance with issuers'
continuing disclosure agreements.

Click here to read the full report.

Toll Road Bankruptcy Reflects Growing Pains of P3 Sector, S&P Says.

WASHINGTON D.C. (Standard & Poor's) Sept. 23, 2014–The bankruptcy filing of the Indiana Toll Road on Sept. 22, 2014, may be the result of an overaggressive capital structure that shifted too much risk to private investors, according to analysts from Standard & Poor's Ratings Services. The Indiana Toll Road, which Standard & Poor' did not rate, was an early-stage public private partnership (P3) transaction in the U.S. We do not believe this bankruptcy will slow the growth of current-generation transportation P3 projects, which have different risk characteristics.

The Indiana Toll Road is one of several "brownfield," or existing, road transactions that relied on overly optimistic traffic volume projections to support an aggressive capital structure. A consortium of investors bought the right to operate the road in 2006, while the Indiana Finance Authority retained physical ownership. Similar projects were more common before the economic downturn and some analogous projects have had difficulty achieving their projected traffic forecasts in recent years.

"These types of deals, which feature an accreting debt structure, are not seen in the marketplace today, but were commonplace in the first generation of these toll-risk projects–what you might call 'Version 1.0' of public-private partnerships," said Steve Dreyer, managing director of the U.S. Utilities & Infrastructure Ratings practice at Standard & Poor's. "Investors and project sponsors have addressed risks differently in more recent transactions, which itself was a driving force behind our newly updated project finance rating methodology. This evolution is both expected and natural, and in our view will ultimately help bridge the substantial financing gap between government resources and public infrastructure needs."

Standard & Poor's will host a discussion on the risks associated with financing public-private roadways like the Indiana Toll Road at its 55 Water Street offices on Thursday, Sept. 25. The discussion, entitled "Traffic and Revenue Forecasting: Is This Risk Too Much For The Private Sector To Bear," is held in conjunction with the International Project Finance Association. Members of the media are invited to attend by registering through the association's website.

Analysts from the Utilities & Infrastructure practice will be available to discuss the sector with reporters in attendance.

Forecasting traffic demand remains the key risk for P3 toll road and managed lane projects. Standard & Poor's newly released project finance criteria focus in detail on these major risks for volume-exposed P3s. Projects with well-established demand, few competing routes, and reasonable toll rates supporting sustainable traffic and revenue growth have been able to achieve investment-grade ratings.

Standard & Poor's publicly rates eight P3 road transportation projects in the U.S., of which half (Elizabeth River Crossings Opco LLC, 95 Express Lanes LLC, and NTE Mobility Partners Segments 3 LLC, and Autopistas Metropolitanas de Puerto Rico LLC) rely on toll revenues. The rest are availability projects where the project is not exposed to volume risk. Under an availability P3, the project does not take volume risk. Instead, a typically high-rated state agency awards the right to a project to build and operate the road and the project receives regular government payments if it meets key performance targets. Recent examples of rated availability transactions include I-4 Mobility Partners Opco LLC, and I-69 Development Partners LLC. For volume and availability transport P3s, the U.S. lags other regions around the globe, where we have assigned about 45 ratings to privately owned transportation projects.

The number of U.S. P3 projects has been growing in recent years. Notably, Virginia, Texas, Florida, Indiana, and Colorado are deploying P3 projects, including investor-owned toll roads, and 33 states and Puerto Rico have enabled P3 legislation.

Under Standard & Poor's policies, only a Rating Committee can determine a Credit Rating Action (including a Credit Rating change, affirmation or withdrawal, Rating Outlook change, or CreditWatch action). This commentary and its subject matter have not been the subject of Rating Committee action and should not be interpreted as a change to, or affirmation of, a Credit Rating or Rating Outlook.

Standard & Poor's Ratings Services, part of McGraw Hill Financial (NYSE: MHFI), is the world's leading provider of independent credit risk research and benchmarks. We publish more than a million credit ratings on debt issued by sovereign, municipal, corporate and financial sector entities. With over 1,400 credit analysts in 23 countries, and more than 150 years' experience of assessing credit risk, we offer a unique combination of global coverage and local insight. Our research and opinions about relative credit risk provide market participants with information and independent benchmarks that help to support the growth of transparent, liquid debt markets worldwide.

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Railroad Tax Fight Lands on Supreme Court Docket.

The U.S. Supreme Court will weigh in on whether state sales taxes on fuel — which do not apply to trucking companies and barge operators — unfairly discriminate against railroads.

The justices, who begin their annual term at the beginning of October, agreed to hear a case pitting Alabama tax collectors against CSX Transportation, a major freight railroad. In doing so, they may finally settle a long-running debate on the rules states must follow when taxing railroads.

The Multistate Tax Commission, a group of tax agencies in 47 states, said in court documents that a lower court decision, which blocked Alabama from collecting sales taxes on railroad fuel, needed a closer look. The decision, they said, "has already imperiled a significant source of revenue for the states, and this uncertainty may be extended to other tax impositions as well if not resolved now."

Lawyers for the railroad say those worries are overblown. No other states joined Alabama in encouraging the high court to take the case. "The silence of the states hardly is surprising because … Alabama's taxing scheme is not common and very few states would be affected by the issue presented here," the CSX attorneys wrote last year in asking the justices to deny the appeal.

The dispute centers on a 1976 federal law, called the Railroad Revitalization and Regulatory Reform Act, which prohibits states from imposing taxes that "discriminate against a rail carrier" regulated by the federal government. CSX claims that Alabama is discriminating against it because Alabama exempts trucking companies and barge operators from its sales taxes. Alabama officials counter that the state's taxing scheme is fair because instead of paying the sales tax, trucking companies have to pay 19 cents per gallon in state fuel taxes.

The fuel tax and sales tax bring in roughly the same amount of money. The sticking point, however, is that municipalities can impose sales taxes on top of the state share with the exception of the state fuel tax on diesel for road use. Railroads pay more taxes on diesel when the price of diesel rises, CSX's lawyers contend, while trucking companies pay the same amount of tax per gallon of diesel no matter how expensive the fuel is.

This is actually the second time the high court has stepped into the Alabama dispute. In 2009, the court allowed the railroad's challenge to go forward over Alabama's objections. That first decision, however, did not settle some of the key questions about how the law should be applied. Since then, lower courts have reached opposite interpretations.

In order to determine whether railroads are being discriminated against, the court will need to decide to which taxpayer group railroads should be compared. In the Alabama case, for example, CSX argues that it should be compared to its competitors — trucking companies and barge operators. The state, however, says CSX should be compared to all other commercial and industrial entities, such as construction companies, which currently pay the same sales taxes CSX does.

CSX lawyers are confident the high court will rule in their favor. They point to other court decisions that struck down similar taxing schemes for railroad fuel in Louisiana, Minnesota, Missouri and Tennessee. Only six of the 23 jurisdictions CSX operates in tax railroad diesel fuel. Some of those, including Illinois and New York, impose the same taxes on road and off-road diesel.

The Supreme Court is expected to issue a decision on the case by the end of next June.

GOVERNING.COM

BY DANIEL C. VOCK | SEPTEMBER 22, 2014

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MMA Municipal Issuer Brief - September 22, 2014

Read the Brief.

San Jose Election Tests Political Risk of Cutting Pensions.

The California city's November election will shed light on whether Democrats can risk the political fallout of cutting a prized union benefit to protect basic city services.

Local government isn't what it once was in San Jose. In 2001, California's third-largest city employed almost 7,500 full-time workers. After 10 consecutive years of spending cuts caused by budget deficits, the number is closer to 5,400. The public library system has lost more than a quarter of its staff, forcing branches to cut operations back from six days a week to four. The parks department has closed all but 11 of its 54 community centers. Public safety has taken a hit, too. The city has 300 fewer police officers and 200 fewer firefighters than a decade ago.

The obvious culprit is the Great Recession, which took its toll on city revenues. But in San Jose, the recession isn't the biggest fiscal problem. Pensions are. San Jose's pension costs currently take up more than 20 percent of the city's general fund, up from 6 percent in 2001. (The national average for big cities is estimated at about 12 percent.) For much of the last decade, San Jose's pension deficit created a depressing cycle in which total city spending rose each year despite annual service cuts. It hasn't mattered that the public workforce has shrunk by 28 percent because the average cost of each remaining employee has grown by 85 percent due to the city's commitments to retirees.

Chuck Reed, the city's Democratic mayor, has been focused on pension problems ever since he first took office in 2007. In 2010, he announced that San Jose had reached a point of "services insolvency" and called for some of the most drastic changes to retiree benefits anywhere in the country. "I wish I had started sooner," he says, "but it's hard to convince people to do something before a crisis."

In 2012, holding together a Democratic majority on the city council, Reed abandoned negotiation with public employee unions and pushed through a pension-cutting ballot measure. Voters approved the referendum with 69 percent of the vote. Two years later, Reed says he has no regrets about the decision, but concedes that "there's a price to pay, especially if you're a Democrat." The passage of the pension measure angered union leaders and prompted the local Democratic Party to question Reed’s party loyalty. Now, as he prepares to leave office after two terms, they have an opportunity to hold one last referendum on the mayor and his pension tactics.

In November, voters will elect a new mayor and three city council members — just enough turnover to threaten the benefit cuts that were enacted in 2012. A group of labor-backed candidates who survived the June primary say they’ll unravel core elements of the pension measure if voters give them a chance.

The vote on pensions in San Jose will have far-reaching implications in California and beyond. Recently, state and local governments throughout the country have had to contend with unaffordable benefits granted to employees in flush economic times. The majority of places aren’t in as bad shape as San Jose, but a February review of state public pension systems by the Brookings Institution found that most hadn’t kept up with payments, leaving a nationwide funding gap of $2.7 trillion. “The political incentives to push funding responsibilities on to future generations were too tempting to withstand,” the authors of the review wrote.

The San Jose mayoral election will shed some light on what happens to elected leaders who are determined to do something about underfunded pensions. It will also test whether Democrats who have long relied on organized labor to win office can risk the political fallout of cutting a prized union benefit in order to protect basic city services.

Some of San Jose’s pension problems can be traced to decisions by the state of California. During Silicon Valley’s dot-com boom in the late 1990s, the California Legislature and then-Gov. Gray Davis enacted a law that lowered the retirement age for all state workers and elevated the maximum possible benefit for state public safety workers. Under the new law, a retired highway patrol officer as young as 50 could collect a lifetime of annual payments equal to 90 percent of his final year’s salary.

Legislators believed the state could afford to pay more expensive retirement benefits because they used optimistic forecasts of how much their pension fund investments would yield in returns each year. “They thought the stock market would keep going up forever,” Reed told a state commission in 2010. “It’s the greatest financial blunder in the history of California.” The legislature’s decision applied only to state workers, but it put pressure on local leaders to make similar offers to their employees. San Jose and other large cities felt they had to grant similar benefits or risk losing their best workers to jurisdictions with better retirement packages.

To be sure, factors outside city officials’ direct control also contributed to San Jose’s difficulty in keeping up with the rising cost of pensions. Retirees are living longer and collecting extra years of payments as a result. Revenue from property taxes and sales taxes fell far short of projections during the recession as real estate values dropped and residents had less money to spend. Nonetheless, many who have followed San Jose’s pension controversy agree that the onus mostly rests on political leaders who spruced up benefits for public employees during an economic boom without anticipating what would happen if the economy tanked in the future. “The employees who receive the benefits did nothing wrong,” says David Crane, a pensions researcher at Stanford University. “Politicians who curry favor make these promises and then can’t fund them.”

The package that Mayor Reed steered through in 2012, known simply as Measure B, sought to save money by reducing the city’s obligation to spend on retirement benefits for both new and current employees. The part that has already gone into effect targets new hires, delaying their age of retirement, limiting cost-of-living increases and forcing them to cover half of the annual pension costs — up from the 25 percent workers had previously been paying.

A number of jurisdictions at the state and local level have cut the benefits of future hires. The boldness of the San Jose plan lay in its reduction in benefits for current workers as well. That is where the bulk of the projected $68 million in annual savings was expected to come from. But a county judge ruled in February that the city couldn't reduce its obligation to pay retirement benefits to current employees because the benefits amounted to a contractual right promised at the point of hiring.

Reed and a narrow majority on the current council want to bring the case before the state Supreme Court, where it is believed they would have a chance to win. The slate of labor-backed challengers running for council seats this year would prefer to settle out of court with the unions. The vote next month will determine whether the next mayor and council decide to continue pressing the pension reform case or forgo some of the biggest savings embedded in Measure B.

After work on a Tuesday night in August, labor's preferred candidate for mayor of San Jose walked into a room packed with new campaign volunteers. "We've already changed the entire dynamic of this election," Dave Cortese told them. "We're going to get swept into office with all of you because it's your city hall."

Cortese is running as an outsider challenging the city's political power structure. It's an unlikely role considering he has held elected office for the past 14 years, first as a San Jose city councilman and currently as a member of the Santa Clara County Board of Supervisors. He has a long business résumé that includes time as a lawyer, real estate manager and restaurant owner. Yet he has become the champion of public librarians, city electricians and cops who feel alienated by the political establishment and want a change in city hall leadership.

In June, Cortese finished first with 34 percent of the vote in an open primary that pitted him against four incumbent council members who supported Measure B. Cortese is a long-time critic of the measure. His opponent for mayor next month is one of its architects, Councilman Sam Liccardo.

Both are pro-transit, anti-sprawl Democrats and the grandsons of Italian immigrants, but their endorsements suggest different flavors of liberalism. Cortese has won the backing of just about every public employee union in the metro area, plus that of five former San Jose police chiefs. Liccardo counts among his supporters three of the last four mayors, the chamber of commerce and more than 50 CEOs from local businesses.

Cortese interprets his first-place finish in the primary to mean that voters have undergone a change of heart since Measure B passed. By his rationale, voters were more likely to favor cuts to public employee benefits in the years immediately after the Great Recession, when layoffs, pay freezes and furloughs were felt in the private sector as well. Today, with unemployment in the San Jose metro area down to 5.5 percent, Cortese believes the electorate will be more sympathetic to public workers who saw their benefits rolled back during the economic slump.

Cortese is also trying to tie Reed's budget and pension cutbacks to public safety problems in the city. Residents have voiced frustration over slow police response times and the lack of a burglaries investigation unit. Both were budget cut casualties.

Before the recession, the city had about 1,400 patrol officers — already a lean operation for a million residents — but now there are fewer than 1,000. Citizens want more cops on the street, but the police department is shedding officers and struggling to replace them. Case in point: The first class of police cadets hired after the passage of Measure B will graduate this fall. Of the original 50 cadets, only 13 remain. Many have either resigned or left for other departments. "You're not in a bubble," Cortese says. "It's a basic business principle. You can't offer your employees consistently less than everybody else."

It's impossible to discern how much pension reform has to do with police departures, especially since the biggest changes haven't gone into effect due to court battles. But even Measure B's most fervent champions admit that San Jose offers lower pay and benefits than neighboring jurisdictions. Liccardo says he'd like to slowly restore the value of benefits lost under Measure B, but to give them in the form of salary boosts, not long-term retirement funds. To that end, the council passed a 10 percent pay increase for cops last year and Liccardo says he is looking for other ways to build back the police force.

Any recruitment efforts, however, will be in spite of the disgruntled Police Officers' Association. Jim Unland, president of the union, says that since Measure B passed, "there's no one to work with over at City Hall" and his group has turned to campaign tactics in the hopes that by defeating council members who defied the union, they can re-establish some influence. The Police Officers' Association already singled out Councilman Pete Constant, a former cop who supports Measure B, by calling him a traitor and kicking him off the union's board of directors. "They completely turned against me," Constant says.

The union has also rejected several olive branches from the council, including an offer to pay more to Spanish-speaking officers and to those who earn advanced degrees. Most recently, the council considered asking voters to approve a specialized sales tax for public safety services, but the union rallied enough opposition to keep it off the November ballot. At this point, the union appears to be focused on a significant electoral victory rather than fighting for incremental concessions that Liccardo could tout as proof of his goodwill toward the aggrieved public workers.

The battle over Measure B is often portrayed as unions resisting all cuts to worker benefits, but Unland says that's not accurate. In the failed labor negotiations in 2012, both the police and fire unions offered concessions that look similar to the changes now in place for new hires — they just wouldn't budge on revising benefit packages for current employees.

Police officers recognize that pensions pose a financial problem to the city, Unland says, but they object to Measure B as the solution. Any cuts to retirement benefits, he says, should have been the result of labor negotiations. Instead, he argues, Reed, Liccardo and most of the council made changes to pay and benefits without the typical compromises that come from negotiating with workers.

It's possible to explain Reed, Liccardo and other Measure B-supporting Democrats in San Jose as having turned against the principles of their party, and some critics do make this accusation. "They're Democrats in registration only," says Steve Preminger, chair of the Santa Clara County Democratic Party.

But Liccardo insists that pension reform has to become part of the Democratic agenda. Measure B represented the least painful way to preserve and restore core city services, he says, from paving roads to housing the homeless. Yes, retirement benefits will be worse for city workers going forward, but that sacrifice was the lesser of two evils. Liccardo sees the upcoming election as a choice between prioritizing employee benefits or city services. "I think the future of the Democratic Party hangs in the balance," he says. "Democrats believe that government can be a force of good, but if you've got crippling debt, it renders government ineffectual."

Although Liccardo finished second to Cortese in this summer's primary, the numbers give him some reasons to be optimistic. Liccardo and other mayoral candidates who ran on a pro-Measure B platform collectively won 62 percent of the primary vote. Meanwhile, the city's overall financial health has improved, allowing four new libraries to open, 900 streetlights to be turned on and 76 firefighters to keep their jobs after funding from a federal grant expired. Following a decade of neglected infrastructure maintenance, the city is also spending $16 million this year on paving roads. The restoration of services and staffing is partially due to Measure B: The portion of the law dealing with new hires, which survived a court challenge, began saving the city an estimated $20 million a year, starting in 2014.

While Liccardo works to convince voters that he deserves credit for the city's incipient turnaround, Reed is already making plans to expand his pension crusade after he leaves office at the end of the year. He and three other California mayors want to place an initiative on the 2016 statewide ballot that would change the state constitution to give cities greater latitude in controlling pension costs. Until state law changes, he says, the risk of lawsuits is too great for smaller cities to deal with those costs.

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BY J.B. WOGAN | OCTOBER 2014

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Striking a Balance on Muni Bonds.

A new federal rule opens the door to counting municipal bonds in bank assets.

Let's dispatch with the bad news first: The municipal bond market has taken yet another hit this month. A new federal rule excludes muni bonds from the liquid assets that banks must hold in case of an emergency. Issued by the U.S. Federal Reserve, the Office of the Comptroller of the Currency and the Federal Deposit Insurance Corporation, the rule exists to make sure banks have enough assets on hand that can quickly be converted to cash in the event of a financial crisis.

The good news is that public finance officials were prepared for the ruling. Ever since the draft rule was released a year ago, they've been slowly building a case to reverse it, arguing that municipal bonds should be designated high quality liquid assets (HQLA) alongside easily sellable assets like Treasuries or highly rated corporate bonds. While the Federal Reserve still issued the rule, it did recommend that some municipal bonds eventually be included as HQLAs.

Why is this inclusion important? A big reason is that the blanket exclusion of munis "would have negative long-term implications for the municipal market, potentially dampening demand and liquidity," according to RBC Capital Markets' Chris Mauro. An assessment by Fitch Ratings in January noted that if banks weren't allowed to count municipal bonds as liquid assets, it would be more expensive for banks to hold the bonds on their balance sheets and, as a result, could lead to banks reducing their muni bond portfolios.

Fortunately for cities, the new liquidity rule won't likely have an immediate impact. As long as overall interest rates remain low, muni bonds will be an attractive option for banks. Indeed, banks have been increasing their presence in the $3.69 trillion municipal market, holding $425.2 billion up from $221.9 billion in 2008. But, wrote Chicago's CFO Lois Scott in a letter to more than a dozen of her counterparts, "when economic conditions change, we will need and want America's big banks to stand by us."

Until then, observers will be watching to see which muni bonds will be exempted and counted as easily sellable liquid assets. Mauro finds the wording of the final rulemaking document troubling for its repeated assertion that “most” municipal bonds do not possess liquidity characteristics consistent with the objectives of the rule. Specifically, the final rulemaking notes that “many municipal securities are not liquid and readily-marketable.”

“Accordingly,” said Mauro, “we fear that the proposed new rule will award the HQLA designation to only a narrow slice of the municipal market. As we have previously articulated, we believe that most investment-grade municipals, particularly those of frequent issuers, should qualify as HQLAs.” In fact, most municipal governments are investment grade, rated BBB- or higher.

In any case, transportation advocates worry that the cost of project financing will increase for governments whose bonds are excluded from this rule. “That could also adversely impact development of public-private partnerships for transportation projects,” said Pete Ruane, president and CEO of the American Road & Transportation Builders Association.

The high-borrowing-cost argument is one that gets made a lot on Capitol Hill, most often as a reason not to start taxing investors’ interest earned on municipal bonds. In recent years, though, that same argument has gotten regulators to drop municipal bonds from being part of the Volcker Rule’s “risky investments” category (although it did place limits on banks’ use of tender-option bonds, which represent a small fraction of the municipal market).

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BY LIZ FARMER | SEPTEMBER 25, 2014

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Why Don't More Cities Sell Air Rights?

Vertically inclined cities could make a lot of money allowing private developers to build high-rise apartments or business spaces above libraries, city halls and schools.

Public works projects often come at heavy expense. Whether it’s building new schools, municipal halls or other facilities, such projects produce not only upfront costs, but depending on their magnitude, long-term debts. There is, however, a way to mitigate costs, or even make a project more profitable: Sell off the air rights.

This is an idea that, while holding vast economic potential, is used sparingly in America. Nowadays whenever cities build a central library, to name one example, they usually construct a single-use facility that is only a few stories tall, if that. But what if, before such libraries were built, the air rights — the undeveloped space above the roofline — were deregulated and sold off? In expensive and vertically inclined U.S. cities, private developers would pay governments enormous sums for the right to build a high-rise apartment complex or business space above public projects. This would lead to the broad maximization of public land values, and thus to enormous cash windfalls for local governments.

So why don’t more cities sell air rights? It’s a good question in these fiscally challenging times. Since the 1980s, the Massachusetts Bay Transportation Authority has granted development rights above its facilities in Boston. For instance, it has sold the air rights above the North Station transit terminal for $20 million plus the cost of extensive repairs to the station. Now, a new deal above the Back Bay Station is being negotiated. Other major cities have also allowed vertical development over transportation infrastructure, most famously in New York City, when the Pan Am Building went up above Grand Central Terminal.

Generally, though, U.S. cities do not maximize their use of public properties. Walk through any city and you'll find countless examples of where modestly sized government buildings have been plopped down onto prime real estate. In Seattle, for example, substantial public money has recently gone toward a new library, City Hall and renovated convention center, none of which exceed a dozen stories in an otherwise vertical downtown.

It is in compact cities such as Seattle — along with Boston, Chicago, New York City, San Francisco and Washington, D.C. — where utilizing air rights would make the most sense. The returns would be substantial in such hot real estate markets, and besides, compact cities are best equipped to handle added density. After all, if proposed three-story schools, libraries and recreation centers could instead sit inside 50-story mixed-use towers, this would increase the supply of affordable housing and office space, further compelling people to locate centrally.

Of course, barriers now exist to making the sale of air rights a common practice. Zoning regulations — along with neighborhood opposition — often prevent public buildings from mixing with private purposes or becoming too large. But the true barrier may be a philosophical one within governments themselves. For too long, many officials have not viewed public properties as crucial assets that should be used efficiently. Selling air rights would be a step in the right direction.

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Moody's: Drought Will Have Little Impact on California Water and Sewer Utilities' Financial Health.

New York, September 17, 2014 — Drought conditions and water conservation measures will not seriously impact the credit quality of California water and sewer utilities, at least through 2016, says Moody's Investors Service in a new report. Rate increases will largely be offsetting the decline in sales volumes the utilities are projecting.

"In the early years of the three-year drought, sales volumes and gross margins have actually increased," says Moody's Michael Wertz, an Assistant Vice President and Analyst. "Therefore, the utilities' projected sales volume decline will typically lead to a return to normal financial performance, not the below-average performance the unusual severity of the drought might suggest."

In a recent survey of Moody's-rated California water and sewer utilities, which the rating agency summarizes in the report "California Water and Sewer Utilities' Rate Increases Will Largely Offset Drought's Financial Impact," Moody's finds the utilities on average expect an approximately 10% decline in water sales because of the drought, a significant difference from the 20% reduction in water usage the California governor is targeting. Only 16% of respondents report amending their scheduled rate increases in direct response to the drought and conservation measures.

Moreover, the drought has actually helped the operating performance of the utilities. Because a substantial portion of water in California is used for irrigation and landscaping, the lack of rainfall has led to greater use of utility water to make up for the lack of rain, driving up water sales and revenues.

Moody's says net revenues and debt service coverage reached three-year highs for both water and sewer systems in 2013.

But conservation measures are now cutting into volumes. In terms of financial performance, however, planned rate increases — averaging 5.3% in fiscal 2015 and 4.1% in fiscal 2016—will generally make up for the loss in volumes, according to the utilities.

Regardless of volumes, a key credit strength for the utilities is the fact they have unlimited authority to adjust rates without outside regulatory approval.

For more information, Moody's research subscribers can access this report at http://www.moodys.com/viewresearchdoc.aspx?docid=PBM_PBM175532.

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Fitch: California Water Rules to Create Winners and Losers.

Fitch Ratings-New York-22 September 2014: Legislation signed by the governor of California last week will benefit municipal water agency credits in the long-term by stabilizing supply and raising drought resiliency, Fitch Ratings says. However, the 10- to 20-year phase-in of the requirements comes too late to mitigate the supply pressures caused by the current severe drought and could hurt ratings of agricultural water agencies in the state in the mid-term.

The legislation requires local agencies to create and adhere to plans for sustainable groundwater management to battle chronic overdraft conditions. It creates agencies with the authority to require reductions in pumping and charge fees to support groundwater projects.

The long-term implementation of this legislation will not change existing supply pressure on California’s water credits, but it should be positive for urban water providers in the long term. The new rules create incentives for California water agencies to invest in alternative water supplies like groundwater recharge, maximizing usage of surface water rights, conjunctive use, waste water recycling, and conservation. These investments will boost debt levels and water bills but will be more than offset for most issuers by supply reliability improvements. If well implemented, the legislation also will lower the risk that water agencies investments in stable supplies will be negated by overuse by neighboring communities through unadjudicated basins.

Over the long term, Fitch believes the legislation will pressure some agricultural water agencies by forcing some farmland out of production, weakening customer bases. The legislative call to more effectively manage groundwater will raise the value of the agricultural water agencies’ services and stimulate investments in sustainable supplies. However, adapting to these changes will be very difficult for those that lack rate setting flexibility. We expect pressures on them to emerge sooner.

Fitch does not expect the legislation to have widespread impact on tax-supported credit ratings, even in heavily agricultural regions. While some agricultural land may be lost, it generally produces small amounts of tax revenue. Fitch also believes the impact of loss of agricultural jobs is likely to be very gradual and would be masked by broader cyclical economic factors in all but the smallest, most narrow agricultural economies that tend to lack public bond ratings.

The groundwater legislation continues a long tradition of state water policymaking in which droughts force the state and its local water agencies to make major investments in long-term supply reliability. In our view these investments are among the main reasons the current extreme drought impact has had little impact on credit ratings. However, the potential for greater impacts remains as the drought lingers.

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The above article originally appeared as a post on the Fitch Wire credit market commentary page. The original article, which may include hyperlinks to companies and current ratings, can be accessed at www.fitchratings.com. All opinions expressed are those of Fitch Ratings.

GASB User Survey on the Effectiveness of Statement 34.

Feedback from those who need financial information about state and local government financial statements is vital to Governmental Accounting Standards Board's (GASB') efforts to improve financial accounting and reporting. The GASB is currently conducting pre-agenda research to inform its assessment of the effectiveness of Statement No. 34, Basic Financial Statements—and Management's Discussion and Analysis—for State and Local Governments, and related standards. The objective of this research is to gather feedback on these broad questions:

- What Statement 34 requirements related to management's discussion and analysis, government-wide financial statements, fund financial statements, and budgetary comparison information are effective or ineffective in providing information that is essential for decision-making and that enhances the ability to assess a government's accountability?
- What concerns exist regarding the application of the standards?
- How do the costs of applying the standards compare with the perceptions of the benefits of the resulting information?

Statement 34 has a pervasive influence over the effectiveness of financial reporting by state and local governments and the ability of that reporting to achieve the objectives of financial reporting. As a result, the GASB decided that it was important, as part of its commitment to maintaining the effectiveness of its standards, to reexamine the current financial reporting model now that it has been in place for a sufficient length of time. This survey is one effort in the planned pre-agenda research to be conducted by the GASB staff.

The GASB has developed an online survey to gather feedback from users of governmental financial information. The GASB would greatly appreciate you taking the time to complete the survey, which can be accessed by following [this link.]

It is anticipated that the survey will take longer than a typical GASB survey, given the magnitude of the requirements of Statement 34. It is vital, however, that the GASB receive your feedback in order to assess whether Statement 34 has resulted in you receiving the information you need. To make it easier to complete the survey, it is possible for you to download a copy of the survey in its entirety to consider the questions before entering your responses into the online version. Additionally, you do not have to complete the online survey in a single session. You can save your responses and will be provided an individualized link to return to your survey at a later date to complete it.

You are asked to complete the survey by Friday, October, 10, 2014.

Your input is essential to the GASB's standards-setting process. If you have any questions, please feel free to contact Roberta Reese (rereese@gasb.org) or Lisa Parker (lrparker@gasb.org).

GFOA Executive Board Approves Four Best Practices.

The GFOA's Executive Board approved three new best practices and one revised best practice on September 22, 2014. These documents provide recommendations to government finance officers in the areas of accounting, retirement benefits administration, and debt issuance.

Coordinating the Work of Multiple Auditors. This new best practice provides recommendations to facilitate the effective, efficient, and timely performance of group audits – when a portion of a government's financial report is audited by other auditors. Appropriately coordinating auditing functions ensures that there won't be delays in the delivery of financial statements, which is important because delays could result in additional costs or modified opinions.

Enhancing Reliability of Actuarial Valuations for Pension Plans. Actuarial information directly affects the funded level and sustainability of pension plans, and this new best practice urges pension plan fiduciaries to ensure that all the information provided to the actuary is accurate and up to date. The document also provides guidance on engaging actuaries and information about additional services that finance officers should consider having the actuary perform.

Investment Fee Policies for Retirement Systems. The GFOA developed this best practice to help pension funds minimize the impact of investment management fees on portfolio returns. It recommends that retirement systems, especially those that use alternative investment strategies, adopt an investment management fee policy that will provide for negotiating the lowest competitive fee possible while looking out for the system's long-term earning potential. The best practice also recommends strategies for reducing investment fees.

Investment of Bond Proceeds. The GFOA updated this best practice to alert governments to the Security and Exchange Commission's classification of brokers as Municipal Advisors under the SEC Municipal Advisor Rule (MA Rule), in certain instances. The MA Rule, which went into effect in July 2014, permits brokers to provide general information without being considered MAs; however, broker-dealers will be deemed to have provided "advice" when they recommend that their government clients buy a particular security. The updated best practice provides recommendations on how to engage brokers for investing bond proceeds, in light of the new rule.

- Post-Implementation Review Completed on GASB Standard Addressing Capital Asset Impairment, Insurance Recoveries.
- Future MCDC Settlements May Be More Detailed.
- MSRB Provides New Resources on Disclosures Made to Municipal Bondholders.
- SEC Could Halt Muni Bond Sales.
- Mintz Levin: Court Rules on Applicability of Make-Whole Premiums Upon Debt Acceleration.
- NABL Urges Aggregate Treatment of Partnerships.
- S&P: U.S. Local Governments General Obligation New Criteria – One Year Later.
- Moody's Analytics: Financial Analysis of Local Governments.
- GASB: What Municipal Analysts Need to Know about Governmental Accounting — Oct. 24, NYC.
- And finally, leaving aside the question of what marketing genius came up with the name, Four Quarters Interfaith Sanctuary of Earth Religion (350 souls strong!), one is left wishing that the Commonwealth Court had perhaps dug a little deeper when it ruled that the church's cliffs were not exempt from taxation due to the fact that they were used solely for an unspecified religious ritual that took place only once every three years. Surely there has to be a virgin or a goat or something out there that would appreciate the effort.

PENSION FUNDING - ALABAMA

Taylor v. City of Gadsden

United States Court of Appeals, Eleventh Circuit - September 16, 2014 - F.3d - 2014 WL 4548614

Recognizing that its pension system was underfunded, City raised its employees' pension contributions by 2.5% of their total compensation. It did so pursuant to an Act passed by the Alabama legislature mandating such an increase for state employees and permitting, but not requiring, localities to do the same.

In response, a class of City firefighters — whose contribution rate was raised from 6% to 8.5% — brought this lawsuit. They alleged that the City's actions impaired the terms of their employment contracts, in violation of both the United States Constitution and the Alabama Constitution.

The Court of Appeals held that plaintiffs had no contractual right to a static, inviolable 6% contribution rate and thus the City was free to amend the employee contribution rate without constitutional consequence.

INVERSE CONDEMNATION - ALASKA

Briggs v. City of Palmer

Supreme Court of Alaska - September 12, 2014 - P.3d - 2014 WL 4494272

Property owner brought action against city for inverse condemnation, claiming airport operation diminished his property value. The Superior Court entered summary judgment for city, and property owner appealed.

The Supreme Court of Alaska held that property owner should have been permitted to testify as to the market value of his property both before and after an alleged taking, based on the premise, that, as an owner, he was informed about the property's value, both before and after the event that purportedly diminished its value.

CEQA - CALIFORNIA

Coalition for Adequate Review v. City and County of San Francisco

Court of Appeal, First District, Division 1, California - September 15, 2014 - Cal.Rptr.3d - 2014 WL 4537020

Objectors petitioned for writ of mandate challenging city's land use plans. The Superior Court denied petition. Objectors appealed, and the Court of Appeal affirmed. The Superior Court granted objectors' motion to tax costs and denied all costs to city. City appealed.

The Court of Appeal held that:

- Trial court was required to award costs to city for its preparation of a supplemental record, but
- Labor costs to review objectors' record of proceedings "for completeness" were not recoverable.

When a petitioner elects to prepare the record for a California Environmental Quality Act (CEQA) action against a public agency but the record is incomplete, and an agency is put to the task of supplementation to ensure completeness, the language of CEQA's record preparation provision allows, and the purpose of the provision to protect public monies counsels, that the agency recoup the costs of preparing the supplemental record.

Trial court was required to award costs to city for its preparation of a supplemental record under California Environmental Quality Act's (CEQA) record preparation statute, after city prevailed in objectors' mandamus action, even though objectors elected to prepare the record, where the city obtained leave from the trial court to prepare the supplemental record, objectors rejected city's offer to defer supplementation of the record until it filed its opposition to the writ petition, and city's preparation of a supplemental record did not violate the city's obligation to minimize record preparation costs.

When a petitioner elects to prepare the record for a California Environmental Quality Act (CEQA) action against a public agency, the agency's labor costs to review the petitioner-prepared record of proceedings "for completeness" in connection with certification are not recoverable record preparation costs under CEQA's record preparation provision.

BENEFITS - DISTRICT OF COLUMBIA

Rivera v. Lew

District of Columbia Court of Appeals - September 11, 2014 - A.3d - 2014 WL 4450507

Former spouse of police officer sought judicial review of District of Columbia Retirement Board's (DCRB) denial of spouse's request for a survivor annuity following officer's death. The District Court granted summary judgment in favor of DCRB. Spouse appealed.

The Court of Appeals held that mayor was not required to comply with posthumous nunc pro tunc order amending divorce settlement.

Mayor was not required to comply with a posthumously-issued nunc pro tunc court order that on its face related back to a date before police officer's death and retroactively amended a divorce settlement agreement to provide the officer's former spouse with entitlement survivor annuity in a way that was inconsistent with the last benefits election executed by the officer prior to his death, where order had not been issued prior to officer's retirement, as officer's death prior to retirement precluded retirement.

LIABILITY - ILLINOIS

Bruns v. City of Centralia

Supreme Court of Illinois - September 18, 2014 - N.E.3d - 2014 IL 116998

Pedestrian brought negligence action against city, alleging that she tripped and fell on an uneven sidewalk. The Circuit Court entered summary judgment in favor of city. Pedestrian appealed. The Appellate Court reversed and remanded. City sought review.

The Supreme Court of Illinois held that:

- Mere fact that pedestrian was looking at the door and steps of eye clinic which was her destination did not constitute a distraction, and
- City had no duty to protect pedestrian from open and obvious sidewalk defect.

Mere fact that pedestrian was looking at the door and steps of eye clinic which was her destination did not constitute a "distraction" that would serve as an exception to the open and obvious rule in negligence action against city on the basis of sidewalk defect, where pedestrian failed to identify any circumstance, much less a circumstance that was reasonably foreseeable by the city, which required her to divert her attention from the open and obvious sidewalk defect, or otherwise prevented her from avoiding the sidewalk defect.

EASEMENTS - ILLINOIS

Nationwide Financial, LP v. Pobuda

Supreme Court of Illinois - September 18, 2014 - N.E.3d - 2014 IL 116717

Eastern landowner brought action against western landowners for declaratory judgment of trespass. Western landowners brought counterclaims for declaratory judgment of prescriptive easement, interference with an express easement, and a declaratory judgment regarding certain developmental modifications in order to prevent flooding on their property. The Circuit Court entered summary judgment in favor of eastern landowner. Western landowners appealed.

The Supreme Court of Illiniois held that:

- Prescriptive easement claim does not require that the claimant prove that the titleholder was altogether deprived of possession and/or use of the property during the 20–year period, overruling

Catholic Bishop of Chicago v. Chicago Title and Trust Co., 2011 IL App (1st) 102389, 954 N.E.2d 797; Chicago Steel Rule Die & Fabricators Co. v. Malan Const. Co., 200 Ill.App.3d 701, 558 N.E.2d 341, and City of Des Plaines v. Redella, 365 Ill.App.3d 68, 847 N.E.2d 732;

- There was a presumption that an easement was granted by predecessor in title of eastern landowner; and
- Western landowners were not required to orally communicate their claim of right to the owners of the eastern property.

EMPLOYMENT - MASSACHUSETTS

Hull Retirement Bd. v. Contributory Retirement Appeal Bd.

Appeals Court of Massachusetts - September 16, 2014 - N.E.3d - 2014 WL 4546047

Police officer brought action against town after he was removed from paid injury leave status and placed on an unpaid leave of absence. Officer and town reached a settlement agreement under which town placed in escrow approximately $44,400 in accidental injury leave pay. Officer appealed retirement board's refusal to recalculate his retirement benefits on the basis of the additional funds. The division of administrative law appeals ordered a correction of the retirement date. Town appealed. The Contributory Retirement Appeal Board affirmed. Town appealed.

The Appeals Court held that funds were regular compensation received by officer for purposes of calculating his retirement benefits.

TAX - NEW HAMPSHIRE

Duncan v. State

Supreme Court of New Hampshire - August 28, 2014 - A.3d - 2014 WL 4241774

Taxpayers and LLC filed petition seeking declaratory judgment that Education Tax Credit Program, which provided tax credit to business organizations and enterprises that contributed to scholarship organizations to provide scholarships to students, violated provision of New Hampshire Constitution prohibiting grant of tax dollars for use by schools or institutions of any religious sect or denomination. Citizens who wished their children to receive scholarship funds under program, and non-profit organization intervened. The Superior Court ruled in plaintiffs' favor. State and intervenors appealed.

The Supreme Court of New Hampshire held that:

- Amended statute conferring taxpayers with standing to challenge action of taxing district without having to demonstrate impairment of or prejudice to personal right violated New Hampshire Constitution's prohibition against rendering of advisory opinions;
- Taxpayers lacked standing to seek declaratory judgment that Education Tax Credit Program violated New Hampshire Constitution's prohibition against tax dollars being granted to or used by schools or institutions of any religious sect or denomination; and
- LLC's assertion that it paid business enterprise taxes or business profit taxes, by itself, did not allege personal injury from implementation of Education Tax Credit Program, as required to have standing to challenge constitutionality of program.

LIABILITY - NEW YORK

Granata v. City of White Plains

Supreme Court, Appellate Division, Second Department, New York - September 10, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 06053

Action was brought against city to recover damages for negligence and wrongful death of customer who was attacked and killed in city's parking garage. The Supreme Court, Westchester County, denied city's motion for summary judgment on cause of action alleging that city failed to maintain premises in reasonably safe condition. City appealed.

The Supreme Court, Appellate Division, held that:

- City acted in its proprietary capacity, and
- There was triable issue of fact as to foreseeability of attack.

City acted in proprietary, rather than governmental, capacity in owning and operating parking garage, for which it was alleged to have failed to provide adequate security, and, in that capacity, city, like any landlord, had duty to take minimal precautions to protect customer from foreseeable harm.

LIABILITY - NEW YORK

Gugel v. County of Suffolk

Supreme Court, Appellate Division, Second Department, New York - September 10, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 06054

Plaintiffs brought action against county to recover for damages they sustained as result of sewage backup. The Supreme Court, Suffolk County, entered summary judgment in county's favor, and plaintiffs appealed.

The Supreme Court, Appellate Division, held that county's proof regarding its regular inspection and maintenance of its sewer system failed to demonstrate its prima facie entitlement to judgment as matter of law.

County's proof regarding its regular inspection and maintenance of its sewer system failed to demonstrate its prima facie entitlement to judgment as matter of law in action to recover damages sustained as result of sewage backup, even though county did not have prior notice of dangerous condition in subject sewer system, where records that county submitted in support of its motion for summary judgment were confusing, internally inconsistent, and did not support conclusion made in accompanying affidavit of county department of public works employee, who stated that subject sewer line was annually "jetted" to clear blockages.

EMPLOYMENT - NEW YORK

Iasillo v. Pilla

Supreme Court, Appellate Division, Second Department, New York - September 10, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 06056

Former mayors and members of Board of Trustees of village brought action against village, mayor, and trustees of Board, seeking declaration that resolution of Board, which terminated former mayors' and Board members' post-retirement healthcare benefits, was null and void and without legal effect. The Supreme Court, Westchester County granted defendants' converted motion for summary judgment. Former mayors and Board members appealed.

The Supreme Court, Appellate Division, held that prior Board resolutions that granted post-retirement healthcare benefits did not establish vested interest in those benefits.

LIABILITY - NEW YORK

Lepore v. Town of Greenburgh

Supreme Court, Appellate Division, Second Department, New York - September 10, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 06063

Plaintiffs brought action against town and police officers to recover damages for civil rights violations pursuant to § 1983. The Supreme Court, Westchester County, denied defendants' motions for summary judgment and to dismiss the complaint. Defendants appealed.

The Supreme Court, Appellate Division, held that:

- Town was entitled to summary judgment on plaintiffs' cause of action seeking to impose liability on town pursuant to § 1983 solely for the actions of police officer, and
- Trial court erred in denying town's motion to dismiss complaint insofar as asserted against John Doe officers.

ZONING - NEW YORK

Quintana v. Board of Zoning Appeals of Inc. Village of Muttontown

Supreme Court, Appellate Division, Second Department, New York - September 10, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 06092

Applicants initiated article 78 proceeding to review determination of board of zoning appeals denying application for lot-depth variance. The Supreme Court, Nassau County, annulled determination. Board appealed.

The Supreme Court, Appellate Division, held that there was no evidence that granting variance would produce undesirable change in character of neighborhood, adversely impact on physical and environmental conditions, or otherwise result in detriment to health, safety, and welfare of neighborhood or community.

Lot-depth variance should have been granted, absent evidence that granting variance would produce undesirable change in character of neighborhood, adversely impact on physical and environmental conditions, or otherwise result in detriment to health, safety, and welfare of neighborhood or community; subjective considerations of general community opposition was not rational basis for denial of variance.

TAX - PENNSYLVANIA

Four Quarters Interfaith Sanctuary of Earth Religion v. Bedford County Bd. of Assessment and Revision of Taxes

Commonwealth Court of Pennsylvania - September 16, 2014 - A.3d - 2014 WL 4547841

Taxpayer, a religious organization that owned 90 acres of real property where members performed religious rituals, appealed decision of county board of assessment and revision, denying taxpayer's request for tax exemption for places of religious worship.

The Commonwealth Court held that:

- Cliffs and other areas of property were not entitled to tax exemption as places of regularly stated religious worship; but
- Portions of unwalkable areas of property that provided members' privacy were entitled to tax exemption as places necessary for the occupancy and enjoyment of religious practice; and
- Campsites and dormitory were entitled to tax exemption as places necessary for the occupancy and enjoyment of religious practice.

LIABILITY - SOUTH CAROLINA

Major v. City of Hartsville

Supreme Court of South Carolina - September 17, 2014 - S.E.2d - 2014 WL 4629587

Pedestrian, who allegedly fell while walking across unpaved area of intersection, brought personal-injury action against city, asserting claims for negligence, gross negligence, and willful and wanton conduct. The Circuit Court granted city's motion for summary judgment. Pedestrian appealed.

The Supreme Court of South Carolina held that genuine issues of material fact as to whether city should be charged with constructive notice of rut on basis that rut existed for such a period of time that city should have discovered it and as to whether recurring nature of defect created continual condition giving rise to constructive notice precluded summary judgment.

PUBLIC RECORDS - WISCONSIN

Wisconsin Professional Police Assn., Inc. v. Wisconsin Counties Assn.

Court of Appeals of Wisconsin - September 18, 2014 - Slip Copy - 2014 WL 4637474

Wisconsin Professional Police Association sought a declaration that the Wisconsin Counties Association was subject to Wisconsin's public records law, that the Wisconsin Counties Association violated that law, and a mandamus order directing the Counties Association to produce records requested by the Police Association pursuant to that law.

The Circuit Court dismissed the complaint on the ground that the public records law imposed record inspection and production duties only on an "authority," as defined in WIS. STAT. § 19.32(1), and the Counties Association, as an unincorporated association, "quite clearly does not fall within" that definition. The Court of Appeals affirmed.

Century of Debt Suiting Ohio State at These Rates.

Ohio State University is joining issuers going into hock for 100 years as dwindling borrowing costs kindle the appeal of locking in interest rates for a century.

The school, with its main campus in Columbus, may sell $150 million in taxable century bonds as soon as this week. It will issue as the relative cost of borrowing for longer periods is shrinking: Thirty-year debt yielded as little as 0.83 percentage point more than 10-year bonds last week, the smallest gap since 2012, data compiled by Bloomberg show.

Even with the advantageous rates, century bonds are rare because they rely on confidence that the issuer will be around in 100 years. While top-rated universities have been the primary users of the securities, interest rates close to generational lows have brought more deals to market. Last week, the Cleveland Clinic became the first not-for-profit health-care system to borrow for a century. In July, the first U.S. public utility sold the securities.

"Century bonds give the ultimate flexibility when it comes to having cost of capital set for a very long period of time," said Michael Papadakis, treasurer of Ohio State, which was established in 1870. "As a public university, we don't have equity, so this is the longest capital you can get."

Century Club

This would be Ohio State's second century offer. In 2011, it became the first public school to issue 100-year taxable debt when it sold $500 million. In earlier issues, Walt Disney Co. (DIS) sold centuries in 1993 and the Port Authority of New York and New Jersey followed a year later. Yale University and the Massachusetts Institute of Technology have sold centuries into the corporate market. So has railroad Norfolk Southern Corp.

Ohio State is determining whether to issue taxable bonds due in 2114 or tax-free securities due in 30 years, Papadakis said. The Cleveland Clinic borrowed Sept. 11 via the corporate market at an interest rate of 4.86 percent for a century, data compiled by Bloomberg show.

While historically low yields are luring issuers, some investors are balking at longer debt.

BlackRock Inc., the world's largest asset manager, is shifting to 10- to 15-year bonds from longer maturities, Peter Hayes, the company's head of municipal debt, said in a Sept. 10 report. Fidelity Investments is also focusing on intermediate debt, said Kevin Ramundo, a money manager who helps oversee its $28.6 billion of state and local securities.

Matching Liabilities

Loews Corp. (L), the holding company run by New York's Tisch family, is still interested in 30-year debt, though not centuries, said Mark Muller, a money manager who helps oversee $13 billion of munis in New York. Demand from philanthropies and insurers looking for assets to match indefinite liabilities dwarfs the supply of 100-year bonds, which means more borrowers may emerge, he said.

"It has been more about supply in century bonds than it has been about demand — demand is always there," Muller said in an interview. "We will go through so many interest-rate cycles by the time these bonds ultimately mature" that investors will have the opportunity to buy higher-yielding debt in the future, he said.

Ohio State's 2011 centuries reflect the appetite. The debt, rated Aa1 by Moody's Investors Service, traded last week at a 4.54 percent yield, the lowest since May 2013, Bloomberg data show.

'Permanent Capital'

The Cleveland Clinic, which opened in 1921, sold $400 million of debt last week.

"We looked at it as an opportunity for the clinic to raise the closest thing to permanent capital that a not-for-profit organization can have," said Steven Glass, chief financial officer of the institution, the 12th-biggest Moody's-rated U.S. health-care system by revenue and the largest employer the city has ever had.

"There's a very unique group of organizations that could access the market to do 100-year bonds," he said. "The investors feel like this is an organization that, with all the changes in health care, is going to be one of those that's here to stay."

Buyers had a similar stance toward about the District of Columbia Water & Sewer Authority, which serves the White House. It issued $350 million of taxable 100-year debt in July, with proceeds going toward a $2.6 billion project to curb sewer overflows.

Cancer Center

Ohio State's sale, which will also include $150 million of variable-rate debt, will complete a capital plan that began in 2010, Papadakis said. The bonds will help fund a $1.1 billion medical-center expansion, he said. They will also finance other infrastructure projects for the school, which enrolls about 63,000 students.

Though munis and Treasuries have slumped the past two weeks, longer bonds have still outperformed their shorter-term counterparts.

Benchmark 30-year munis yield 3.15 percent, compared with 2.29 percent for 10-year maturities. The difference has shrunk from 1.3 percentage points to start the year. Longer-maturity bonds typically have higher yields to compensate for the added risk of the lengthier holding period.

Bonds maturing in longer than 22 years have earned the most in the $3.7 trillion municipal market this year. Their 12 percent gain compares with the broad market's 7 percent rally, Barclays Plc data show.

"This is a historically great opportunity to lock in low-yielding long-term debt," said Muller at Loews.

BLOOMBERG

By Brian Chappatta Sep 15, 2014 5:00 PM PT

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Puerto Rico Wins With Worst Riskless Return: Muni Credit.

Debt of junk-rated Puerto Rico is beating the entire $3.7 trillion municipal-bond market in 2014 and all U.S. states. Take volatility into account and the securities come in dead last.

Bonds from the struggling commonwealth have generated a 12.1 percent total return this year through Sept. 15, beating the 7.4 advance for the broader market, according to S&P Dow Jones Indices. Yet after factoring in price swings using Bloomberg's risk-adjusted return calculator, Puerto Rico's gain is only 1.6 percent, compared with 4.7 percent for the entire market.

The last-place showing underscores the risk-reward tradeoff of the bonds, which are tax-exempt nationwide and carry yields rivaling those on Venezuela bonds. While the swings are luring hedge funds, traditional muni investors such as AllianceBernstein Holding LP and Vanguard Group Inc. are balking as the island tries to boost its economy and repay $73 billion of debt.

"We don't think we're being compensated enough at these prices to be a buyer, given the risks we see," said Guy Davidson, who helps manage $30 billion of munis at New York-based AllianceBernstein. "And that's even true for our high-yield funds."

Rally Temptation

A two-month rally in Puerto Rico debt hasn't been enough to draw AllianceBernstein back to the territory. The company cut its holdings to zero after Governor Alejandro Garcia Padilla's June proposal of a new debt-restructuring law, down from a 2 percent allocation at the start of the year, Davidson said.

"Their ability to pay this debt is largely going to be dependent on their economy starting to grow," Davidson said.

An index that tracks Puerto Rico's economy has contracted by 19 percent since 2006, according to the Government Development Bank, which handles the commonwealth's debt sales. Compounding the challenge, the population has shrunk for eight straight years, to 3.6 million, as people move to the U.S. mainland, according to U.S. Census data.

Puerto Rico bonds have rebounded from record lows set in July following passage of a law allowing some agencies, including the Electric Power Authority, to restructure obligations.

Restructuring Pick

Prepa, as the utility is known, picked New York-based turnaround firm AlixPartners LLP this month to help repair its finances. It must file a debt restructuring plan by March 2.

Uninsured Prepa bonds maturing in July 2040 traded yesterday at an average price of 56.36 cents on the dollar, up from a record low 38.14 cents on July 7.

Ten-year Puerto Rico obligations yield about 8.6 percent, equivalent to a taxable 14.3 percent for investors in the top federal income bracket, Bloomberg data show. Similar-maturity dollar-denominated bonds for Venezuela, which has the world's highest inflation rate and plunging foreign reserves, yield about 14.4 percent.

Those interest rates are attracting buyers of risky securities.

Hedge funds bought the bulk of the commonwealth's $3.5 billion general-obligation sale in March, the municipal market's largest speculative-grade borrowing ever. More than 60 alternative fund managers hold about $16 billion of commonwealth debt, according to an August Fitch Ratings report.

Yield Response

The price swings attract hedge funds because they're looking for price appreciation, said David Tawil, co-founder of hedge fund Maglan Capital LP, which holds the island's general-obligation bonds.

Puerto Rico "provides a pretty compelling investment opportunity," said Tawil, who oversees a $75 million fund in New York. "There's a fair amount of identifiable financial reforms that could go ahead and be carried out and yields would respond as a result."

A group of 28 hedge funds, including Brigade Capital Management LLC, Fir Tree Partners, Monarch Alternative Capital LP and Perry Capital LLC, hold more than $4.5 billion of Puerto Rico securities, according to Russ Grote, a Washington-based spokesman who represents the coalition at Hamilton Place Strategies.

The group is "a potential source of financing to assist the commonwealth and the governor as they continue their efforts to improve the island's financial position," it said in a statement last month.

Fund Pullback

Puerto Rico may need to tap that financing as it plans to sell $900 million of notes in the next 30 days.

The hedge funds and alternative investors are stepping in as mutual funds, which own about 17 percent of all municipal debt, have pulled back. About 57 percent of U.S. muni mutual funds hold Puerto Rico securities as of September, down from 77 percent in October, according to Morningstar Inc.

The $9.8 billion Nuveen High Yield Municipal Bond Fund, the largest U.S. mutual fund focusing on lower-rated munis, hasn't held Puerto Rico securities since June 2013, according to John Miller, co-head of fixed income in Chicago.

Outside that fund, Nuveen holds $100 million of Puerto Rico debt, or less than 1 percent of its $94 billion of muni assets, down from 1.5 percent two years ago, Miller said.

The commonwealth's history of selling bonds to repay creditors is deterring Nuveen, even with the high yields.

"The island does have an uncanny ability to continue to convince different constituencies to enable them to extend, borrow more, extend more, borrow more," Miller said.

Vanguard's weighting is below benchmark levels because of recurring budget deficits and a flagging economy, said Chris Alwine, head of munis in Valley Forge, Pennsylvania. The company oversees $140 billion of state and local debt.

"We haven't seen the economic growth," Alwine said. "There's still progress to be made."

BLOOMBERG

By Michelle Kaske September 16, 2014

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U.S. Backs Dakar Bonds in Model for Fast-Growing Cities.

The U.S. Agency for International Development said yesterday that it will guarantee Senegal's first municipal bond sale of $41.8 million, part of a broader American effort to help stabilize an increasingly urban world.

The U.S. aid agency is guaranteeing 50 percent of the general-obligation bond issue for seven years, and will spend $8,360 to help Dakar, the Senegalese capital, list it on the regional stock exchange sometime in the next three or four months. It would be the first in sub-Saharan Africa, and the first non-sovereign-backed.

Instead, the bonds, announced at the aid agency's Frontiers in Development conference in Washington, will be backed by Dakar city taxes, with the expectation that all the proceeds will be used to pay the bonds. If there's a shortfall, the city has created a reserve account that can be tapped.

Dakar, with 3 million residents according to the CIA Factbook, is Senegal's largest city, economic hub and the business gateway to West Africa. The municipal bonds will be used to build a marketplace for about 3,500 street vendors, allow them to establish and grow their businesses and give the city a chance to collect rent and taxes.

With 1.5 million people a week streaming into cities, and almost 60 percent of the world's people expected to live in them by 2050, U.S. intelligence officials say urban growth could either boost Asian and African economic and political stability or generate contagious instability.

'Front Lines'

As municipalities struggle to meet the growing demand for services and infrastructure, central-government funding has often failed to keep pace. Finding ways to tap private investment could counter the failures that mire megacities with traffic congestion, failing infrastructure, entrenched criminal networks, deteriorating health and sanitation conditions and — the U.S. aid agency's concern — extreme poverty.

"Municipalities are on the front lines of battling extreme poverty, especially in a world where populations are exploding in cities and will in the future, and more central governments are reducing the amount of tax transfers that they send," said Michael Metzler, director of the agency's Development Credit Authority.

The shortage in central government funding and limited city tax bases "opens a space where private financing makes a lot of sense" for cities, Metzler said, "but a lot of them aren't able to access" it.

The agency's Development Credit Authority specializes in leveraging private capital to further economic development, sidestepping tightening federal budgets and departing from the traditional role of simply doling out aid. It encourages local banks in developing countries to make loans to underserved businesses that deal with agency priorities such as agriculture and energy by pledging to cover 50 percent of any losses.

Private Capital

Raj Shah, the agency's administrator, said the partnership with Dakar underscores how it's "working with engines of American innovation — like the Gates Foundation — to end extreme poverty. By unlocking the power of private capital, we can help local leaders like Mayor Khalifa Sall seize opportunities for broad-based economic growth."

The bond issue "will help diversify the city's capital resources at a lower rate for a longer maturity," Sall, the mayor, said in an e-mail. "Dakar is setting the example of how to find innovative and sustainable ways to finance major infrastructure projects in order to improve life for the urban population." Its success, Sall said, would create opportunities for his city, as well.

The preparations for issuing the bonds already have had an impact, Metzler said.

Gates Foundation

The Bill & Melinda Gates Foundation worked with Dakar to found a municipal financing unit aimed at selling the bonds. The unit has worked on strategic budgeting, financial forecasting and strengthening capacity for future bond sales.

The standards needed to meet investors' demand for transparency and effective management also will help improve governance, Metzler said.

"Once a city wants to enter these markets, it has to become transparent; it has to open itself up to critique; and then it has to improve any systems seen as lacking by potential investors," he said. "The city is much, much stronger today than they were when this transaction process started."

Sall heads a pan-African group of municipal leaders, and a larger goal of the issuance is to encourage other cities to explore loan guarantees as a way to access private capital, Metzler said.

BLOOMBERG

By Nicole Gaouette Sep 18, 2014 5:00 PM PT

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To contact the editors responsible for this story: John Walcott at jwalcott9@bloomberg.net Larry Liebert

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Mintz Levin: Court Rules on Applicability of Make-Whole Premiums Upon Debt Acceleration.

The linked Mintz Levin client advisory, which discusses a recent bankruptcy court ruling regarding the applicability of a make-whole premium upon a refinancing of corporate debt following such debt's automatic acceleration upon bankruptcy under the terms of the governing documents, may also be of interest to holders of municipal bonds with call protection and/or early redemption premiums.

In the context of make-whole premiums, court decisions suggest that the applicability of the premium upon a refinancing in bankruptcy will be governed by the wording of the debt documents, and that if an automatic acceleration is triggered by the documents and the documents do not expressly provide for a prepayment premium in such circumstances, no prepayment premium will be payable by the issuer.

Municipal bonds typically feature fixed percentage optional redemption premiums rather than make-whole premiums, but courts may also be inclined to apply to municipal bonds the principle that such early redemption premiums are inapplicable upon an acceleration absent express contract language applying the premium in that context (or, as some courts have suggested, absent evidence that the issuer deliberately defaulted for the purpose of circumventing the call protection provisions.)

Len Weiser-Varon | Mintz Levin

9/19/2014

S&P: U.S. Local Governments General Obligation New Criteria – One Year Later.

Dallas – Chicago – San Francisco – New York – Boston

Please join us for roundtable discussions on the results one year after our release of the revised criteria for general obligation (GO) bonds issued by U.S. local governments.

These roundtables will be held in New York, Chicago, Dallas, Boston, and San Francisco. Click the link of each location to view the preliminary agenda for each city.

We invite you to join our team of credit analysts to discuss the ratings changes, distribution of ratings changes and other results of the criteria published in September 2013.

Registration is complimentary. Space is limited and pre-registration is required.

Please reserve your place as soon as possible by clicking here.

Breakfast or lunch will be served.

Please feel free to forward this invitation to your colleagues.

We look forward to seeing you!

Reserve your seat at one of our roundtables, being held in Dallas, Chicago, San Francisco, New York, and Boston.

Dallas
Date: October 13, 2014
Time: 10:00 a.m. – 1:00 p.m.
Standard & Poor's
Ratings Services
500 N. Akard Street

Concourse Level
Dallas, TX

Chicago
Date: October 14, 2014
Time: 11:30 a.m. – 1:30 p.m.
The Mid-America Club
200 East Randolph Drive
Burnham Ballroom C
80th Floor
Chicago, IL

San Francisco
Date: October 15, 2014
Time: 9:30 a.m. – 12:00 p.m.
Standard & Poor's
Ratings Services
One California Street
31st Floor
San Francisco, CA

New York
Date: October 17, 2014
Time: 8:30 a.m. – 10:30 a.m.
Standard & Poor's
Ratings Services
55 Water Street
37th Floor
New York, NY

Boston
Date: October 28, 2014
Time: 8:30 a.m. – 10:30 a.m.
Bank of America
Conference Center
5th Floor
225 Franklin Street
Boston, MA

Sincerely,

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House P3 Panel Calls for Supporting Greater Use of P3S.

The House Transportation and Infrastructure's special Panel on Public-Private Partnerships on Wednesday recommended improving public sector capacity to undertake P3s, lowering barriers the federal government to entering P3s agreements and ensuring transparency and accountability when the government and the private sector partner on infrastructure projects.

The panel's final report called for creating a Transportation Procurement Office in the Department of Transportation to implement P3 procurement best practices, including P3 model contracts, and continuing the Transportation Infrastructure Finance and Innovation Act (TIFIA) program.

"Billions of dollars of infrastructure needs in the U.S. are in search of funding, and well-executed public-private partnerships can enhance the delivery and management of infrastructure," Rep. John Duncan (R-Tenn), chairman of the P3 panel, said. "P3s cannot provide the sole solution to all of the Nation's infrastructure needs, but they can offer significant benefits, particularly for high-cost, technically complex projects that otherwise may risk dying on the vine."

Echoing Duncan's statement, Rep. Peter DeFazio (D-Ore.), told reporters the even under optimal conditions, only 10 to 12 percent of infrastructure would be funded through P3s.

"We are still going to need a very significant and robust federal investment to solve these problems," DeFazio said at a press conference.

In addition to proposals to streamline the P3 process for government, the report proposes improvements to traditional procurement processes.

Over the past six months, the panel held roundtables, hearings and meetings in an effort to understand the role P3s play in development and delivery of transportation and infrastructure projects. In March, NCPPP President Sandra Sullivan testified before the panel, discussing the importance of P3s in water infrastructure.

NCPPP
By Editor September 17, 2014

Social Impact Bonds are Going Mainstream: Forbes.

Now making waves in public finance circles are social impact bonds (SIBs). The bipartisan funding concept is a type of "Pay For Success" model where private investors invest capital and manage public projects, usually aimed at improving social outcomes for at-risk individuals, with the goal of reducing government spending in the long-term. Some social impact bonds seek to reduce the prison population through funding rehabilitation and employment programs for first-time offenders with the ultimate goal of reducing recidivism rates. Other SIBs seek to reduce the number of children in foster care. The catch is that private investors front all the costs and will be paid back a financial return by the government if and only if social outcomes are improved based on some standard measurement. The profit-motivating component comes from the fact that some of the savings from reduced costs for the government can be used to pay back the investor contingent upon their success. Now, Congress is considering the bipartisan Social Impact Bond Act, legislation that will enable the U.S. federal government to allocate $300 million to SIBs. A House Committee on Ways and Means hearing discussing the merits of social impact bonds led by the two co-sponsors of the bill, Rep. Todd Young (R-IN) and Rep. John Delaney (D-MD), was held last week.

Continue Reading.

Future MCDC Settlements May Be More Detailed.

CHICAGO – Future Municipalities Continuing Disclosure Cooperation initiative settlements may offer more detail on the Securities and Exchange Commission's priorities and the SEC's Office of Municipal Securities may offer more municipal advisor rule guidance, commission officials said Thursday.

The information came from two SEC lawyers speaking on separate panels at the National Association of Bond Lawyers' Bond Attorneys' Workshop, which concluded Friday.

The SEC's MCDC program, which offers reduced settlement terms to issuers and underwriters who voluntarily report instances over the past five years in which their official statements falsely claimed compliance with continuing disclosure obligations, was the hottest topic of the conference. Lawyers repeatedly tried to get the lone SEC enforcement official present to reveal more detail on the SEC enforcement division's thinking.

During a discussion panel devoted to MCDC, Kevin Guerrero, a senior counsel in the enforcement division's municipal securities and public pensions unit, revealed some additional detail on what market participants can expect from MCDC settlements. Although he was unprepared to make promises to the attorneys present, Guerrero said the commission is mindful of the criticism that was doled out by the legal community after the SEC released an MCDC settlement with Kings Canyon Joint Unified School District in July that was vague. That settlement order referenced various failures to file continuing disclosures by the district, but did little to offer the market more clues about what sorts of continuing disclosure lapses the SEC is most interested in.

Guerrero told the bond lawyers that he hopes future orders will be more detailed. He also said it is likely that settlements with broker-dealers, whose deadline to self-report passed at midnight Sept. 9, would include all deals they reported to the SEC as opposed to separate orders for each different issuer for which they underwrote bonds. The SEC probably will not wait until the issuer reporting deadline of Dec. 1 to start releasing those dealer settlements, he added.

"I expect we will try to churn these out as we get the settlements completed," Guerrero said.

Rebecca Olsen, chief counsel in the SEC's muni office, told bond lawyers that the commission staff could issue further municipal advisor rule guidance. Although the muni office has no "concrete plans" to release another batch of information about the massive rule approved last fall, it is mulling the possibility, she said.

"It's possible we may consider a few additional topics on the investment side, including possibly something on local government investment pools," Olsen said.

There is still apprehension among dealers about dealing with investments under the MA rule, which implemented the Dodd-Frank Act's requirement that individuals and firms giving advice to municipalities be subject to a fiduciary duty to place the clients' interests over their own.

All bond proceeds and muni escrows are subject to the rule, and Utah State Treasurer Richard Ellis noted during a different panel discussion that municipalities must keep track of where they put bond money because even a small amount of bond proceeds could "taint" a much larger pool of tax revenue dollars so that the advisers would be considered municipal advisors subject to federal oversight.

The SEC has already offered some guidance on the subject, saying that dealers could rely on a good faith effort to determine that a fund did not contain bond proceeds, if there was evidence to support that conclusion. Dealers could make use of exemptions from the MA rule to protect themselves from having to register, including by running that business through a registered investment advisory arm of the business, but firms have said that would increase costs for issuers.

THE BOND BUYER

BY KYLE GLAZIER
SEP 19, 2014 12:07pm ET

Quick-Turn Bond Brokers Would Disclose Profits Under Finra Plan.

Bond dealers who match retail buyers and sellers without assuming much risk themselves would be required to disclose their sales markups under a rule proposed today by the brokerage industry's self-regulator.

The Financial Industry Regulatory Authority measure would cover matched pairs, where firms fill client orders with bonds they hold for no more than one day, according to a statement released today. While stock brokers must tell investors how much they earn, many corporate bond dealers have profited from an opaque market where most trades are completed by telephone.

Securities regulators have sought a way to force dealers to disclose markups on certain bond sales, proposing rules on three occasions that were never adopted. Under Finra's new plan, which applies to trades involving 100 bonds or fewer, investors would see the price they paid or received as well as the dealer's price on their confirmation statement.

"The fact that we see these trades occurring in the vast majority of cases in a very short time period, and we see significant variation with respect to the type of markups that occur, suggest to me there could be significant value to relaying that information to customers," Finra Chief Executive Officer Richard G. Ketchum said in an interview this week.

Lobbyists for Wall Street brokerages say regulators should be careful to avoid judging markups based simply on how much time passes between when a dealer buys and sells a bond.

Balancing Needs

"We support reasonable efforts to improve bond-market transparency and we intend to study and comment on Finra's proposal," Sean Davy, managing director of the Securities Industry and Financial Markets Association, said in a statement. "A key issue for Sifma will be balancing the need to improve transparency with the need to preserve market liquidity."

The Finra proposal was prompted by Securities and Exchange Commission Chair Mary Jo White, who called in June for regulators to develop rules for disclosure of markups by the end of the year. SEC Commissioners Daniel M. Gallagher and Michael S. Piwowar also have called for the disclosure. The SEC must approve the proposal for it to become effective.

Finra's Board of Governors today also approved rule proposals aimed at improving transparency in off-exchange venues that trade stocks and bonds. One would require electronic bond-trading platforms to report to the regulator the price quotes they disseminate for corporate debt and mortgage bonds backed by the U.S. government. Finra said it would separately seek public comment on whether to make those quotations available to the public.

Oversee Testing

The board approved another proposal sought by White — extending Finra's registration requirements to employees of trading firms who develop computerized trading algorithms. Finra also issued new guidance for how firms are expected to oversee the testing and use of automated trading tools to ensure they aren't manipulative and don't harm markets.

"What we're basically describing is best practice in the industry," Ketchum said. "There is a wide variation of controls existing there and we think there ought to be a greater focus across the board."

By Dave Michaels Sep 19, 2014 11:56 AM PT

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IRS LTR: Utility's Rate Base Reduction Inconsistent with ACRS Rules.

The IRS ruled that the reduction of a public utility company's rate base by the full amount of its accumulated deferred income tax account balance unreduced by the balance of its account balance relating to net operating loss carryovers would be inconsistent with the requirements of section 168(i)(9) for use of the accelerated cost recovery system.

Citations: LTR 201438003

Third Party Communication: None
Date of Communication: Not Applicable
Person To Contact: * * *, ID No. * * *
Telephone Number: * * *

Index Number: 167.22-01
Release Date: 9/19/2014
Date: June 12, 2014

Refer Reply To: CC:PSI:B06 – PLR-104157-14

LEGEND:

Taxpayer = * * *
Parent = * * *
State A = * * *
Commission A = * * *
Commission B = * * *
Year A = * * *
Year B = * * *
Year C = * * *
Year D = * * *
Date A = * * *
Date B = * * *
Date C = * * *
Date D = * * *
Case = * * *
Director = * * *

Dear * * *:

This letter responds to the request, dated January 24, 2014, and additional submission dated May 19, 2014, submitted on behalf of Taxpayer for a ruling on the application of the normalization rules of the Internal Revenue Code to certain accounting and regulatory procedures, described below.

The representations set out in your letter follow.

Taxpayer is a regulated, investor-owned public utility incorporated under the laws of State A primarily engaged in the business of supplying electricity in State A. Taxpayer is subject to the regulatory jurisdiction of Commission A and Commission B with respect to terms and conditions of service and particularly the rates it may charge for the provision of service. Taxpayer's rates are established on a rate of return basis.

Taxpayer is wholly owned by Parent, and Taxpayer is included in a consolidated federal income tax return of which Parent is the common parent. Taxpayer employs the accrual method of accounting and reports on a calendar year basis.

Taxpayer filed a rate case application on Date A (Case). In its filing, Taxpayer used as its starting point actual data from the historic test period, calendar Year A. It then projected data for Year B through Year C. Taxpayer updated, amended, and supplemented its data several times during the course of the proceedings. Rates in this proceeding were intended to, and did, go into effect for the period Date B through Date C.

In computing its income tax expense element of cost of service, the tax benefits attributable to accelerated depreciation were normalized and were not flowed thru to ratepayers.

In its rate case filing, Taxpayer anticipated that it would claim accelerated depreciation, including "bonus depreciation" on its tax returns to the extent that such depreciation was available in all years for which data was provided. Additionally, Taxpayer forecasted that it would incur a net operating loss (NOL) in Year D. Taxpayer anticipated that it had the capacity to carry back a portion of this NOL with the remainder producing a net operating loss carryover (NOLC) as of the end of Year D.

On its regulatory books of account, Taxpayer "normalizes" the differences between regulatory depreciation and tax depreciation. This means that, where accelerated depreciation reduces taxable income, the taxes that a taxpayer would have paid if regulatory depreciation (instead of accelerated tax depreciation) were claimed constitute “cost-free capital” to the taxpayer. A taxpayer that normalizes these differences, like Taxpayer, maintains a reserve account showing the amount of tax liability that is deferred as a result of the accelerated depreciation. This reserve is the accumulated deferred income tax (ADIT) account. Taxpayer maintains an ADIT account. In addition, Taxpayer maintains an offsetting series of entries — a “deferred tax asset” and a “deferred tax expense” — that reflect that portion of those ‘tax losses’ which, while due to accelerated depreciation, did not actually defer tax because of the existence of an NOLC.

In the setting of utility rates in State, a utility’s rate base is offset by its ADIT balance. In its rate case filing and throughout the proceeding, Taxpayer maintained that the ADIT balance should be reduced by the amounts that Taxpayer calculates did not actually defer tax due to the presence of the NOLC, as represented in the deferred tax asset account. Thus, Taxpayer argued that the rate base should be reduced as of the end of Year D by its federal ADIT balance net of the deferred tax asset account attributable to the federal NOLC. It based this position on its determination that this net amount represented the true measure of federal income taxes deferred on account of its claiming accelerated tax depreciation deductions and, consequently, the actual quantity of “cost-free” capital available to it. It also asserted that the failure to reduce its rate base offset by the deferred tax asset attributable to the federal NOLC would be inconsistent with the normalization rules Testimony by another participant in Case argued against Taxpayer’s proposed calculation of ADIT.

Commission A, in an order issued on Date D, held that it is inappropriate to include the NOL in rate base for ratemaking purposes. Commission A further stated that it is the intent of the Commission that Taxpayer comply with the normalization method of accounting and tax normalization regulations. Commission noted that if Taxpayer later obtains a ruling from the IRS which affirms Taxpayer’s position, Taxpayer may file seeking an adjustment. Commission A also held that to the extent tax normalization rules require recording the NOL to rate base in the specified years, no rate of return is authorized.

Taxpayer requests that we rule as follows:

1. Under the circumstances described above, the reduction of Taxpayer’s rate base by the full amount of its ADIT account balance unreduced by the balance of its NOLC-related account balance would be inconsistent with (and, hence, violative of) the requirements of § 168(i)(9) and § 1.167(l)-1 of the Income Tax regulations.

2. For purposes of Ruling 1 above, the use of a balance of Taxpayer’s NOLC-related account balance that is less than the amount attributable to accelerated depreciation computed on a “with and without” basis would be inconsistent with (and, hence, violative of) the requirements of § 168(i)(9) and § 1.167(l)-1 of the Income Tax regulations.

3. Under the circumstances described above, the assignment of a zero rate of return to the balance of Taxpayer’s NOLC-related account balance would be inconsistent with (and, hence, violative of) the requirements of § 168(i)(9) and § 1.167(l)-1.

LAW AND ANALYSIS

Section 168(f)(2) of the Code provides that the depreciation deduction determined under section 168 shall not apply to any public utility property (within the meaning of section 168(i)(10)) if the taxpayer does not use a normalization method of accounting.

In order to use a normalization method of accounting, section 168(i)(9)(A)(i) of the Code requires the taxpayer, in computing its tax expense for establishing its cost of service for ratemaking purposes and reflecting operating results in its regulated books of account, to use a method of depreciation with respect to public utility property that is the same as, and a depreciation period for such property that is not shorter than, the method and period used to compute its depreciation expense for such purposes. Under section 168(i)(9)(A)(ii), if the amount allowable as a deduction under section 168 differs from the amount that-would be allowable as a deduction under section 167 using the method, period, first and last year convention, and salvage value used to compute regulated tax expense under section 168(i)(9)(A)(i), the taxpayer must make adjustments to a reserve to reflect the deferral of taxes resulting from such difference.

Section 168(i)(9)(B)(i) of the Code provides that one way the requirements of section 168(i)(9)(A) will not be satisfied is if the taxpayer, for ratemaking purposes, uses a procedure or adjustment which is inconsistent with such requirements. Under section 168(i)(9)(B)(ii), such inconsistent procedures and adjustments include the use of an estimate or projection of the taxpayer's tax expense, depreciation expense, or reserve for deferred taxes under section 168(i)(9)(A)(ii), unless such estimate or projection is also used, for ratemaking purposes, with respect to all three of these items and with respect to the rate base.

Former section 167(l) of the Code generally provided that public utilities were entitled to use accelerated methods for depreciation if they used a "normalization method of accounting." A normalization method of accounting was defined in former section 167(l)(3)(G) in a manner consistent with that found in section 168(i)(9)(A). Section 1.167(l)-1(a)(1) of the Income Tax Regulations provides that the normalization requirements for public utility property pertain only to the deferral of federal income tax liability resulting from the use of an accelerated method of depreciation for computing the allowance for depreciation under section 167 and the use of straight-line depreciation for computing tax expense and depreciation expense for purposes of establishing cost of services and for reflecting operating results in regulated books of account. These regulations do not pertain to other book-tax timing differences with respect to state income taxes, F.I.C.A. taxes, construction costs, or any other taxes and items.

Section 1.167(l)-1(h)(1)(i) provides that the reserve established for public utility property should reflect the total amount of the deferral of federal income tax liability resulting from the taxpayer's use of different depreciation methods for tax and ratemaking purposes.

Section 1.167(l)-1(h)(1)(iii) provides that the amount of federal income tax liability deferred as a result of the use of different depreciation methods for tax and ratemaking purposes is the excess (computed without regard to credits) of the amount the tax liability would have been had the depreciation method for ratemaking purposes been used over the amount of the actual tax liability. This amount shall be taken into account for the taxable year in which the different methods of depreciation are used. If, however, in respect of any taxable year the use of a method of depreciation other than a subsection (1) method for purposes of determining the taxpayer's reasonable allowance under section 167(a) results in a net operating loss carryover to a year succeeding such taxable year which would not have arisen (or an increase in such carryover which would not have arisen) had the taxpayer determined his reasonable allowance under section 167(a) using a subsection (1) method, then the amount and time of the deferral of tax liability shall be taken into account in such appropriate time and manner as is satisfactory to the district director.

Section 1.167(l)-1(h)(2)(i) provides that the taxpayer must credit this amount of deferred taxes to a reserve for deferred taxes, a depreciation reserve, or other reserve account. This regulation further provides that, with respect to any account, the aggregate amount allocable to deferred tax under section 167(1) shall not be reduced except to reflect the amount for any taxable year by which Federal income taxes are greater by reason of the prior use of different methods of depreciation.

That section also notes that the aggregate amount allocable to deferred taxes may be reduced to reflect the amount for any taxable year by which federal income taxes are greater by reason of the prior use of different methods of depreciation under section 1.167(l)-1(h)(1)(i) or to reflect asset retirements or the expiration of the period for depreciation used for determining the allowance for depreciation under section 167(a).

Section 1.167(l)-1(h)(6)(i) provides that, notwithstanding the provisions of subparagraph (1) of that paragraph, a taxpayer does not use a normalization method of regulated accounting if, for ratemaking purposes, the amount of the reserve for deferred taxes under section 167(l) which is excluded from the base to which the taxpayer's rate of return is applied, or which is treated as no-cost capital in those rate cases in which the rate of return is based upon the cost of capital, exceeds the amount of such reserve for deferred taxes for the period used in determining the taxpayer's expense in computing cost of service in such ratemaking.

Section 1.167(l)-1(h)(6)(ii) provides that, for the purpose of determining the maximum amount of the reserve to be excluded from the rate base (or to be included as no-cost capital) under subdivision (i), above, if solely an historical period is used to determine depreciation for Federal income tax expense for ratemaking purposes, then the amount of the reserve account for that period is the amount of the reserve (determined under section 1.167(l)-1(h)(2)(i)) at the end of the historical period. If such determination is made by reference both to an historical portion and to a future portion of a period, the amount of the reserve account for the period is the amount of the reserve at the end of the historical portion of the period and a pro rata portion of the amount of any projected increase to be credited or decrease to be charged to the account during the future portion of the period.

Section 1.167(l)-1(h) requires that a utility must maintain a reserve reflecting the total amount of the deferral of federal income tax liability resulting from the taxpayer's use of different depreciation methods for tax and ratemaking purposes. Taxpayer has done so. Section 1.167(l)-1(h)(6)(i) provides that a taxpayer does not use a normalization method of regulated accounting if, for ratemaking purposes, the amount of the reserve for deferred taxes which is excluded from the base to which the taxpayer's rate of return is applied, or which is treated as no-cost capital in those rate cases in which the rate of return is based upon the cost of capital, exceeds the amount of such reserve for deferred taxes for the period used in determining the taxpayer's expense in computing cost of service in such ratemaking. Section 56(a)(1)(D) provides that, with respect to public utility property the Secretary shall prescribe the requirements of a normalization method of accounting for that section.

Regarding the first issue, § 1.167(l)-1(h)(6)(i) provides that a taxpayer does not use a normalization method of regulated accounting if, for ratemaking purposes, the amount of the reserve for deferred taxes which is excluded from the base to which the taxpayer's rate of return is applied, or which is treated as no-cost capital in those rate cases in which the rate of return is based upon the cost of capital, exceeds the amount of such reserve for deferred taxes for the period used in determining the taxpayer's expense in computing cost of service in such ratemaking. Because the ADIT account, the reserve account for deferred taxes, reduces rate base, it is clear that the portion of an NOLC that is attributable to accelerated depreciation must be taken into account in calculating the amount of the reserve for deferred taxes (ADIT). Thus, the order by Commission A is not in accord with the normalization requirements.

Regarding the second issue, § 1.167(l)-1(h)(1)(iii) makes clear that the effects of an NOLC must be taken into account for normalization purposes. Section 1.167(l)-1(h)(1)(iii) provides generally that, if, in respect of any year, the use of other than regulatory depreciation for tax purposes results in an NOLC carryover (or an increase in an NOLC which would not have arisen had the taxpayer claimed only regulatory depreciation for tax purposes), then the amount and time of the deferral of tax liability shall be taken into account in such appropriate time and manner as is satisfactory to the district director. While that section provides no specific mandate on methods, it does provide that the Service has discretion to determine whether a particular method satisfies the normalization requirements. The “with or without” methodology employed by Taxpayer is specifically designed to ensure that the portion of the NOLC attributable to accelerated depreciation is correctly taken into account by maximizing the amount of the NOLC attributable to accelerated depreciation. This methodology provides certainty and prevents the possibility of “flow through” of the benefits of accelerated depreciation to ratepayers. Under these facts, any method other than the “with and without” method would not provide the same level of certainty and therefore the use of any other methodology is inconsistent with the normalization rules.

Regarding the third issue, assignment of a zero rate of return to the balance of Taxpayer’s NOLC-related account balance would, in effect, flow the tax benefits of accelerated depreciation deductions through to rate payers. This would violate the normalization provisions.

We rule as follows:

1. Under the circumstances described above, the reduction of Taxpayer’s rate base by the full amount of its ADIT account balance unreduced by the balance of its NOLC-related account balance would be inconsistent with the requirements of § 168(i)(9) and § 1.167(l)-1 of the Income Tax regulations.

2. For purposes of Ruling 1 above, the use of a balance of Taxpayer’s NOLC-related account balance that is less than the amount attributable to accelerated depreciation computed on a “with and without” basis would be inconsistent with the requirements of § 168(i)(9) and § 1.167(l)-1 of the Income Tax regulations.

3. Under the circumstances described above, the assignment of a zero rate of return to the balance of Taxpayer’s NOLC-related account balance would be inconsistent with the requirements of § 168(i)(9) and § 1.167(l)-1.

This ruling is based on the representations submitted by Taxpayer and is only valid if those representations are accurate. The accuracy of these representations is subject to verification on audit.
Except as specifically determined above, no opinion is expressed or implied concerning the Federal income tax consequences of the matters described above.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides it may not be used or cited as precedent. In accordance with the power of attorney on file with this office, a copy of this letter is being sent to your authorized representative. We are also sending a copy of this letter ruling to the Director.

Sincerely,

Peter C. Friedman
Senior Technician Reviewer,
Branch 6
(Passthroughs & Special Industries)
cc:
* * *

SEC Could Halt Muni Bond Sales.

CHICAGO – The Securities and Exchange Commission will probably use emergency court action to stop state and local governments from selling municipal bonds if it thinks their offerings are fraudulent, an enforcement division official told bond lawyers meeting here.

Kevin Guerrero, a senior counsel at the muni and public pensions unit in the SEC's enforcement division made the comments during a panel discussion at the National Association of Bond Lawyers' Bond Attorneys' Workshop conference. Guerrero referenced the commission's June enforcement action against Harvey, Ill., when the SEC went to court and filed a successful request to block a planned debt issue by the Chicago suburb after it and its Comptroller, Joseph Letke, allegedly engaged in a several-year fraudulent scheme to divert bond proceeds for improper, undisclosed purposes.

While it is not unusual for the commission to seek emergency action from a court to restrain a party from making a fraudulent offering, Guerrero noted the Harvey, Ill. case was the first time the commission had done so in the muni market. The SEC found the alleged fraud in a previous offering, and when it discovered an upcoming offering during the course of the investigation, it moved to block a muni sale for the first time.

"I don't think it will be the last," Guerrero warned.

The SEC lawyer also reinforced the SEC's stance of offering minimal concrete guidance on participation in its Municipalities Continuing Disclosure Cooperation initiative, which offers lenient settlement terms to issuers and underwriters who self-report instances in the last five years in which their official statements falsely claimed compliance with their continuing disclosure obligations. NABL members and issuers have asked for more guidance from the SEC about the MCDC, including information on both what the commission might consider to be "material" disclosure failures as well as procedural guidance on how to submit the reports.

Guerrero continued to deflect requests under questioning from attending bond lawyers. While the deadline for underwriters to participate has passed, attorneys are still interested in how issuers should process their filings, which are due by Dec. 1. Some bond lawyers have questioned whether only the most flagrant violations should be submitted under the MCDC.

"Is it better to just send in the stinkers?" asked Bracewell & Giuliani partner Paul Maco, who was on the panel.

Guerrero said issuers need to use their own best judgment, but added that the SEC thinks it is reasonable to use a "bucket" approach to classify some submissions as very obvious violations and others as borderline. He added that issuers who have had their deals reported by their underwriters could choose to send the enforcement division a letter making the case that a deal didn't include an enforceable violation. The SEC can't offer much guidance beyond that on how issuers should organize their deals for submission, he said.

The NABL conference concludes Friday.

THE BOND BUYER
BY KYLE GLAZIER
SEP 18, 2014 1:49pm ET

Moody's Analytics: Financial Analysis of Local Governments.

This seminar provides an in-depth workshop on the financial statements seen in U.S. public finance. With real-world case studies, delegates will learn where to find information in an audit, what the line items mean, and key ratios and trend analysis used by Moody's analysts.

November 3, 2014
New York

For more information and to register, click here.

Reed Smith: Private Partnerships Can Work - Pittsburgh Penguins and Community Agree on Development Plans.

The Pittsburgh Penguins have finalized a groundbreaking agreement with local community groups after years of negotiations involving the development of the 28 acre site where the former Civic Arena once stood. The agreement provides for, among other things, the inclusion of minority participation in the development of the 28 acres and a percentage of affordable housing.

The announcement, made by City and County officials earlier this week, was a turning point in what has been a long process of negotiations between competing interest groups and stakeholders in the Hill District. In articles published in the Pittsburgh Post-Gazette and Pittsburgh Business Times, the team and local political leaders announced a wide ranging set of terms addressing the minority participation details and the percentage of affordable housing.

The full text of the Post-Gazette article can be found here.

The full text of the Pittsburgh Business Times article can be found here.

Last Updated: September 16 2014
Article by Gerald S. Dickinson
Reed Smith

GASB: What Municipal Analysts Need to Know about Governmental Accounting -- Oct. 24, NYC .

The Governmental Accounting Board (GASB) is joining SIFMA to present, "What Municipal Analysts Need to Know about Governmental Accounting."

This seminar will provide in-depth instruction on the rules that state and local governments follow when accounting for and reporting their finances in audited financial reports. It will cover the basics from the perspective of the financial statement analyst, focusing on how the accounting standards affect the information that analysts receive, to the significant new changes to government financial reports that analysts have seen or will soon see, such as the new fund balance classifications, the appearance of deferrals and the forthcoming pension information.

Registration includes a free copy of “An Analyst’s Guide to Government Financial Statements,” 2nd Edition, which will serve as the text for the session.

REGISTER.

Treasury's Hiteshew Warns of Heightened Scrutiny for Munis.

CHICAGO – Bankruptcies in Jefferson County, Ala. and Detroit, as well as regulatory and enforcement actions, have garnered increased scrutiny of the bond market in Washington, D.C. and market participants need to better understand the policymaking process, a key Treasury Department official told bond lawyers on Wednesday.

Kent Hiteshew, director of Treasury’s State and Local Finance Office, made the remarks at the opening session of the National Association of Bond Lawyers’ Bond Attorneys’ Workshop, which is in session here until Friday. He discussed municipal bankruptcies, the Municipalities Continuing Disclosure Cooperation Initiative, the new liquidity coverage ratio rule, and other current topics in the market to illustrate how the perception of the muni market have changed in ways that market participants should be aware of.

Also during the session, Kevin Guerrero, a senior counsel at the Securities and Exchange Commission’s enforcement division’s muni and pensions unit, warned that that the SEC will likely seek financial penalties against issuers who have violations and do not participate in the MCDC. Issuers have until Dec. 1 to self-report failures to disclose noncompliance with continuing disclosure obligations for bonds issued during a five-year period.

Hiteshew began his remarks by talking about the tremendous growth of the municipal market. “When I started my career in the early 1980s, total municipal debt outstanding was just $575 billion.” he recalled. Today the $3.7 trillion muni market is unique in the world as it provides low cost, easy capital market access to state and local governments large and small to finance our nation’s critical infrastructure needs. But, the system’s advantage of de-centralized capital planning and execution is also its challenge: there are over 50,000 issuers with more than 1.5 million distinct CUSIPs issued under more than 50 separate legal frameworks and state income tax exemptions.”

“Notwithstanding remarkably low historic default experience,” he continued, “the recent bankruptcies of Jefferson County, several California local governments and Detroit, and bid-rigging and swap scandals, while isolated, have increasingly captured headlines.”

“These events have increased attention and focus on the municipal market, particularly in the regulatory community,” he said.

Hiteshew urged a close reading of the Securities and Exchange Commission’s 2012 comprehensive muni market report, and said that understanding the SEC’s view that muni market is “opaque, illiquid and fragmented,” is important to understanding why bank regulators did not include munis as high-quality liquid assets in its liquidity coverage rule. Hiteshew acknowledged market fears that the exclusion of munis as HQLAs could hamper banks’ appetite for them and hurt the market, and said his office will be monitoring the situation to understand what impact the new rule is having on the market.

"My point here is that there is significant focus on the municipal market in Washington today," Hiteshew said. "Whether you agree with these developments or not, the municipal bond industry should be more cognizant of how it is perceived by policymakers and work to better understand the policymaking process."

Hiteshew also challenged NABL to perform an analysis of the legal treatment of "special revenues" during and after municipal bankruptcy. Recent municipal bankruptcies have brought increased attention to the treatment of bonds backed by a user or service fee versus general obligation bonds in bankruptcy proceedings. Hiteshew said recent NABL papers on other topics have been helpful.

Hiteshew also touted the Obama administration's proposal to create a permanent America Fast Forward Bond program. This proposal was included in the president's fiscal 2015 budget proposal.

The AFF bond program "would attract new sources of capital for infrastructure investment and provide significant benefits for both issuers and the overall municipal market," he said.

AFF bonds would be similar to Build America Bonds in that they would be in the direct-pay mode, but the subsidy rate would be 28% instead of 35%. AFF bonds could be used for the same types of projects as BABs as well as current refundings and 501(c)(3) financings. They could also be used for projects that could be financed with private-activity bonds.

Starting in 2013, the subsidy payments to issuers have been reduced because of federal spending cuts known as sequestration. But the Obama administration's proposal precludes subsidies for AFF bonds from being reduced because of sequestration.

Hiteshew noted that AFF bonds would be a supplement, rather than a substitute, to tax-exempt bonds. The program would "make the tax-exempt market more efficient and actually bolster support for tax-exempt bonds among federal policymakers," he said.

Hiteshew said it is important that the AFF program be permanent in order to "incentivize investors to make a longer-term commitment to the municipal bond market and more effectively broaden the taxable investor base for infrastructure investment in our country." When BABs were being marketed, potential investors, particularly foreign investors and U.S. pension funds, told Treasury that they found the fact that BABs could only be issued for a short time period to be a disincentive to developing credit expertise and portfolio management systems for the bonds, he said.

"Overall, a new large class of institutional investors could be a healthy addition to the municipal market – enhancing both market liquidity and promoting improved disclosure standards," he said.

Additionally, AFF bonds would be helpful to the market because they "would provide issuers with an effective alternative when tax-exempt market supply-demand technicals turn negative and the value of tax exemption cheapens," Hiteshew said. "[AFF] Bond issuance could be used to reduce tax-exempt supply, thereby improving tax-exempt pricing — particularly on the long end of the curve where traditional tax-exempt demand is more limited."

Furthermore, "for larger issuers, America Fast Forward Bonds would provide an important additional source of demand when their traditional tax-exempt investors reach capacity limits," he said.

Hiteshew invited NABL members to give a new working group suggestions about innovative financing approaches to infrastructure.

The group, called the Interagency Infrastructure Finance Working Group, is co-led by Treasury

Secretary Jack Lew and Transportation Secretary Anthony Foxx. It is supposed to submit to President Obama by mid-November recommendations about how to increase collaboration between the public and private sectors on infrastructure development and promote awareness and understanding of innovative infrastructure financing programs.

Guerrero said the SEC enforcement division's muni and pensions unit of roughly 30 attorneys will spend the coming months combing through underwriter self-reports under MCDC, which were due earlier this month. Under the terms of the initiative, the enforcement division will recommend to the commission favorable settlement terms for both underwriters and issuers who self-report instances in the past five years in which the participated in deals where official statements falsely claimed compliance with continuing disclosure obligations.

Guerrero said that when evaluating MCDC submissions, the SEC may ask follow-up questions of the self-reporting entities and will contact them if the commission thinks enforcement is warranted. Guerrero urged issuers, who still have until Dec. 1 to report, to use their best judgment in deciding to do so.

THE BOND BUYER
BY KYLE GLAZIER and NAOMI JAGODA
SEP 17, 2014 4:20pm ET

U.S. Treasury Will Monitor Bank Liquidity Rule's Impact on Munis- Official.

(Reuters) – The U.S. Treasury will monitor the impact of a recent bank liquidity rule on the cost of new municipal debt issuance, a federal official said on Wednesday.

Kent Hiteshew, director of the Treasury's newly-formed Office of State and Local Finance, told a meeting of bond attorneys that he was aware of concerns that the elimination of municipal bonds from the definition of banks' high-quality liquid assets could potentially limit bank demand for the debt, pumping up costs of new bond issuance.

Earlier this month, the U.S. Federal Reserve, the Federal Deposit Insurance Corporation, and Office of the Comptroller of the Currency tightened rules on which assets banks can sell in the event of a credit crunch.

The rule did not count municipal bonds as "liquid assets," raising an outcry from states, cities, schools and other issuers of the debt.

Issuers say the rule will drive down banks' demand for their bonds, forcing them to offer higher interest rates on their debt in order to attract buyers. That, in turn, will make borrowing more expensive and curb their ability to embark on capital improvement projects.

Hiteshew noted that banks own just 12 percent of the $3.7 trillion market, although they have doubled their aggregate exposure to municipal debt since 2008.

He also told the National Association of Bond Lawyers' workshop that the Obama Administration continues its legislative push for America Fast Forward Bonds as an alternative to tax-exempt issuance. The proposed bond program would follow the short-lived, but popular Build America Bond program that was part of the economic stimulus act.

“Overall, rather than a threat to tax-exempt financing, we think a permanent direct-pay taxable program, like America Fast Forward Bonds, would make the tax-exempt market more efficient and actually bolster support for tax-exempt bonds among federal policy makers,” Hiteshaw said in prepared remarks.

Another speaker, Kevin Guerrero, senior counsel in the U.S. Securities and Exchange Commission’s enforcement division, said the regulator continues to crack down on deficient disclosures by borrowers, noting settlements with high-profile issuers New Jersey, Illinois and Kansas involving their unfunded pension liabilities.

“Municipal disclosure has been and will continue to be an ongoing focus for us,” Guerrero said, adding that the SEC’s new initiative that encourages issuers and underwriters to self-report potential disclosure problems is just one aspect of that focus.

He also said the first phase of the initiative, which began in March, ended earlier this month for underwriters to report potential disclosure problems and that the SEC was pleased with the response. Issuers have a reporting deadline of Dec. 1.

Wed Sep 17, 2014 11:12pm BST

(Reporting By Karen Pierog, additional reporting by Lisa Lambert in Detroit; Editing by Diane Craft)

SEC's Gallagher Calls for Reforms in Fixed Income Markets.

(Reuters) – A top U.S. regulator called for major reforms in the fixed income markets on Tuesday, saying many of the rules are out of date and lack enough protections for retail investors.

In prepared remarks for a market structure conference at Georgetown University, Securities and Exchange Commission Republican member Daniel Gallagher said he is concerned by “a troubling asymmetry of information” in the bond market.

“Retail participation in the municipal and corporate bond market is very high,” Gallagher said. “And yet, these markets are incredibly opaque to retail investors.”

Gallagher called for a handful of reforms, including potential changes by the industry to permit the use of more standardized contracts similar to the standardized structure of many derivatives products.

Such a change, he said, could help improve price transparency because it would facilitate a migration toward the less opaque exchange and electronic dealer-to-dealer trading.

He also said the SEC should consider removing references from the agency’s rules to CUSIP identifiers, or the nine-character code used to identify securities that are assigned by Standard & Poor’s CUSIP Global Services.

“The commission needs to do something about the de facto monopoly forcing the use of CUSIPs in the fixed income markets,” Gallagher said.

The push for reforms in the multi-trillion dollar municipal and corporate bond market by Gallagher and several other SEC commissioners marks a shift in focus by the agency.

Over the last several years, the SEC has mostly been focused on reforming the U.S. equity market, after a series of high-profile glitches and major market events damaged investor confidence.

Among those events were the May 2010 “flash crash,” the collapse and sale of Knight Capital to what became KCG Holdings after a technology error flooded the market with erroneous orders, and most recently, the major outage of Nasdaq OMX’s securities information processor (SIP), which receives all traffic quotes and orders for the exchange’s stocks.

Gallagher said Tuesday that some reforms are also needed in the equities space, particularly around SIPS, which are owned and operated by exchanges.

The market’s reliance on SIPs lessens competition for trading data, creates delays in gaining access to the information and concentrates risk around a single point of failure, he said.

This raises questions about whether the SEC should instead encourage market players to decide which data feeds they want to use, he said.

“We could mandate that the exchanges make their direct feeds available, for a fee, to third-party data vendors, who can then aggregate the last-sale prices. This could facilitate market competition for consolidated data,” Gallagher said.

BY SARAH N. LYNCH
WASHINGTON Tue Sep 16, 2014 2:20pm EDT

WSJ: In California, a Novel Use of Eminent Domain Hits Headwinds.

RICHMOND, Calif.— Morris LeGrande and Scott Barker would both benefit from a radical plan being eyed here to use the power of eminent domain to slash their home mortgages.

Yet the two homeowners occupy opposite ends of a debate over who should take responsibility for inflated housing debts—lenders or borrowers.

Without debt forgiveness, Mr. LeGrande says, he and his wife “have a decision to make as to how long we stay” in their house. Mr. Barker condemns the city’s plan to chop his mortgage as “snake-oil stuff” that is “wrong on a number of levels.” Both have loans that were among the 624 mortgages the city proposed forcibly purchasing last year.

Six years after the financial crisis spurred Washington to bail out entire sectors of the economy, few cities capture the unevenness of the nation’s recovery quite like this industrial hub of 100,000 residents on San Francisco’s East Bay.

Home prices in nearby San Francisco and Silicon Valley are setting new highs, but prices here still hover around 37% below where they were at their peak in 2006. More than a quarter of Richmond borrowers owe more than their homes are worth, according to a report prepared by researchers at the University of California, Berkeley, compared with 10% nationally.

How so many Richmond homeowners got so deeply in debt helps explain why the plan is so controversial. Borrowers often compensated for slowly rising incomes during the boom years by tapping rising home equity to pay for bills and repairs. Then when the market crashed, they were left with mortgage debt exceeding their homes’ values.

Richmond Mayor Gayle McLaughlin wants to use the city's property-seizing powers of eminent domain—normally reserved for shared public purposes like building roads—to help homeowners like Mr. LeGrande dig out from huge housing debts. Other cities, including Newark and Irvington in New Jersey, have proposed similar plans but none has advanced as far as Richmond's.

Under Richmond's plan, the city would seize the mortgage—but not the home—with backing from a private firm. They would then reduce the loan principal and refinance into a new government-guaranteed loan. That would leave the borrower with a fixed payment and less debt.

But the plan has met a wall of protest from banks and mortgage-bond investors, who have sued to block the seizures. They fear the plan works only if cities are able to buy loans at deep discounts, and mortgage investors say the proposal would make them less willing to extend credit in Richmond.

Mr. Barker's experience gives some sense of the costs involved. The city proposed buying 10 loans last year in his neighborhood, developed in 2004 on a ridge overlooking the San Francisco Bay. While homes have sold in the $600,000 range over the past year, the city last year offered to pay as little as $231,000 for some loans.

The next few weeks could determine the plan's fate. The seven-member City Council is one vote shy of the state-required supermajority needed to begin eminent-domain proceedings. Backers have been working furiously to find another city willing to join them, holding talks recently with city leaders in San Francisco; creating a joint-powers authority with another city would require a simple majority.

Time is running out because November's elections could alter city leadership. Ms. McLaughlin, who is running for a council seat, isn't eligible to run again for mayor.

Mr. LeGrande, who bought in Richmond in 2004 after he tired of moving between rentals in Oakland, figures that he owes $250,000 more than his four-bedroom home is worth.

The 58-year-old jazz musician and his wife, Luajuana, put no money down for the $310,000 purchase of their four-bedroom home by taking out two loans. They refinanced the two loans into a larger one in 2005, using some of the proceeds to pay down a car loan, fix a bathroom and repair a fence, he says.

The LeGrandes refinanced again to avoid higher payments, but by 2008, they fell behind on the loan, which had swelled to $423,000. Their mortgage company modified the loan twice. But without more help, Mr. LeGrande said, "it becomes a bad decision to keep this house."

An extreme example: Doris Ducre, a 61-year-old laboratory technician, bought her parents' four-bedroom home here in 1999 and steadily increased her mortgage debt from $144,000 to $412,000 over eight years.

She says she and her husband used the proceeds of refinancing—after brokers took their cut—to fix her home. But the property today is worth far less today than the $385,000 they still owe.

"Right now, we're like renters. I don't own anything," she said. "The banks got bailed out, and the average person was left behind."

Meanwhile, even though Mr. Barker and his wife, Vivian, say it is in their interest to accept the city's help, they don't want it. They bought their home for $997,000 with 20% down in 2005, just as the market peaked. They recall neighbors who walked away from homes as the foreclosure crisis deepened.

“Who’s going to want to invest in loans if someone like us, paying their loan, can get it written down?” said Mr. Barker, a software salesman who lost his job during the recession and was unemployed for 18 months. “There’s a ton of people who got screwed, but I don’t feel like this is the answer.”

THE WALL STREET JOURNAL

By NICK TIMIRAOS

Sept. 16, 2014 1:16 p.m. ET

Write to Nick Timiraos at nick.timiraos@wsj.com

Duane Morris: Has P3 Reached a Tipping Point in The United States?

Malcom Gladwell’s 2000 best-seller The Tipping Point: How Little Things Can Make a Big Difference posits that most social shifts (or epidemics, as Gladwell refers to them in his book) share common characteristics, including what he refers to as (1) the law of the few, (2) the stickiness factor, and (3) the power of context. Gladwell asserts that a few influential innovators, whether purposefully or unintentionally, influence society to change, that the changing force has an “it” factor that captures our imaginations and that societal context can speed up change in a way that seems epidemic. These three factors come together and form a phenomenon Gladwell refers to as a Tipping Point, where an idea can go from small to big in a real hurry.

Though not stated with the exact paradigm used in Gladwell’s book, this is essentially what Moody’s Investors Services Managing Director Chee Mee Hu says is happening for Public Private Partnerships (P3s) in the United States. He states:

More US states and governments around the world are using P3s to develop and maintain public infrastructure . . . Two inter-related trends are at work that could cause P3 activity to expand: the need to upgrade, replace or build out essential infrastructure assets and the inability of governments to finance these current and future infrastructure investments entirely on their balance sheets.

A solution to an infrastructure problem is taking hold in this country, as a result of its adoption by influencers, and the timing and context are perfect for that idea to become really big. The Moody’s press release is available here and refers to Moody’s recently released “Global P3 Landscape” report.

P3s have long been touted as a solution to infrastructure funding shortfalls, and, slowly, this concept is taking root across the country. The Moody’s article cites to a number of P3 transportation projects already underway, but the reality is that P3 is also being used for downtown city planning in San Antonio and even for scientific cancer research. Furthermore, P3s are also being considered for all manner of infrastructure projects, including schools, ports, tunnels, bridges, and water treatment plants, to name but a few.

Moody’s states that P3 models have been steadily increasing over the last five years and that “given the sheer size of its infrastructure and growing urban population, the US has the potential of becoming the largest market for public-private partnerships (P3s) in the world.”

Last Updated: September 12 2014

Article by Antony L Sanacory and William W. Fagan III
Duane Morris LLP

Disclaimer: This Alert has been prepared and published for informational purposes only and is not offered, nor should be construed, as legal advice. For more information, please see the firm's full disclaimer.

Orrick: FERC Proposes to Streamline Market-Based Rate Program.

On June 19, 2014, the Federal Energy Regulatory Commission ("FERC") issued a notice of proposed rulemaking ("NOPR") proposing to revise its policies for applications to sell energy, capacity, and ancillary services at market-based rates.

Generation owners and power marketers that sell wholesale energy, capacity, or ancillary services in the continental United States, outside of the area operated by the Electric Reliability Council of Texas, must obtain prior authorization from FERC to sell at market-based rates. FERC grants requests for market-based rate authority from sellers that can demonstrate that they and their affiliates lack or have adequately mitigated horizontal and vertical market power in the relevant geographic market. FERC uses a seller's balancing authority area or the relevant regional transmission organization ("RTO") or independent system operator market, as applicable, as the default geographic market. A seller that obtains market-based rate authority is subject to ongoing compliance obligations to demonstrate that it continues to lack or has adequately mitigated market power in its relevant market.

FERC's policy is to use two indicative screens for assessing an applicant's horizontal market power: the "pivotal supplier analysis" and the "wholesale market share analysis." Under each screen, FERC examines all of the generation owned or controlled by an applicant and its affiliates in the relevant market. Applicants that fail either indicative screen are rebuttably presumed to have market power and are given an opportunity to present other evidence to demonstrate that, despite the screen failure, they do not have market power. Once an applicant obtains market-based rate authority, it must comply with ongoing compliance obligations to demonstrate that it continues to lack or has adequately mitigated horizontal and vertical market power.

To streamline its horizontal market power analysis, FERC proposes to no longer require sellers in RTO markets to submit the indicative screens. Instead, wholesale power sellers in RTO markets would be permitted to rely on RTO market monitoring and mitigation measures to prevent the exercise of market power. FERC also clarifies that if all of the generation owned by a seller and its affiliates in the relevant and first-tier markets is fully committed, a seller does not need to submit the market screen analyses; instead, the seller can state that its capacity is fully-committed. FERC also proposes to clarify how sellers should prepare simultaneous transmission import limit studies, which measure the amount of power that can be imported into the relevant market.

FERC proposes to require sellers to provide an organization chart depicting their affiliates and upstream owners when filing initial market-based rate applications, updated market power analyses and notices of change in status. Under the proposed rule, sellers also would be required to submit the indicative screens and affiliated asset appendices in an electronic spreadsheet format that can be searched, sorted, and otherwise accessed using electronic tools. FERC seeks comment on whether it would be useful for FERC to develop a comprehensive searchable public database of the information contained in the asset appendices.

Under FERC's existing regulations, sellers with market-based rate authority must report to FERC any change in status that would reflect a departure from the characteristics FERC relied upon in granting market-based rate authority, including increases in affiliated generation of 100 MW or more. FERC proposes to clarify that the 100 MW reporting threshold is not limited to the geographic markets previously studied by a seller. That is, a seller must file a notice of change in status if it or its affiliates acquire generation that causes a cumulative net increase of 100 MW or more in any relevant geographic market. The revised regulations also would require sellers to include long-term firm purchases of capacity and/or energy in calculating the 100 MW change in status threshold.

FERC requires all market-based rate applicants, and sellers submitting a notice of change in status reporting new affiliates, to submit an asset appendix in the form prescribed in Order No. 697. In its NOPR, FERC states that the asset appendix should include all behind-the-meter generation and qualifying facilities owned or controlled by the applicant or its affiliates. FERC also proposes to allow sellers to aggregate their behind-the-meter generation by balancing authority area or market into one line on the asset appendix. Similarly, FERC proposes to allow sellers to aggregate their qualifying facilities under 20 MW by balancing authority area or market into one line. We note that while the proposed rule would alleviate some of the burdens associated with reporting numerous on-site generation, such as multiple rooftop residential or commercial solar facilities owned by a solar energy developer, the requirement to report all behind-the-meter generation will still be quite burdensome for sellers that own multiple small distributed generation facilities. We recommend that such sellers submit comments to FERC suggesting that the asset appendix should exclude all behind-the-meter generation that is 1 MW or smaller or that does not export power to the grid.

Finally, FERC provides guidance on the use of joint tariffs. FERC allows affiliated sellers within the same corporate family to choose whether to transact under a single market-based rate tariff for an entire corporate family or under separate tariffs. These "joint tariffs" allow sellers that are part of the same corporate family to designate a filing party to submit a single tariff on behalf of all affiliates within the corporate family. FERC notes that it is providing guidance on its website on how the corporate family should identify its designated filer and what each of the other filers should submit as a tariff record.

Comments on the NOPR are due by 5 PM Eastern on Tuesday, September 23, 2014.

Click here for a copy of the NOPR.

Last Updated: September 15 2014
Article by Adam Wenner and A. Cory Lankford
Orrick

Muni Funds Can Take the Spotlight by Buying Green.

Municipal bond fund managers are finding they can stand out from the competition and lure new investors by taking advantage of this year's flood of green bonds.

While overall municipal bond issuance is 12% below last year's level, issuance of green bonds, which are devoted to funding sustainable and environmentally beneficial projects, has surged in 2014. Green bond sales in the first half alone, including municipal and other green bonds, has surged to

$20 billion, matching the total for the past 7 years, according to Bank of America.

Muni managers are turning to green bonds to meet rising demand from investors that's resulted in net inflows to municipal bond funds for most of the year, including 11 of the last 12 weeks according to Lipper FMI. Just last week municipal bond funds reported inflows of $470.3 million, even though the broader municipal market experienced a sell-off. Interest in green funds has grown even as some of them have underperformed benchmarks, as they attract investors who are motivated by a desire to promote conservation or help offset global warming, not just the prospect of earning a return.

Going green "is a differentiating feature, no doubt about it," Brian Kinney, head of the global beta fixed income team at State Street Advisors, referring to SSA's High Quality Green Bond Fund. "In the field of high quality bond funds, having a green specific portfolio is an interesting feature."

To date, no green bond fund has been devoted exclusively to munis. The ones in existence also include corporate and asset-backed bonds. Fund managers say going green has differentiated their funds from the non-green ones that contain bonds of similar maturities or ratings.

"Instead of working against 500 other mutual funds, we are working against a few," Benji Baily, fixed income investment manager at Everence, said in an interview when discussing Everence Financial's Praxis Intermediate Income Fund, which Everence calls a green fund.

This summer's muni green bonds included such deals as the New York Environmental Facilities Corp.'s $213 million green bond issuance and the DC Water and Sewer Authority's $300 million green century bond, both issued in June.

Morgan Stanley is expected to price a $350 million Massachusetts green bond on Thursday. The retail order period started on Monday and is scheduled to last three days.

Revenues from the bonds will fund projects ranging from clean water and drinking water, conservation and habitat restoration.

New Investors Buy In

Municipal issuers of green bonds this year have been able to attract buyers with the green product who had not purchased bonds from the issuing municipality, or municipal bonds at all, previously, The Bond Buyer reported in June.

Green bond fund managers said they have also been able to increase and diversify the type of investors in their funds by going green.

Kinney said that when State Street launched its fund in the spring of 2012, the initial demand did not come from the usual participants in the fixed income sector. He said investors interested in the fund were focusing mainly on the fact the fund was green, and that many of them had initially been invested in equity.

"It appears the kinds of people who have an interest in green [bonds] in general are people who are somewhat concerned about climate change, who have concerns about quality of life and who have concerns about having value in their portfolio, other than those just looking out for the best return," Delmar King, fixed income manager at Everence, said in an interview.

Kinney also said the market's interest in green products is growing.

"We are increasingly seeing questions from investors that may not have been trying to invest in green products in previous issues," he said.

Big Banks Push Clients Towards Green Funds

Part of the reason green bond funds have been able to attract a broad and diverse group of buyers is because some of the larger banks that do not have green bond funds in place have recommended to their clients to buy into investment groups' green bond funds.

"We have not seen competing funds at Bank of America, JP Morgan, and ones like that," King said. "Some of these large asset managers have been coming to funds like us and saying 'we would like to have you on our green platform, we would like your fund to be an option.'"

Kinney said his group has also had conversations with banks and other intermediaries to aggregate smaller orders to invest in funds like State Street's green bond fund.

"We are not speaking directly to smaller players or retail players, because our fund is designed to be invested in by institutional buyers," he said.

Mauricio Agudelo portfolio manager of taxable fixed income at Calvert Investment Management said that it was less of a transition for Calvert to start luring green bond investors to its Calvert Green Bond Fund. Calvert has dealt in socially responsible investing for over 30 years, and it has recognition in the industry for that type of investing, he said.

Green Bond Funds Do Not Outperform

These green bond funds have managed to stand out from their competition and attract new clientele without outperforming benchmark municipal or corporate bond funds with similar maturities.

The Calvert Green Bond Fund's year-to-date return is 3.07% as of September 12, according to the group's website Calvert.com. Everence's Praxis Intermediate Income Fund returned 3.95% for the same period, a spokeswoman for Everence wrote in an email.

Both of these funds that contain green bonds with intermediate maturities YTD returns are not as large as the S&P Dow Jones Intermediate Municipal Index which has returned 7.80% as of Sept. 12, or the Barclays Intermediate Term Corporate Bond ETF, which returned 4.22% YTD as of Aug. 30.

S&P Dow Jones Indices Green Bond Fund has only returned 2.06% YTD as of September 12.

A spokeswoman for State Street wrote in an email that information about State Street's green bond fund couldn't be provided.

THE BOND BUYER
BY HILLARY FLYNN
SEP 15, 2014 2:26pm ET

FT: Century Bond Surge Defies Rate Fears.

Investors are seizing the chance to lend money to US companies and municipalities for up to 100 years in exchange for a chance to capture higher yields for longer.

Sales of the so-called ultra long bonds, those maturing in 50 years or longer, have exploded this year despite expectations of higher US bond yields, which may hit long-dated corporate and municipal debt.

Cleveland Clinic, the Ohio-based medical and research centre giant, became on Thursday the first not-for-profit healthcare company to sell 100-year bonds.
Strong demand from institutional investors, such as large pension funds and insurers, has boosted total returns on the bonds with investors leaving aside concerns about duration – a measure of the sensitivity of bond prices to changes in interest rates – in their bond portfolios.

Longer dated bonds have higher duration, meaning they are more vulnerable to interest rate increases.

"It is a special market, for investors who are comfortable managing a higher exposure to duration risks in exchange to adding great names to their portfolios and the possibility of earning higher yields," said Jay Sterns, director of public finance at Barclays.

Some large corporate borrowers, including Caterpillar and EDF, and not-for-profit organisations, such as the Massachusetts Institute of Technology, have tapped the ultra-long market this year.

Total sales of the securities are running at $14.3bn, a jump of almost 60 per cent from the same period in 2013, according to Dealogic.

Long-term corporate debt has generated a total return of 11.5 per cent so far in 2014 compared with a 3.6 per cent return on corporate bonds maturing in 10 years or less, according to Barclays.

The strong performance on long-term debt has been welcomed by pension funds and insurers, which have been traditionally the biggest buyers of this type of bond.
They use high-grade, longer-dated securities to match their underlying liabilities.

But a broader pool of buyers and borrowers has been increasingly attracted to the ultra-long corner of the market.

The Cleveland Clinic deal follows the sale of $350m worth of "century" bonds from the District of Columbia Water and Sewer Authority in July.

Cleveland Clinic completed the sale of $400m in securities maturing in 2114, with yields of about 4.85 per cent, compared with 3.27 per cent for the US 30-year note, according to people familiar with the sale.

Cleveland Clinic's century bonds received an investment-grade rating of Aa2 from Fitch Ratings, and will account for about 12 per cent of the company's total debt portfolio, according to Fitch Ratings.

Barclays and JPMorgan managed the offer.

Mr Sterns said there are at least another 15-20 tax-exempt healthcare companies with the right profile to sell century bonds.

"We saw the 100-year funding option as a very good opportunity for us given the combination of low borrowing costs and investor interest," said Steve Glass, chief financial officer of Cleveland Clinic.

The Financial Times

September 11, 2014 6:20 pm

By Vivianne Rodrigues in New York

[Municipal Market Advisors Municipal Issuers Brief - September 15, 2014.]

[Read the Brief.]

[EPA Disqualifies $481m of Tappan Zee Bridge Loan.]

ALBANY Gov. Andrew Cuomo said the state will appeal the federal government's decision Tuesday to strike down 94 percent of a controversial $511 million loan for the Tappan Zee Bridge replacement project.

The U.S. Environmental Protection Agency's regional office rejected using the loan for seven of 12 bridge-related projects, including $110 million slated for Hudson River dredging and $65 million to remove the current bridge between Rockland and Westchester counties.

In all, $481.8 million of the planned loan for part of the $3.9 billion bridge project was disallowed, according to a letter sent Tuesday to state officials by Joan Leary Matthews, director of EPA Region 2's Clean Water Division.

"If New York state spends either capitalization grant funds or recycled funds toward projects that EPA has determined to be ineligible, EPA will disallow those costs," she wrote.

The loan has been at the center of a months-long dispute between Cuomo's administration and environmental groups, who argued the loan was improper and not consistent with the fund it came from. And the loan could impact the final cost of the project — and how much tolls will need to increase to fund it.

The money was to come from the Clean Water State Revolving Fund, a pot of mostly federal funds that is reserved for financing sewer and clean-water projects, nearly always on the local level.

In June, the state Environmental Facilities Corp. — which administers the loan fund — unanimously approved the full $511 million loan, half with no interest and half at a low rate. The Public Authorities Control Board later cut that amount in half, but the Thruway Authority pledged to seek the rest at a later date.

Ultimately, the EPA agreed with the environmentalists, ruling Tuesday that the seven disallowed projects didn't comply with the goals of the loan program under the Clean Water Act.

Speaking to reporters Tuesday in New Paltz, Ulster County, Cuomo vowed to appeal the ruling. He said the rejection of the bulk of the loan wouldn't have an impact on the progress of the $3.9 billion construction project, which is scheduled to continue into 2018.

The state has 30 days to appeal to the EPA's disputes decision official.

"We'll go back and we'll appeal that," Cuomo said. "But remember again this was never part of the planning for the bridge financing in the first place. We'd like to get it done, but it's not like the bridge was dependent on it."

The Thruway Authority touted the loan as a way to help keep toll rates down on the Hudson River bridge, which connects Westchester and Rockland counties in the lower Hudson Valley. The state has already been approved for a separate federal Department of Transportation loan for up to $1.6 billion.

The Thruway has not revealed how much tolls will increase to help finance the project, and a long-promised task force to examine the toll has not yet been named.

The state may have an alternative plan, though. The state is receiving $4 billion in bank settlements over the next year, and Cuomo and state officials have indicated that a portion could go to transportation projects — perhaps to help fund the bridge.

The Environmental Facilities Corp. maintained that the latest loan was appropriate under the Clean Water Act because it would finance a project that would improve water quality in the Hudson, a national estuary. The bridge removal, for example, qualified because the span is covered in lead paint, the state authority argued.

The EPA ultimately disagreed.

Along with river dredging and removal of the old bridge, the federal regulator blocked loan funds for armoring the river bottom ($29.9 million), underwater noise protection ($48 million), a shared-use path ($66.7 million), Oyster bed restoration ($1.4 million) and the transfer of a falcon nest ($100,000), along with $160.7 million in engineering, design and legal fees.

Just $29.1 million of the loan was approved, with $14.4 million going toward stormwater-related projects.

Peter Iwanowicz, executive director of Environmental Advocates of New York, said the EPA decision “affirmed what we’ve said all along.”

“These projects aren’t eligible,” he said. “We should have never been in this position where we’re having this big kerfuffle about spending a half billion dollars on bridge construction when we have tens of billions of dollars of (clean water) projects that need to get done in the next decades.”

Matthew Driscoll, president of the Environmental Facilities Corp., said the state is on solid ground to appeal the EPA’s decision.

“The federal government has always given wide discretion to states in terms of these decisions,” Driscoll said. “So today is really a departure from that because this is the policy that EPA has followed for over 25 years.”

Jon Campbell, jcampbell1@gannett.com | @JonCampbellGAN 5:03 p.m. EDT September 16, 2014

JCAMPBELL1@gannett.com

Michigan Board OKs $450 Million Detroit Hockey Arena Bonds.

(Reuters) – The Michigan Strategic Fund board gave final approval on Wednesday for the sale of up to $450 million of 30-year revenue bonds for a downtown Detroit arena that will be home to the National Hockey League’s Detroit Red Wings.

The financing plan calls for $250 million of tax-exempt bonds backed by increases in tax collections on real estate and personal property from the development. The bonds will be priced through underwriter Merrill Lynch.

Another $200 million of variable-rate taxable bonds backed by arena concession fee payments will be privately placed with Comerica Bank.

The Detroit Downtown Development Authority, which will own the arena, will hedge interest rate risk on the bonds through a swap agreement with a yet-to-be named counterparty. According to a briefing memo on the deal, the authority will follow federal financial reform regulations known as Dodd-Frank and engage an independent representative to conduct negotiations.

Interest-rate swaps ensnared many municipalities during the last financial crisis. Swaps associated with Detroit's pension debt soured when interest rates and the city's credit ratings dropped. The money Detroit subsequently owed to the swap counterparties helped push it to file the biggest-ever municipal bankruptcy in July 2013.

The Detroit Downtown Development Authority approved the financing on Tuesday.

The authority has been working more than a year on a "new multipurpose events center" of at least 650,000 square feet that will have 18,000 seats and retail space. It expects it to open in 2017.

A U.S. Bankruptcy Court judge is currently evaluating Detroit's plan for restructuring its $18 billion of debt and obligations to exit bankruptcy. Anticipating the plan will win the judge's approval soon, city leaders are talking about a revitalized city with less blight and more economic development.

In a briefing memo, Mark Morante, senior advisor at the Michigan Economic Development Corporation, described the arena as an "innovative facility that will act as a powerful generator of economic activity and be a good urban neighbor."

He added that private parties will develop the area around the arena, making an "aggregate capital investment of at least $200,000,000 in projects."

That development will occur concurrently with the arena work "to more rapidly generate jobs, positive economic impact and transformation of the district," Morante wrote.

Wed Sep 17, 2014 6:36pm EDT

(Reporting by Lisa Lambert in Detroit and Karen Pierog in Chicago; Editing by James Dalgleish and Andre Grenon)

Fracking's Financial Losers: Local Governments.

Localities are forced to deal with much of the problems associated with fracking, while states and the federal government rake in all the revenue.

The shale gas market is an economic boon for the 30-odd states that permit fracking. The severance tax states impose on the process adds up. In 2010, it generated more than $11 billion. The flow of that revenue goes straight into state and federal piggy banks, as does increased corporate income tax revenue from energy companies profiting from fracking.

Localities, however, enjoy no such benefits. Instead, they get stuck with all the fracking problems: noise from blasting, storage of toxic chemicals, degraded water sources and heavy truck traffic, as well as the rising costs of cleaning up the detritus fracking leaves behind. North Dakota counties affected by hydraulic fracturing have reported to the state Department of Mineral Resources’ Oil and Gas Division that traffic, air pollution, jobsite and highway accidents, sexual assaults, bar fights, prostitution and drunk driving have all increased.

In addition, fracking, in many cases, negatively impacts property values, which in turn depresses property tax revenue. For property owners who own the rights to the oil and gas on their land, the effects of drilling can be offset by royalty payments. But localities have no revenue offset if properties lose value.

The financial risks posed by fracking have become significant enough to capture the attention of mortgage bankers and insurers, who appear to be adopting guidelines that forbid mortgage loans or insurance coverage on properties affected by drilling. According to a 2013 survey by business researchers at the University of Denver, persons bidding on homes near fracking locations reduced their offers by as much as 25 percent. In North Texas, the Wise County Central Appraisal Review Board reduced the appraised value of a family’s home and 10-acre ranchette more than 70 percent. The board agreed to the extraordinary reduction as a result of numerous environmental problems related to fracking just one year after the first drilling rig went up on the property.

While a number of states continue to push to expand fracking, localities have some leverage. They control land use policies, zoning and property rights. Ironically, one of the earliest local-state challenges came from Exxon’s CEO. As a homeowner in an upscale community in Bartonville, Texas, the CEO found himself at odds with a local fracking operation.

He filed suit to block construction of a water tower near his home — a tower that would increase fracking in the area — alleging it would create “a noise nuisance and traffic hazards.”

The dispute in Texas is only the tip of the derrick, as it were. In New York, the state’s highest court upheld the right of two of the Empire State’s local governments to establish zoning laws that keep out fracking companies. The court’s 5-2 decision was based solely on reaffirming the towns’ rights to make their own zoning choices. In its ruling, the majority noted that the towns had engaged in a “reasonable exercise” of their zoning authority, that they had “studied the issue and acted within their home-rule powers in determining that gas drilling would permanently alter and adversely affect the deliberately cultivated small-town character of their communities.”

In Colorado, where the cities of Boulder, Broomfield, Fort Collins and Lafayette have adopted antifracking measures, Gov. John Hickenlooper recently announced the appointment of a task force to develop recommendations that would reduce land use conflicts when oil and gas facilities are located near homes, schools, businesses and recreation areas. He would also ask the Colorado Oil & Gas Conservation Commission to dismiss litigation challenging the city of Longmont’s ban on hydraulic fracturing and call on all parties to withdraw ballot initiatives on the topic. The task force will make recommendations to the legislature and issue majority and minority opinions.

GOVERNING.COM

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Texas May Increase the Number of Toll Roads in the State.

Even as billions of dollars in toll road projects are in various stages of development across Texas, state leaders say their home is still a hot spot for new toll projects.

That embrace was on full display this week at the International Bridge, Tunnel and Turnpike Association's annual conference.

"You have come to what I would suggest is the mecca of innovation on transportation infrastructure," Gov. Rick Perry said in a keynote address at the toll road industry's annual event. More than 900 people from 18 countries attended it, said Patrick Jones, the association's executive director.

Joe Weber, the Texas Department of Transportation's executive director, echoed other state officials when he described tolling as "vital" to the state's future mobility planning as Texas tries to close the gap on a road funding shortfall. The tax Texans pay on a gallon of gas — 38.4 cents — has not changed since 1993 even as road construction costs have risen sharply and cars have become more fuel efficient, reducing the amount of money raised. A state proposition on the November ballot, if it passes, is projected to raise a third of the agency's $5 billion annual shortfall by diverting some tax revenue from oil and gas production to the state highway fund.

Throughout the four-day conference, various attendees dismissed the possibility of federal or state lawmakers managing to find enough money to allow Texas to return to the days of a pay-as-you-go system for road construction.

"It's not like we're turning money away that could be used to build non-tolled facilities," said Mike Heiligenstein, the association's president and executive director of the Central Texas Regional Mobility Authority, which operates toll roads near Austin. "It just isn't there."

The conference took place about 20 miles from the State Highway 130 toll road, the southern portion of which is privately operated and sports the country's fastest speed limit at 85 mph. In July, Moody's Investment Service declared the SH 130 Concession Company, a partnership between Spain-based Cintra and San Antonio-based Zachry American Infrastructure, was in "technical default" because it had rescheduled a payment on $1.1 billion in debt.

Joseph Krier, chairman of the SH 130 Concession Company, said at the conference that traffic has come in below expectations but predicted that the road would eventually prove a wise investment as drivers look for an alternative to Interstate 35.

"We have a 50-year franchise on that road, and we are pretty confident that in the long term, this is going to be a huge transportation asset for the region," Krier said. "I-35 is going to become a parking lot."

Yet signs of a growing resistance to the state's increasing reliance on toll projects are emerging. In July, 12 elected officials representing North Texas' Collin County signed a letter to the Transportation Department opposing a proposal to convert high-occupancy-vehicle lanes on United States Highway 75 to high occupancy toll lanes, in which vehicles with just a driver pay a toll but those carrying multiple passengers could drive for free or at a discount.

"There is a strong feeling in our communities that they are already paying too much for travel upon our roadways due to tolling of the three major highway corridors in Collin County," the letter reads.

At a panel discussion titled “Texas: A Toll Industry Laboratory,” the letter was cited by Kenneth Barr, chairman of the North Texas Tollway Authority, as a cause for concern.

“We’re beginning to see some pushback on that,” Barr said. “The challenge is our region added a million people in the last six years. If that’s going to continue, we have to figure out how to build those roads. Without additional gas tax revenue, they’re going to have to be toll roads.”

Phineas Baxandall, a transportation analyst for the United States Public Interest Research Group, who was invited to speak at the conference as a tolling critic, said an increase in tolls dissuades the public from supporting an increase in the gas tax and can affect a community’s development in unexpected ways.

“Toll roads don’t just add new choices or benefits,” Baxandall said. “Like any other transportation project, they also foreclose choices and impose potential harms. This shouldn’t be discounted just because a transponder is involved.”

BY THE TEXAS TRIBUNE | SEPTEMBER 19, 2014

By Aman Batheja

California Said to Begin Pricing $2.3 Billion General Obligation.

California began selling about $2.3 billion of general-obligation debt to individual buyers, with 10-year debt being offered at a yield of 2.52 percent, according to preliminary pricing information.

The yield is 0.24 percentage point above an index of benchmark municipal bonds, data compiled by Bloomberg show. The pricing data was provided by three people with knowledge of the borrowing who requested anonymity because the sale isn’t final.

Moody’s Investors Service rates California Aa3, fourth highest. Standard & Poor’s and Fitch Ratings grade the state two steps lower at A.

BLOOMBERG

By Michelle Kaske and Brian Chappatta Sep 19, 2014 7:57 AM PT

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Texas Pension Cuts Hedge Fund Exposure by 1 Percentage Point.

The Teacher Retirement System of Texas, the sixth-largest U.S. public pension, cut its hedge fund allocation by 1 percentage point, three days after the nation’s largest fund, California Public Employees’ Retirement System, announced it would divest entirely from the asset class.

The board of the $126 billion Texas system approved the change today following an asset allocation study, Howard Goldman, a spokesman, said by e-mail. Texas will reduce hedge funds to 8 percent of the pension from 9 percent, according to board documents.

State pensions across the U.S. have turned to hedge funds to solve the growing problem of paying for retiree benefits. State funds last year had 75 percent of the assets needed to satisfy expected claims, according to Wilshire Consulting. States and localities in March faced a $1.4 trillion funding gap for meeting future benefits.

Besides reducing its bet on hedge funds, the Texas pension lowered the portion of assets it gives to equities by 4 percentage points and to fixed-income securities by 2 percentage points, while adding 5 percentage points each to risk parity and private markets, according to board documents. Risk parity is a strategy for investing based on allocation of risk and private equity and real assets.

“These new allocations are expected to be funded from a diverse set of asset classes across the trust in order to increase the overall probability that TRS will be able to achieve the 8 percent actuarial return target,” according to a statement provided by Goldman.

Calpers, with assets of $298.8 billion, said Sept. 15 that it would eliminate its $4 billion allocation to hedge funds. The Sacramento-based pension said the investment vehicles were too complex, costly and small to affect performance.

Texas Teachers’ has an unfunded liability of about $28.9 billion, meaning it has 80.8 percent of the assets needed to fund future payments to retirees.

BLOOMBERG

By Darrell Preston Sep 18, 2014 5:59 PM PT

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Pete Young

Bank Buying Spree Undiminished by Liquidity Rules: Muni Credit.

Banks added to a record bet on the $3.7 trillion municipal market last quarter as an unprecedented rally overshadowed regulations that will remove an incentive for the companies to own the securities.

U.S. lenders boosted holdings of state and city debt by $4.7 billion from March through June to $430 billion, the most since Federal Reserve data begin in 1945. The purchases extended a more than four-year spree that swelled banks’ ownership by $206 billion, exceeding all other types of investors, according to Fed data released yesterday.

The institutions’ appetite helped propel the local-debt market to eight straight months of gains to start the year, the first time that has happened in Bank of America Merrill Lynch data going back to 1989. The banks are buying even as a pending rule change will exclude local debt from the easy-t--sell assets banks can hold to weather a credit crisis. Their demand is helping munis outpace corporate bonds and Treasuries.

“Munis are attractive,” said Vikram Rai, a Citigroup Inc. municipal analyst in New York. “There’s a global scarcity of high-quality, liquid assets.”

Keeping Company

Banks aren’t the only buyers this year. Individuals, who own at least 40 percent of the market as of June, have added $8.3 billion to muni mutual funds in 2014, Lipper US Fund Flows data show. Meanwhile, issuance is about 13 percent below last year’s pace as the lingering strains of the recession that ended in 2009 leave officials wary of taking on new projects, data compiled by Bloomberg show.

Munis have earned about 8 percent this year, on pace for the biggest annual gain since 2011, according to Bank of America indexes. That compares with returns of 3 percent for Treasuries and 5.5 for corporate debt.

The rally has pushed muni borrowing costs toward generational lows. Benchmark 10-year munis yield about 2.28 percent. For buyers in the top federal income bracket, that’s equivalent to a taxable rate of 3.8 percent. In comparison, similar-maturity Treasuries yield about 2.6 percent.

“Munis have been outperforming other asset classes,” said Robert Donahue, a managing director at Concord, Massachusetts-based research firm Municipal Market Advisors. “Banks have really been buying for the yield.”

Expanded Role

Since the credit crisis, banks have expanded their role in the municipal market as demand for other types of loans dimmed while the economy recovered.

They increased munis holdings every quarter since late 2009, even as the broader market began to shrink in 2011, Fed data show. By the end of June, they held 12 percent of the market, twice their share at the end of 2009.

State and local officials, including California Treasurer Bill Lockyer, have expressed concern that the new regulations will drive banks away from the market.

The rules, first released in 2013, were approved by the Fed and other regulators this month. While banks won’t be able to use munis to satisfy the liquidity requirement, the Fed said it may tweak the rules to allow the most easily traded munis to be included.

Assets Aplenty

Most banks have enough assets on hand so that they don’t need to use munis to meet the standards, which take effect starting in January, said Bank of America muni analyst Philip Fischer. The rules may cause banks to sell munis during times of financial stress, he said.

“We don’t expect that to be a near-term effect, but it introduces one more risk to the market,” said Fischer, who’s based in New York.

Banks buy munis primarily for investment reasons, procuring money at short-term rates and plowing it into higher-yielding, long-term bonds, he said.

Munis maturing in 25 or more years are the biggest draw, said Citigroup’s Rai.

As the market has rallied this year, long-dated securities have fared the best. Bonds maturing in more than 22 years have returned about 12 percent, according to Barclays Plc data. That compares with the 6.7 percent return on 10-year debt.

“We expect these buying patterns to continue,” he said. “It’s been a strong source of support.”

BLOOMBERG

By William Selway Sep 19, 2014 9:31 AM PT

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WSJ MoneyBeat: Municipal-Bond Issuers Find It's Easy Being 'Green.'

Massachusetts, a pioneer in selling so-called green bonds for environmental projects, is going greener.

The state this week is selling $350 million of the bonds, more than triple the size of last year’s sale, as more municipalities tap into investor demand for environmentally friendly investments.

Case in point: California is prepping its first green-bond sale ever and plans to start selling $200 million in the debt Friday. Earlier this year, the New York State Environmental Facilities Corp. and the District of Columbia Water and Sewer Authority sold green bonds, with the latter selling a bond that matures in a whopping 100 years.

Investors who buy green bonds are paid interest and principal from the same revenues as other municipal bonds. The difference is that municipalities pledge to use the proceeds of a green-bond sale for projects that are environmentally friendly.

Massachusetts will use this week’s green bond to help pay for a marine terminal in New Bedford, Mass., that will be designed to support the construction of offshore wind projects. The state will also use proceeds for clean-water, energy-efficiency, river-revitalization and open-space-protection efforts, according to the prospectus.

As of late Wednesday morning, the state had received more than $250 million in orders for the green bonds from individual investors. A 10-year bond, rated double-A-plus, was offered to yield 2.45%. The sale is to be completed Thursday after orders from larger institutional investors.

“There are an increasing number of investors, both individual and institutional investors, who want legitimately green, energy-efficient projects in which they can invest,” said Massachusetts Treasurer Steven Grossman. “I would think it is overwhelmingly likely that we will do this again in the future and that it will be a regular part and fixture of our bond offerings.”

The growth in green bonds this year “is partially due to the success of the bonds that were issued last year,” said Kevin Lehman, a credit analyst at Breckinridge Capital Advisors, which oversees about $20 billion and has bought green municipal bonds in the past.

“We invest in projects that are essential to a community, and typically these environmentally related bonds are essential projects that support the community in critical ways, whether it's through clean water or whatever it might be," he said.

California didn't indicate a specific project that would be funded with its green-bond proceeds but provided a list of similar categories to which the money could be allocated.

California has experience on the other side of green-bond transactions—on Wednesday, it announced it agreed to buy $250 million in two-year green bonds issued by the World Bank for the state's pooled investment account. California has been buying World Bank green bonds since 2009.

"It's a way to provide investors an opportunity to buy bonds that they know will be used exclusively to finance projects that strengthen and protect the environment," said Tom Dresslar, a spokesman for California Treasurer Bill Lockyer. "We finally reached the point where we were comfortable going down this road."

There are no immediate plans for a second green-bond sale, but Mr. Dresslar said, "we hope it becomes a permanent part of our bond-sale program."

Not all investors are enthusiastic. Marilyn Cohen, president at Envision Capital Management in California, which oversees $320 million, said she wouldn't be opposed to buying green bonds as long as they are backed by the state's taxing authority, like other California state bonds. But she said she would skip the coming sale because her clients are already fully invested in California state debt.

The green-bond label is a marketing tool to "entice the retail public," she said. "I, for one, find it a big yawn."

THE WALL STREET JOURNAL

By MIKE CHERNEY
Sept. 17, 2014 7:01 p.m. ET

Write to Mike Cherney at mike.cherney@wsj.com

Post-Implementation Review Completed on GASB Standard Addressing Capital Asset Impairment, Insurance Recoveries.

Norwalk, CT, August 19, 2014—An accounting standard for state and local governments that addresses the impairment of capital assets and insurance recoveries provides important information to users of financial statements and resolves some but not all of the issues underlying its purpose. That is a central conclusion of the Post-Implementation Review (PIR) of Governmental Accounting Standards Board (GASB) Statement No. 42, *Accounting and Financial Reporting for Impairment of Capital Assets and for Insurance Recoveries.*

Issued in 2003, GASB Statement 42 establishes measurement guidance for capital asset impairments and requires governments to report the effects of those impairments when they occur, rather than as a part of the ongoing depreciation expense for the capital asset or upon disposal of the capital asset. It also provides uniform reporting guidance for insurance recoveries of state and local governments.

"The recent PIR Report has provided some important stakeholder feedback on the benefits of and the cost associated with the requirements of Statement 42 in light of actual experience," said GASB Chair David A. Vaudt. "On behalf of the GASB, I would like to thank the Foundation for undertaking this important process and all of the individuals and organizations who gave their time to share their insights and experiences with the PIR staff."

The PIR team received broad-based input from GASB stakeholders including auditors and preparers, and more limited input from financial statement users and academics. Based on its research, the review team concluded:

- Statement 42 resolved some of the issues underlying its stated need but may not have completely resolved all of them.
- In particular, users have mixed views as to whether Statement 42 achieved the two objectives for capital asset impairments: establishing recognition criteria for impairments, and requirements that appropriately measure the effects of impairments.
- For insurance recoveries, Statement 42 achieves the objective of establishing and clarifying guidance for accounting for insurance recoveries for all funds and activities.
- The capital asset impairment and insurance recovery information governments provide in their financial statements is important to users of financial statements. However, that information may be difficult for some users to understand and may not be as detailed or as comparable across governments as some users may wish.
- Most of Statement 42's requirements are operational but some stakeholders find certain aspects challenging. The primary operational concern, which was voiced by practitioners in particular, relates to the service utility approach and related techniques for measuring impairment of capital assets.
- Statement 42 did not result in significant changes to financial reporting and operating practices, nor did it result in significant unanticipated consequences.
- The cost to implement Statement 42 and the continuing application costs generally are consistent with the costs that stakeholders expected.
- Statement 42's expected benefits of improved user understanding for when capital asset impairments have occurred and enhanced comparability for insurance recovery information have been achieved. However, the expected benefit of improved user understanding of capital asset impairments' financial impact on governments may not have been achieved to the extent expected.

With regard to standard-setting process recommendations as a result of the review, the PIR team recommended that the GASB conduct, at a minimum, a limited field test when proposing to issue a standard with new recognition or measurement approaches, and share the results with users to assess the usefulness of the resulting information.

The review of Statement 42 was undertaken by an independent team of the Financial Accounting Foundation (FAF), the parent organization of the GASB and the Financial Accounting Standards Board (FASB). The team's formal report is available here. The GASB's response letter to the report is available here.

With the completion of the review of GASB Statement 42, the PIR team will initiate its review of GASB Statements No. 33, Accounting and Financial Reporting for Nonexchange Transactions, and No. 36, Recipient Reporting for Certain Shared Nonexchange Revenues, later this year.

Stakeholders who would like the opportunity to participate in upcoming PIRs should register online.

For more information on the PIR process, visit the FAF website.

NFMA Introduction to Municipal Bond Credit Analysis.

The National Federation of Municipal Analysts will hold its Introduction to Municipal Bond Credit Analysis on November 20 and 21 at Le Meridien in Philadelphia.

To view the topics to be covered, please click here to see the preliminary program.

To register for this event, click here.

CUSIP: Municipal Bond Issuance Indicator Showing Improvement.

"Though we've seen some noteworthy declines in requests for new corporate bond issues in the US and international markets in August, it could be attributable to a seasonal blip," said Richard Peterson, Director, Global Markets Intelligence, S&P Capital IQ. "However, with major monetary policy decisions looming at the Fed and European Central Bank, we will have to watch the CUSIP indicator closely over the next several months for signs of a changing tide in new capital creation."

Read Press Release.

September 15, 2014

MSRB Provides New Resources on Disclosures Made to Municipal Bondholders.

Alexandria, VA – The Municipal Securities Rulemaking Board (MSRB) today continued its focus on promoting timely and complete disclosure in the municipal securities market with the release of an educational podcast that emphasizes for issuers the importance of disclosures to bondholders. "Providing Disclosure Information to Investors," provides an audio overview of issuers' obligations to disclose key financial information to investors through the MSRB's Electronic Municipal Market Access (EMMA®) website.

"Choosing financial disclosure as the subject of the MSRB's first-ever podcast highlights the importance of this issue to the MSRB," said MSRB Executive Director Lynnette Kelly. "The MSRB has developed an extensive library of educational resources for state and local governments to assist them in understanding their obligations to disclose information to investors."

The podcast can help state and local governments ensure that staff responsible for making municipal securities disclosures understand the requirements. This is particularly important in light of a recent enforcement initiative by the Securities and Exchange Commission that provides issuers and underwriters the opportunity to submit to the MSRB previously unreported disclosure documents to honor commitments specified in their bond offering documents. The podcast, as well as other multimedia resources on disclosure, is available in the MSRB Education Center.

The MSRB today also published a new report on the volume and types of municipal securities continuing disclosure submitted to the EMMA website. The newest edition of the MSRB's annual report on continuing disclosure submissions provides data about the nearly 700,000 documents submitted to EMMA between July 2009 and June 2014. The report notes a marked increase in submissions in June 2014. Bond calls continue to be the most common type of submission, accounting for 36 percent of all submissions. Read the report.

The EMMA website is the official repository for information on virtually all municipal securities. EMMA provides free public access to official disclosures, trade data, credit ratings, educational materials and other information about the municipal securities market.

Date: September 17, 2014

Contact: Jennifer A. Galloway, Chief Communications Officer
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The MSRB protects investors, state and local governments and other municipal entities, and the public interest by promoting a fair and efficient municipal securities market. The MSRB fulfills this mission by regulating the municipal securities firms, banks and municipal advisors that engage in municipal securities and advisory activities. To further protect market participants, the MSRB provides market transparency through its Electronic Municipal Market Access (EMMA®) website, the official repository for information on all municipal bonds. The MSRB also serves as an objective resource on the municipal market, conducts extensive education and outreach to market stakeholders, and provides market leadership on key issues. The MSRB is a Congressionally-chartered, self-regulatory organization governed by a 21-member board of directors that has a majority of public members, in addition to representatives of regulated entities. The MSRB is subject to oversight by the Securities and Exchange Commission.

NABL Urges Aggregate Treatment of Partnerships.

NABL has submitted comments to the Treasury and the IRS regarding treating a partnership of private businesses and governmental persons (or section 501(c)(3) organizations for qualified 501(c)(3) bonds) as an aggregate of its partners where there is a fixed allocation of all partnership items for the entire measurement period for the bonds or the entire period that the person is a partner. NABL believes that the policies of I.R.C. §§ 141 and 145 are not in any way impaired by permitting aggregate treatment of public-private partnerships in cases where the attributes of ownership in the partnership are fixed for at least as long as any tax-advantaged bonds will remain outstanding.

The comments were prepared by an ad hoc task force led by Matthias Edrich of Greenberg Traurig and approved by NABL's Board of Directors. These comments supplement NABL's submissions to the Department of the Treasury and the Internal Revenue Service on December 22, 2006, and February 15, 2008, relating to the proposed allocation and accounting regulations published in the Internal Revenue Bulletin on October 30, 2006 (REG-140379-02; REG-142599-02). To view the September 17, 2014 comments, click here.

- Advisor Groups Push For Clarity In Municipal Market Rules.
- Judge Mulls SEC Limits on Political Donations.

- Many Underwriters Reported Deals by MCDC Deadline.
- Chicago at Brink of Swaps Fee as Bond Ratings Fall: Muni Credit.
- BofA Sees Limited Harm To Munis From New Bank Liquidity Rule.
- Chamber of Commerce Argues Court Erred in Work Product Analysis.
- *S.E.C. v. City of Miami* – After SEC institutes civil enforcement action against City of Miami and its Budget Director for securities fraud in connection with bond issuance, Court of Appeals holds – in a matter of apparent first impression – that qualified immunity is not available to municipal officials as a defense in SEC enforcement actions.
- And finally, in another matter of apparent first impression, *Thebeau v. Smith* brings us the story of a promising political career tragically cut short by a traitorous Star Wars action figure. Mayoral candidate claiming to be domiciled in Springhill is outed as an actual resident of Shongaloo when this grown man, a) welcomes a plumber into his mother's Shongaloo home, b) admits to the plumber that he lives with his mom, then c) takes the plumber to his room to show him "some of his personal belongings he had in his room there." Like Jack and Bobby. Cut down in his prime.

LIABILITY - CALIFORNIA

Suarez v. City of Corona

Court of Appeal, Fourth District, Division 1, California - August 29, 2014 - Cal.Rptr.3d - 2014 WL 4254312

Van passenger brought action against city for dangerous condition of public property. The Superior Court granted summary judgment for city and awarded attorney fees and costs against passenger and his attorneys. Passenger and his attorneys appealed.

The Court of Appeal held that:

- Costs statute does not authorize an award against a party's counsel;
- Court commissioner had jurisdiction to hear city's costs motion;
- Passenger maintained his action against city without reasonable cause; and
- Timing of city's costs motion did not violate due process.

Van passenger's action against city for dangerous condition of public property, based on incident in which the compressed natural gas tank in the van exploded while being filled at a fueling station owned by the city, was maintained without reasonable cause, thus supporting sanctions under the statute providing public entities and other specified defendants with a way to recover the costs of defending against unmeritorious and frivolous litigation, where passenger had information from other sources that showed the accident was not caused by a dangerous condition on the city's property, the city made numerous demands to dismiss the case against the city or provide a viable theory of liability, and passenger ignored those demands and let the case languish for approximately one year.

BONDS - FLORIDA

S.E.C. v. City of Miami

United States Court of Appeals, Eleventh Circuit - September 5, 2014 - Fed.Appx. - 2014 WL 4377831

The SEC instituted a civil enforcement action alleging that the City of Miami and its Budget

Director, Michael Boudreaux committed securities fraud, and that the City violated a 2003 SEC cease-and-desist order, imposed after the City violated the anti-fraud provisions of the federal securities laws in connection with the issuance of municipal bonds in 1995.

The crux of the SEC's allegations concerned alleged material misrepresentations and omissions reflected in 2007 and 2008 fiscal year-end City financial documents that were incorporated by reference into the City's bond offerings in 2009.

As relief, the SEC requested that the district court: (1) grant injunctive relief that would permanently enjoin the defendants from further violations of federal securities law; (2) order the City to comply with the 2003 cease-and-desist order; and (3) impose civil monetary penalties on the defendants.

Boudreaux moved to dismiss the claims against him based on the doctrine of qualified immunity because he was acting within the scope of his official responsibilities as City Budget Director when the alleged misconduct occurred. The District Court denied the motion and Boudreaux appealed.

The Court of Appeals noted that the issue of whether municipal officials are entitled to qualified immunity in a SEC enforcement action under the federal securities laws appeared to be a matter of first impression.

The Court of Appeals affirmed, holding that qualified immunity was unavailable to Boudreaux as a defense against the SEC's civil enforcement action.

LIABILITY - ILLINOIS

Pattullo-Banks v. City of Park

Appellate Court of IllinoisFirst District, Fourth Division - September 4, 2014 - N.E.3d - 2014 IL App (1st) 132856

Pedestrian who had been hit by car while crossing street brought action against city, alleging that she had been forced to cross street at a point where there was no crosswalk because the city had breached its duty to maintain its property in a reasonably safe condition by unreasonably piling snow on the sidewalk so as to make it impassable. The Circuit Court entered summary judgment in favor of city, and pedestrian appealed.

The Appellate Court held that whether pedestrian was an intended user of street in location where she was hit by a car was irrelevant to determination of whether city breached its duty maintain its property in a reasonably safe condition by unreasonably piling snow on the sidewalk so as to make it impassable, for purposes of determining whether city was immune from liability for pedestrian's injuries under Local Governmental and Governmental Employees Tort Immunity Act. Issue of whether pedestrian was an intended and permitted user was to be determined based upon the property for which the city was alleged to have breached its duty rather than the place where the injury occurred.

IMMUNITY - ILLINOIS

Bowman v. Chicago Park Dist.

Appellate Court of Illinois, First District, Fifth Division - September 5, 2014 - N.E.3d - 2014

IL App (1st) 132122

Mother brought action against city park district on behalf of her 13-year-old child following child's ankle injury while using a damaged slide, alleging that city's failure to repair slide after having been informed of its condition nearly one year earlier was willful and wanton. The Circuit Court entered summary judgment in favor of city. Mother appealed.

The Appellate Court held that thirteen-year-old child was a permitted and intended user of playground on city park on which she was injured while using slide that city park district had notice was damaged for nearly one year but failed to replace, and thus city owed child duty of care under the Local Governmental and Governmental Employees Tort Immunity Act, even though ordinance prohibited use of playground equipment designed for children under 12 years old.

Ordinance did not identify which parks were designated for certain age groups and did not state that playground or slide at issue were designed for such children, park website mentioned no age range, there were no signs at playground or any other indication that it was designed or designated for such children, and city did not take any measures to prevent children who were 12 years and older from using park.

ELECTIONS - LOUISIANA

Thebeau v. Smith

Court of Appeal of Louisiana, Second Circuit - September 8, 2014 - So.3d - 49, 665 (La.App. 2 Cir. 9/8/14)

City resident brought action against candidate contesting his qualifications to run for mayor. The District Court entered judgment in favor of resident. Candidate appealed.

The Court of Appeal held that:

- Candidate was not a valid elector in city at the time of his qualification for mayor, and
- Candidate was not domiciled in nor did he reside in city for the year immediately preceding his candidacy for mayor.

Candidate was not a valid elector in city at the time of his qualification for mayor, as required by statutory qualifications for mayor, even though he changed his address to city on the date he qualified for mayor, where candidate had previously listed his address in another city for all important documents, and candidate's original voter registration application listed address in another city.

Candidate was not domiciled in nor did he reside in city for the year immediately preceding his candidacy for mayor, as required by statutory qualifications for mayor, even though candidate and his relatives testified that he was domiciled in city, where candidate's driver's license, voter registration, bank accounts, and corporate addresses had been in another city for many years preceding his candidacy.

ZONING - MASSACHUSETTS

[Welch-Philippino v. Zoning Bd. of Appeals of Newburyport]

Appeals Court of Massachusetts, Suffolk - September 9, 2014 - N.E.3d - 2014 WL 4410875

Neighbors appealed decision of city zoning board of appeals to issue special permit authorizing property owners to replace nursing-home facility, which was nonconforming use but dimensionally conforming structure, with modernized facility in residential zone. The Land Court Department determined that project was permissible as of right. Neighbors appealed.

The Appeals Court held, as an apparent matter of first impression, that replacement of a conforming structure devoted to a nonconforming use that does not result in a change or substantial extension of the use is permissible as of right under the zoning statute governing existing structures and uses.

MUNICIPAL ORDINANCE - NEW JERSEY

[In re Jackson Tp. Administrative Code]

Superior Court of New Jersey, Appellate Division - September 8, 2014 - A.3d - 2014 WL 4388283

Mayor and township council brought action against petitioners seeking declaratory judgment that ordinance proposed in initiative petition was unlawful. The Superior CourT granted mayor and council summary judgment. Petitioners appealed.

The Superior Court, Appellate Division, held that:

- Trial court had the authority under Declaratory Judgments Act to hear the pre-election challenge to the proposed township ordinance, and
- In a matter of first impression, trial court did not have authority to revise proposed ordinance and order that altered ordinance be placed on ballot.

Trial court did not have authority to revise township ordinance dealing with insourcing of legal department and shared-services agreement with board of education, which ordinance was proposed in citizens' initiative petition, and order that altered ordinance be placed on ballot, even though proposed ordinance contained a severability clause. The Optional Municipal Charter Law (Faulkner Act), mandated minimal judicial interference in initiative process, and the policies underlying the Faulkner Act were not served by the court severing part of the ordinance based on its subjective evaluation of the significance of the school board and severability clauses, then rewriting the ordinance, ballot question, and interpretative statement.

EMINENT DOMAIN - NEW JERSEY

[Borough of Merchantville v. Malik & Son, LLC]

Supreme Court of New Jersey - August 7, 2014 - 218 N.J. 556 - 95 A.3d 709

Borough filed petition to condemn property. The Superior Court denied motion by mortgagee's assignee to dismiss, and entered judgment for borough. Mortgagee's assignee appealed.

The Supreme Court of New Jersey held that:

- Borough was not obligated to negotiate with mortgagee's assignee prior to initiating condemnation

proceedings, and
- Borough did not breach its duty to engage in bona fide negotiations with property owner.

PUBLIC UTILITIES - NEW JERSEY

PPL Energyplus, LLC v. Solomon

United States Court of Appeals, Third Circuit - September 11, 2014 - F.3d - 2014 WL 4454999

Dissatisfied with the stock and reliability of power-generating facilities in New Jersey, the state adopted the Long Term Capacity Pilot Program Act. The Act-known as LCAPP-instructed New Jersey's Board of Public Utilities to promote the construction of new power-generating facilities in the state. Rather than pay for the construction of these plants directly, the Board of Public Utilities crafted a set of contracts, called Standard Offer Capacity Agreements, that assured new electric energy generators fifteen years of revenue from local utilities and, ultimately, New Jersey ratepayers. LCAPP guaranteed revenue to new generators by fixing the rates those generators would receive for supplying electrical capacity, that is, the ability to make energy when called upon.

Energy producers and sellers brought action seeking to have LCAPP declared unconstitutional. The District Court granted judgment for plaintiffs. New Jersey's Board of Public Utilities and contractor under LCAPP appealed.

The Court of Appeals held that LCAPP was preempted by the Federal Power Act.

FPA occupied field of interstate rates for electricity, and therefore LCAPP – which provided incentives for construction of new power plants by regulating rates that new electric generators would receive for their capacity through Standard Offer Capacity Agreements – intruded into area reserved exclusively for federal government and was preempted, since LCAPP compelled participants in federally-regulated marketplace to transact capacity at prices other than price fixed by marketplace. Even if reasonableness of Agreements' rates would be within exclusive jurisdiction of FERC to review, Agreements could not set capacity prices in the first place.

PENSIONS - NEW JERSEY

Saccone v. Board of Trustees of Police and Firemen's Retirement System

Supreme Court of New Jersey - September 11, 2014 - A.3d - 2014 WL 4450553

Retired member of Police and Firemen's Retirement System (PFRS) sought review of PFRS Board of Trustees' decision to uphold Division of Pension and Benefits' denial of member's request to reassign survivors' benefits from his disabled son as an individual to special needs trust (SNT) in his son's name. The Superior Court, Appellate Division, affirmed. Member petitioned for certification, which was granted.

The Supreme Court of New Jersey held that SNT was permitted to stand in son's place as beneficiary to whom survivors' benefits were due.

TAX - NEW YORK

[Baldwin Union Free School Dist. v. County of Nassau]

Supreme Court, Appellate Division, Second Department, New York - September 10, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 06043

School district brought action against county, alleging ordinance establishing and imposing “service charges” upon exempt users of sewer system violated equal protection and due process, violated General Municipal Law and county charter, and that adoption of ordinance was precluded by doctrine of preemption. School district moved for preliminary injunction and county cross-moved for summary judgment. The Supreme Court, Nassau County, granted school district’s motion and denied county’s motion. County appealed.

The Supreme Court, Appellate Division, held that trial court’s denial of summary judgment should have been without prejudice to renewal upon the completion of discovery.

While Trial court providently exercised its discretion in denying county’s motion, in effect, for summary judgment declaring that ordinance establishing and imposing “service charges” upon exempt users of sewer system was an authorized exercise of county’s lawmaking authority and was constitutional under the New York and United States Constitutions, such denial should have been without prejudice to renewal upon the completion of discovery.

IMMUNITY - OHIO

[Porter v. Probst]

Court of Appeals of Ohio, Seventh District, Belmont County - August 29, 2014 - N.E.3d - 2014 -Ohio- 3789

Laid-off jail administrator filed complaint against county commissioners and sheriff alleging promissory estoppel, denial of sick leave benefit, due process violation, and tortious interference with employment, and subsequently moved to amend complaint to include county’s insurer. The Court of Common Pleas denied motion and granted summary judgment for defendants. Administrator appealed.

The Court of Appeals held that:

- Court did not abuse its discretion in finding undue prejudice as basis for denying motion;
- Defendants had sovereign immunity from promissory estoppel claim;
- County commissioners were not required to pay administrator sick leave benefit;
- Administrator failed to show he had any constitutionally protected interest in vacation time in excess of caps; and
- Tortious interference claim was barred by doctrine of sovereign immunity.

CONTRACTS - SOUTH CAROLINA

[Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia]

Supreme Court of South Carolina - August 20, 2014 - S.E.2d - 2014 WL 4087917

In April 2003, the City entered into an MOU with Stevens & Wilkinson of South Carolina, Inc. (S&W) to develop a publicly-funded hotel. As architect, S&W was to complete sufficient preliminary design work to determine a guaranteed maximum price for the project, which would be used by the City to obtain municipal bond funding to cover the cost of the hotel. Pursuant to the MOU, the construction company was to pay S&W directly. On June 26, 2003, the City received a letter stating that S&W would complete its preliminary design on July 10, 2003, and would thereupon cease further work until the bond financing for the hotel was finalized. Realizing this could delay the start of construction, S&W offered to continue working the remaining ninety days until the anticipated bond closing date of October 13, 2003, but required assurance it would be compensated for the work it performed during this time frame. It provided an estimate requiring $650,000 through October 13 and $75,000 per week after that. On July 30, the City approved “$650,000 for interim architectural design services for a period of 90 days prior to bond closing.”

The bond closing did not occur as scheduled, but S&W nevertheless continued to work. On December 16, 2003, S&W submitted an invoice to the City for $697,084.79 for work that took place from July 10 to December 15, 2003. By letter dated December 17, 2003, S&W informed the construction company that the City had voted that day “to advance [$705,000.000] to the design team for design services and expenses at cost covering the time period between July 10, 2003 to December 15, 2003.” Because under the MOU the construction company was to pay S&W, not the City, the construction company agreed to reimburse the City for the funds paid to S&W after the bond closing. The City remitted $697,084.79 directly to S&W later that month. S&W continued to work on the project, but in March 2004, the City abandoned its plans under the MOU and ended its relationship with S&W. S&W received no further compensation and sued the City for breach of contract under the MOU and the July 2003 agreement. S&W then moved for partial summary judgment arguing it had a contract with the City as a matter of law based on the performance of and payment for architectural design services agreed to in July 2003. S&W’s motion clarified that it only sought resolution of whether there was a contract, and did not seek summary judgment on the issue of breach or damages.

The City argued there was no separate agreement and the payment of interim fees was merely an advance on fees under the MOU and furthermore, the MOU provided that S&W was to be paid by the construction company, not the City. The circuit court agreed with S&W and granted partial summary judgment on the sole issue of the existence of a contract under the July 2003 agreement. Specifically, the court found S&W made an offer by delivering its estimate to the City, and the City accepted the offer, “albeit on seemingly modified terms,” by voting to authorize the $650,000.

The City filed a Rule 59(e) motion, abandoning the argument that there was no contract. For the first time, the City argued the authorization of the $650,000 could not constitute an acceptance on “seemingly modified terms” because any modification of the terms resulted in a counteroffer, which S&W accepted by performance. It further argued that because S&W accepted by performance, the terms were limited to the counteroffer of $650,000. Because S&W had already been paid that sum, the City argued the court should find the City had fully performed and the contract was satisfied.

The Supreme Court of South Carolina held that city failed to preserve for appellate review assertion that contract was satisfied.

PUBLIC UTILITIES - TEXAS

[Exelon Wind 1, L.L.C. v. Nelson]()

United States Court of Appeals, Fifth Circuit - September 8, 2014 - F.3d - 2014 WL 4421392

Qualifying wind generation facilities under the Public Utilities Regulatory Policies Act (PURPA) brought action against the Texas Public Utilities Commission (PUC), challenging the PUC’s requirement that only qualifying facilities that generate "firm power" were eligible to sell power through a legally enforceable obligation. The District Court granted summary judgment for the generation facilities. The PUC appealed.

The Court of Appeals held that:

- Texas Courts had exclusive jurisdiction over the facilities' challenges to the Texas PUC's order;
- Federal courts had exclusive jurisdiction over the facilities' challenges to the Texas PUC's rule; and
- PURPA and Federal Energy Regulatory Commission (FERC) regulations did not mandate that all qualifying facilities must be able to form legally enforceable obligations.

MMA Municipal Issuer Brief - Sept. 8, 2014

This week's Municipal Market Advisors issuer brief takes a look at which of the seven bigger budget states that have reported their annual earnings actually made their revenue projections for the 2014 fiscal year that ended on June 30. The report found that California, Massachusetts and Ohio reported actual revenues above their projections while New Jersey, Pennsylvania, Connecticut and Florida revenues came in below forecasts (even though these states still outperformed the previous fiscal year's actual performance). "The takeaway here," said MMA, "is that the estimates in these states were overly aggressive, possibly to use revenue to 'balance' the budget while spending more in the interim."

Whether a state makes its revenue target is important to investors and credit analysts. But it also sends a crucial signal to localities within a state. "Revenue performance can indicate whether shortfalls (or surpluses) are in the future, possibly meaning painful budget cuts and even rating downgrades," MMA said.

NYT: Detroit Reaches a Deal With a Key Creditor, but Others Balk at Plan.

DETROIT — A major opponent to Detroit's blueprint for shedding debts and remaking city services announced Monday that it has reached a settlement with the city and would now support Detroit's emergence from the nation's largest municipal bankruptcy.

But another of Detroit's holdout creditors was unable to reach a settlement on the same bankruptcy claim after several days of mediation, lawyers said on Monday, leaving uncertain how quickly the city could shed debts and emerge from reorganization.

Representatives for Syncora Guarantee, a bond insurer that had for months been vociferous in its objections to the city's proposed blueprint, told a federal judge overseeing Detroit's bankruptcy that it would now support the city. "This is a big day for Syncora and a big day for the city of Detroit," said Ryan Bennett, a lawyer representing Syncora, which has said its exposure in Detroit amounted to about $400 million.

David G. Heiman, a lawyer representing the struggling city, described the settlement as a significant step in bringing Detroit closer to departing court oversight "as soon as possible and to return the city to its citizens."

Still, representatives of Financial Guaranty Insurance Company of New York, another bond insurer, and some other creditors at the same ranking in bankruptcy, will miss out on a portion of the money that Detroit used to close its deal with Syncora. They made it clear that they intend to continue their objections to the city's reorganization plan, and sought a delay in the city's trial in order to further prepare their cases now that Syncora has settled and the city was preparing to file a revised blueprint including that settlement.

Last week, Syncora abruptly announced an agreement in principle with the city, a week into a trial over whether Detroit's exit strategy could be confirmed by the bankruptcy court. Until its announcement, Syncora was one of a few remaining opponents of Detroit's plan of debt adjustment, and one of the most insistent. Syncora went so far as to file a formal objection to the handling of the case under a team of mediators led by Gerald E. Rosen, who is also the chief judge of the United States District Court for the Eastern District of Michigan, the seat of Detroit's bankruptcy court.

Syncora argued that Judge Rosen was biased and his leadership of the mediation had given rise to a settlement plan that improperly favored Detroit's retirees over capital-markets creditors. Syncora retracted those objections on Monday and offered a full-throated apology to Judge Rosen.

When Syncora said last week that it had a preliminary agreement with the City of Detroit, the confirmation trial was halted until Monday, so that representatives of Syncora and other parties to the bankruptcy could attempt to agree on specific details of a settlement.

Preliminary outlines of Syncora's agreement said that it offered Syncora a stake in vehicle tolls from the tunnel that runs between Detroit and Windsor, Ontario, as well as interests in some land that would rise in value as Detroit's recovery went forward. But Syncora said Detroit had offered those items outside of the bankruptcy, in what it called a "redevelopment agreement." That meant that none of the assets being offered to Syncora would be shared with Financial Guaranty, or the other creditors that hold uninsured certificates in a 2005 borrowing which are now in default.

That left Financial Guaranty and the others with a far less satisfying settlement with Detroit, even though they were said to be getting the same recovery rate in the bankruptcy as Syncora, roughly 13 cents on the dollar. This outcome left Financial Guaranty and the other creditors to soldier on alone in their fight against the plan of adjustment. Although Financial Guaranty's claims were classified the same as Syncora's, its proposals for an acceptable settlement were different. For months, it has been making the case that the city's art collection should be included in the assets available for settlements, and it had been working with a lending consortium on a loan for Detroit that would be secured by the art.

Since early this year, Detroit officials have said they hoped to reach agreements with as many of their thousands of creditors as possible to speed the process of leaving bankruptcy, to avoid endless appeals over core issues like cuts to pensions and to be able to move ahead. For months, as Detroit reached deals with groups of creditors, including city workers and retirees, Syncora and Financial Guaranty had held out, becoming the city's most outspoken adversaries. Among their complaints about Detroit's plan to shed $7 billion and spend about $1.5 billion on city services: that it favored retirees as it forced much harsher losses on the investors who took part in the 2005 borrowing, and the two insurers themselves. The borrowing raised $1.4 billion to help fund the retirees' benefits.

As a trial opened here on Sept. 2, lawyers for the insurers made it clear that they had no intention of allowing the city's plan to win approval without an intense legal fight. Early estimates suggested the trial would run well into October, though a broad deal could shorten that significantly. Last week, too, deals were announced with Detroit's suburban neighbors for leasing the city's water system to a new regional authority, removing another impediment to a smooth departure from court.

NEW YORK TIMES

By MONICA DAVEY and MARY WILLIAMS WALSH

SEPT. 15, 2014

Chicago Shrinks Yields on $368 Million Water Bonds on Demand.

Chicago issued about $368 million of tax-exempt water bonds today, lowering yields from initial levels in the city's first such offering since 2012.

The deal includes a portion maturing in November 2044 that priced to yield 4.01 percent, down from an initial 4.13 percent, according to data compiled by Bloomberg. The yield is about 0.9 percentage point above benchmark 30-year municipal bonds. By comparison, an index of A rated revenue bonds due in three decades yields about 0.8 percentage point more than AAA munis, Bloomberg data show.

The pricing confirmed investors' expectations that the affiliation with Chicago, which bears the biggest pension burden among the most-indebted U.S. localities, would boost yields on the offering. Yet with interest rates in the $3.7 trillion municipal market close to generational lows, bond buyers are also seeking extra yield with riskier securities.

Yields on some maturities fell as much as 0.17 percentage point from preliminary levels. The second-lien debt has a Standard & Poor's grade of AA-, fourth-highest, while Moody's Investors Service rates it three steps lower, at A3.

Today's sale will pay for work on pumping stations and the replacement of water mains, some of which are more than a century old, according to bond documents and the city.

By Brian Chappatta and Elizabeth Campbell Sep 10, 2014 12:00 PM PT

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SEC Complaint Filed in Braves Bond Issuance.

A Cobb County attorney said Tuesday that she filed a complaint with the U.S. Securities and Exchange Commission in relation to the county's plan to issue up to $397 million in bonds for construction of the new Atlanta Braves stadium.
Susan McCoy said that she filed the complaint in March because municipal bonds are overseen by the SEC and she was unsettled by how quickly the Braves deal was approved by commissioners — just two weeks after the Braves made public their intention to move to Cobb County before the 2017 season.

"The SEC has jurisdiction if there is fraud or material misstatement," in a bond issuance, McCoy said. When asked if she believes there has been fraud or misstatement, McCoy responded: "The full extent of what that means would have to come from them."

The SEC does not comment on investigations or complaints. McCoy said she knows of at least two other complaints filed with the SEC.

Posted: 6:55 p.m. Tuesday, Sept. 9, 2014

By Dan Klepal

The Atlanta Journal-Constitution

Advisor Groups Push For Clarity In Municipal Market Rules.

Banks, insurance companies and financial advisors want more clarity on principal transactions and disclosures in proposed rules drafted by regulators governing the conduct of nonsolicitor municipal advisors.

The draft rules are part of the federal government's new regulatory framework of the $3.7 trillion municipal market.

Local and state governments tap the municipal market to raise billions of dollars every year to fund public improvement projects. Financial reforms contained in the Dodd-Frank Wall Street Reform and Consumer Protection Act called for more scrutiny of the municipal market.

The Municipal Securities Rulemaking Board (MSRB) had already gone through a first round of comments earlier this year related to amendments to Rule G-42 on the standards of conduct and duties of municipal advisors.

Subsequent to comments received from industry groups on the MSRB's initial draft rules, the board asked for more comments following the release of revised draft rules.

The National Association of Independent Public Finance Advisors (NAIPFA) was swift to condemn parts of the revised draft rules.

The MSRB's proposal surrounding the disclosure of "inadvertent advice" would benefit "municipal advisors who are also registered broker/dealers who wish to avoid being prohibited from underwriting an issuance of securities pursuant to MSRB Rule G-23," NAIPFA said.

Rule G-23 prohibits a broker/dealer who serves as a financial advisor to an issuer — a school district or local government — for a particular municipal bond issue, from switching roles and underwriting the same bond issue.

Allowing broker/dealers an exemption under the "inadvertent advice" clause would lead to "widespread abuses by broker/dealers" looking to circumvent fiduciary duty requirements already put in place by the Securities and Exchange Commission and the MSRB, NAIPFA said.

NAIPFA further called the inadvertent advice clause "both troubling and unwarranted."

In a letter to the MSRB, the powerful Bond Dealers of America took issue with what it said was language "vague and open to interpretation" when it came to prohibiting municipal advisors or affiliates from engaging in transactions "directly related to the same municipal securities transaction or municipal financial product as to which the municipal advisor is providing advice."

"It is not clear to us exactly what transactions would be considered 'directly related to' other transactions, the BDA said in the letter. "Would acting as a municipal advisor for a swap while acting as the underwriter on a related series of variable rate bonds be too 'directly related'?"

Underwriters and big financial services companies also had questions for MSRB regulators about the prohibition of principal transactions for an advisor's own account.

The Financial Services Roundtable, which represents 100 financial services companies offering banking, insurance, payment and investment products, said regulators should include in the revised draft rules alternative mechanisms for advisors "that would permit them to engage in principal transactions with municipal entitles subject to disclosure and consent requirements."

FSR members also said G-42's draft rules around disclosure requirements for advisors and the advisors' affiliates were "vague and overly broad," and would make it "very difficult for a municipal advisor to comply with if it is part of a large, multiservice financial conglomerate."

For decades, municipal market players — including bond dealers, securities broker/dealers, bond issuance advisors, bond counsel, advisors to the municipal governing body, and consultants — have plied a lucrative trade with little oversight.

In the municipal market, it is often difficult to discern who is representing whom, and where to draw the line between who has a fiduciary standard of care toward the municipal entity — the taxpayer — and who doesn't, and how far that standard extends.

Last year, the SEC filed suit against the Greater Wenatchee Regional Events Center Public Facilities District, in Wenatchee, Wash., in connection with a real estate project that soured during the financial crisis.

In its complaint, the SEC noted that the director of executive services for the City of Wenatchee, while "on loan" to the facilities district, signed off on financial documents for a development project despite no formal financial background.

The director of executive services, at the behest of the local mayor, found herself the de facto liaison between the municipality, the developer, attorneys and underwriters.

Unlike U.S. Treasury securities that are traded every day and subject to transparent pricing, price-setting in the municipal market remains an exercise shrouded in relative opacity with layers of intermediaries, often politically connected, benefiting from every transaction.

Proponents of municipal market reform say the difficulty with which to pin down advice when it comes to the municipal market is exactly why this market is in need of a robust regulatory framework.

September 09, 2014

By Cyril Tuohy

InsuranceNewsNet

Cyril Tuohy is a writer based in Pennsylvania. He has covered the financial services industry for more than 15 years. Cyril may be reached at cyril.tuohy@innfeedback.com.

BofA Sees Limited Harm To Munis From New Bank Liquidity Rule.

Bank of America Merrill Lynch today weighs in on the new federal regulations governing what liquid, easy-to-sell securities big banks need to hold in reserve, regulations that so far exclude municipal bonds from this category of high-quality liquid assets. BofA is among those who see limited harm to the muni markets, and it lists five specific reasons why:

[T]he immediate impact of the adopted rule is likely to be limited for several reasons. First, as Regulators point out, only roughly half of the $425 billion of municipal securities held by domestic banks are held by those large banks subject to the new requirements. Second, most banks subject to these regulations are already in compliance with, or have made significant strides toward compliance with, the regulations as currently drafted. Third, were municipal securities to be added to the definition of HQLA in accord with the international regulations under Basel, municipal securities would still be subject to a 15% haircut as a Level 2a asset type, and further limited by the requirement that Level 2a and 2b assets can make up no more than 40% of total HQLA. Fourth, some municipal securities may be allowed to be counted toward HQLA in the near future, though no proposal or criteria for inclusion have yet been released. And, lastly, the Regulators contend that banks likely purchase municipal securities for profit generation rather than as a means of meeting Regulator’s capital and liquidity requirements.

Although regulators have said they’re still reviewing whether munis should be treated as high-quality liquid assets, BofA says investors shouldn’t assume they’ll eventually be included in the category:

While political opposition to the exclusion of municipal securities in the definition of HQLA is likely to persist following the adoption of the rule, some municipal securities may get a reprieve if the Fed adopts a rule allowing those securities in the future. That said, the market should treat these rules as final until further notice. They serve to introduce a new long-term regulatory risk that should be priced. Over time, the muni market may be compelled to find a higher-priced source of liquidity if these rules become binding on banks.

Barrons
By Michael Aneiro

Detroit Creditors Seek Delay in Trial After Syncora Deal.

A group of Detroit creditors led by Financial Guaranty Insurance Co. asked a judge to push back for a week the trial on the bankrupt city’s $7 billion debt-cutting plan.

FGIC, which faces claims on about $1.1 billion in Detroit pension debt it insured, and other creditors said in a filing yesterday that they wanted until Sept. 22 to consider their next steps in light of the settlement announced last week between the city and bond insurer Syncora Guarantee Inc.

On Sept. 10, U.S. Bankruptcy Judge Steven Rhodes halted a trial on the fairness of Detroit’s plan after the city settled with Syncora, which backed more than $300 million of the pension debt. Rhodes postponed the trial until today to give time to work out the details of their agreement.

FGIC and other creditors were ordered to join Syncora and other creditors in mediation sessions last week by the chief federal judge in Detroit. In yesterday's filing, New York-based FGIC said it needed to make changes to its witness list and reconsider expert testimony after the Syncora deal.

Detroit's bankruptcy plan hinges on a bargain with philanthropic foundations and the state government, who agreed to shore up the city's public pension system with more than $800 million. In exchange, Detroit pledged not to use its art collection to pay debts.

FGIC has said the city could use the collection to boost payments to creditors whose claims the insurer may otherwise be forced to cover.

The creditor group asked Rhodes to hold a hearing today to consider the request for a delay.

The case is In re City of Detroit, 13-bk-53846, U.S. Bankruptcy Court, Eastern District of Michigan (Detroit)

By Steven Church Sep 14, 2014 9:26 PM PT

To contact the reporter on this story: Steven Church in Wilmington, Delaware at schurch3@bloomberg.net

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Syncora Gets 13.7% in Detroit Bankruptcy Deal; FGIC Fights.

Detroit creditor Syncora Guarantee Inc. (SYCRF) will recover about 14 percent on what it's owed in a deal that includes $44.8 million in new debt, leaving bankruptcy holdout Financial Guaranty Insurance Co. the last major creditor opposing the city's debt-cutting plan.

Syncora has claimed it's owed more than $333 million. Under its agreement with Detroit, the bond insurer will get two sets of notes, a lease to operate a tunnel to Canada, land near the tunnel and the option for a long-term lease to operate a parking structure.

The deal is a "very favorable one to the city," David Heiman of Jones Day, a lawyer for Detroit, told U.S. Bankruptcy Judge Steven Rhodes at a hearing today after he disclosed the accord and Syncora's estimated recovery. The parties have "laid down their swords," he said.

While the settlement with Syncora may help speed Detroit's record municipal bankruptcy to completion, FGIC remains a significant obstacle, as it faces claims on about $1.1 billion in pension debt it insured. The city planned to almost wipe out that debt, offering holders only about 10 cents on the dollar.

Should investors in the pension debt take losses, FGIC may be forced to pay them. Cutting the debt is part of the city's plan to eliminate more than $7 billion in liabilities while shoring up its retirement system with money from the state and private donors.

Pension Debt

Syncora Guarantee insures more than $300 million of the pension debt and also holds some of the debt directly. The company also insured some tax-backed bonds. Shares of parent Syncora Holdings Ltd. fell 2.3 percent to $2.15 today.

FGIC and Detroit put together a tentative trial schedule after Rhodes asked lawyers to find a way to give the New York-based company time to collect information about the Syncora deal and hire an expert to testify against it.

The trial, in which the judge is considering the feasibility and fairness of Detroit's plan, continued today with the testimony of a pension expert.

Glenn Bowen of pension adviser Milliman Inc. said the city assumed its pension systems would earn about 6.75 percent over time, a figure that has been attacked by pension-bond holders as too low. Using that figure means the city would have to increase the amount of money it sets aside for its two pension systems.

7% Return

Other public pension systems assume they will earn more than 7 percent, the bondholders' attorney, Jonathan Wagner, said in court while questioning Bowen.

Bowen said public agencies will choose a higher or lower return estimate depending on their tolerance for risk. A higher number is riskier because if returns fall short, the agency would have to make up the difference to keep the pension system solvent, he said.

Tomorrow, the city may call Ron Bloom, a Lazard Ltd. vice chairman, who led President Barack Obama's effort to revive the auto industry. A loss of manufacturing jobs in Detroit contributed to the city's decline.

Detroit, a city of about 700,000, filed an $18 billion municipal bankruptcy last year, saying it was unable to provide basic services and still meet financial obligations. Since then, Emergency Manager Kevyn Orr has cut deals with city unions, retired workers and some bondholders to pay them less than they are owed.

Two Series

Under its pact with the city, New York-based Syncora will get two series of notes. The B notes will be worth about $23.5 million, while a series of C notes will be worth $21.3 million and bear a 5 percent interest rate.

The C notes will be tied to parking revenue. The company will also have the option to take over and develop additional parcels for development that will be disclosed in the next few days, lawyers for the city said today at the hearing.

Ryan Bennett of Kirkland & Ellis, an attorney for Syncora, told the judge his client planned to withdraw its objections to the city's debt-reduction plan.

"This is a big day for Syncora and a big day for the city of Detroit," Bennett told Rhodes.

Detroit's bankruptcy plan hinges on a bargain with philanthropic foundations and the Michigan government, who agreed to contribute more than $800 million to the city's public pension system. In exchange, Detroit pledged not to use its art collection to pay debts.

FGIC has said the city could use the collection to boost payments to creditors whose claims the insurer may otherwise be forced to cover.

The case is In re City of Detroit, 13-bk-53846, U.S. Bankruptcy Court, Eastern District of Michigan (Detroit).

By Steven Church Sep 15, 2014 2:31 PM PT

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Scranton Stalked by Bankruptcy Mulls Selling Sewers: Muni Credit.

Scranton, with the weakest pension plan among Pennsylvania's cities, is trying to prop up its retirement funds to avoid becoming the first U.S. municipality since Detroit to file for bankruptcy.

The former manufacturing community will tax commuters starting next month and may sell its sewer system to buttress its retirement funds. The city has 23 cents for every dollar in retiree obligations, down from 47 cents in 2009, according to state data. Without a fix, Scranton may go bankrupt in less than five years, said Pennsylvania Auditor General Eugene DePasquale.

Cities and towns nationwide are coping with paying for pension benefits agreed to in more robust fiscal times. Pennsylvania ranks among the states of most concern since it has allowed municipalities to underfund mounting obligations, said Tamara Lowin, director of research at White Plains, New York-based Belle Haven Investments, which manages about $2 billion of municipal bonds.

"Without union cooperation, it would be incredibly difficult for them to resolve their liability problem outside of bankruptcy," she said.

National Deficit

Localities in Pennsylvania face at least $6.7 billion in unfunded pension liabilities, DePasquale said. The state, home to more than a quarter of U.S. public-employee plans, should consolidate systems and limit the local pension costs that it reimburses, he said.

Across the country, municipal officials have altered pensions, from Washington's repeal of some workers' cost-of-living adjustments, upheld by its Supreme Court this year, to Rhode Island's hike in retirement ages in 2011. States and local governments had about $1.4 trillion less than they needed as of the end of March to pay for promised benefits, according to the Federal Reserve Board.

Scranton, about 125 miles (201 kilometers) northwest of New York, is considering changes to its plans, said David Bulzoni, the business administrator.

"We would like to be in a position to try to solve as many problems that we can, with assistance from the commonwealth, without having to look at that option," he said of bankruptcy.

Distressed Program

The city has been in Pennsylvania's program for fiscally distressed municipalities, called Act 47, since 1992. At the time, it was racking up budget deficits and had lost 21 percent of its population over two decades, according to the state's Community and Economic Development Department.

Dwindling coal and railroad industries took a toll, said Jason Shrive, the city's lawyer. The community is still shrinking: its population fell 0.4 percent from 2010 to 2013, to about 76,000 residents, even as Pennsylvania's grew 0.6 percent, Census data show. About 21 percent of Scranton residents live in poverty, compared with 13 percent statewide.

The city, with an annual budget of about $130 million, has about $99 million of debt, financial filings show. None of the three biggest ratings companies grade the bonds.

Scranton general obligations maturing in September 2028 and insured by Ambac traded Sept. 5 at an average yield of 6 percent, or 3.5 percentage points above benchmark munis, data compiled by Bloomberg show.

Three Funds

The city runs three pension funds, one each for police officers, firefighters and non-uniformed personnel. The police and fire plans have fewer active employees than retirees, according to the auditor general's report. Combined, the funding status is 23 percent, weakest among Pennsylvania cities, data from the state's Public Employee Retirement Commission show.

The funds for fire personnel and municipal workers will run out of money in about three years and for the police, in about five, DePasquale's report said.

Scranton "will be facing bankruptcy within five years, potentially sooner without a fix to this," he said by telephone.

Municipal bankruptcies are rare, with 291 since 1980 and no filing by a community since Detroit's record case in July 2013, said James Spiotto, a bankruptcy specialist and managing director at Chicago's Chapman Strategic Advisors LLC, which advises on financial restructuring.

Wake Up

"Detroit has been a wake-up call for others to address their problems," he said. "Chapter 9 is a process, not a solution. It is time-consuming and uncertain, and you may wind up in a place where you may not want to be."

Scranton's pension costs are rising. The city's contribution next year will reach $15.8 million, from $3.4 million in 2008, data from the city and the auditor general show. Pension expenses will take up 16 percent of the budget in 2018, from 9 percent in 2006, according to a July presentation by Hackensack, New Jersey-based financial consultant HJA Strategies LLC.

The seat of Lackawanna County, Scranton passed a 0.75 percent income tax on nonresident commuters effective Oct. 1. The measure would generate at least $5 million annually, based on county data on tax collections, and the funds would go toward pensions, Bulzoni said.

Besides the local and federal governments, top employers include health-care centers, a bond document shows. Opponents have sued to prevent the levy, which they consider illegal.

Sewer Sale

Another option is to sell the sewer authority, which has started a review of the proposal, Bulzoni said. In addition, municipal officials this month met with union representatives to discuss contract features that are depleting pension assets, Bulzoni said. He declined to elaborate because he said some solutions will involve bargaining.

“There has to be some collective agreement to help shore up the plan’s solvency,” he said.

John J. Judge IV, president of the International Association of Fire Fighters Local 60, said he’s optimistic officials will solve the fiscal crisis.

“It’s going to take a little bit of time to turn it around,” Judge said.

By Romy Varghese Sep 14, 2014 5:00 PM PT

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Chicago Water Bonds Seen Shielded From Pension Woes: Muni Credit.

Chicago, bearing the biggest pension burden among the nation’s most-indebted localities, is selling water bonds for the first time since 2012. Investors say the deal’s strengths outweigh the city’s fiscal woes.

Tomorrow’s planned sale of about $372 million of debt will pay for work on pumping stations and the replacement of water mains, some of which are more than a century old, according to bond documents and the city. Mayor Rahm Emanuel in 2011 set in motion an almost doubling of water and sewer rates over four years. The move has bolstered the system’s finances, earning the debt a AA- grade, Standard & Poor’s fourth-highest level.

While Emanuel pushed through higher rates, he has failed to contain the swelling pension costs that led Moody’s Investors Service to cut Chicago’s general-obligation rating to the lowest among the 90 most-populous U.S. cities, excluding Detroit. Paul Mansour of Conning and Patrick Morrissey of Great Lakes Advisors LLC are considering buying the water bonds, in part with the expectation that the association with Chicago will boost yields on an otherwise healthy issuer.

“The water enterprise bonds are among the best that Chicago can offer,” said Richard Ciccarone, the Chicago-based chief executive officer of Merritt Research Services LLC, which analyzes municipal finance. “Even though Chicago has been in the news and has some fiscal challenges, the enterprise itself has been well-supported.”

Chicago faced heightened scrutiny in the $3.7 trillion municipal market after Moody’s in July 2013 lowered the city’s grade three levels the same week that Detroit filed for bankruptcy. The New York-based company dropped Chicago again in March, to Baa1, three steps above junk.

The park district, board of education and transit authority also had their ratings cut by Moody’s. The same goes for the water and sewer system: its A3 mark for second-lien bonds, the fourth-lowest investment grade, is down three levels from 14 months ago.

Moody’s may be too punitive, said Morrissey, who helps oversee $3.8 billion of fixed income at Great Lakes Advisors in Chicago. S&P ranks the second-lien water and sewer bonds three levels higher than Moody’s.

Payoff Time

S&P’s rating shows that “Chicago’s efforts are paying off with respect to increased service coverage and better financial oversight of our utilities,” Emanuel, a 54-year-old Democrat who is up for re-election next year, said in a Sept. 2 statement. S&P also rates the city’s general obligations three steps higher than Moody’s.

The water system’s finances have improved. Revenue is projected to double by 2016 from 2009 after the rate increases, while cash reserves are expected to hold at three months of operating expenses through fiscal 2016, bond documents show.

While Chicago’s rates rose 25 percent in 2012, with planned increases of 15 percent in each of the following three years, residents in New York, Los Angeles and San Francisco face higher charges, bond documents show. A family’s cost per 7,500 gallons of water in Chicago was below $30 in 2013, compared with more than $50 in San Francisco, according to the documents.

Chicago’s system, whose source is Lake Michigan, supplies and treats water for about 5.4 million people in Chicago and its environs. Suburban customers made up about 47 percent of net sales in 2013, bond documents show.

880 Miles

The 10-year project that Emanuel introduced in 2011 will improve pumping stations, replace 880 miles (1,416 kilometers) of water main and install 204,000 meters.

This is the first sale of water debt for the city since May 2012, according to data compiled by Bloomberg. The bonds are federally tax-exempt though subject to state levies.

Among the most-traded Chicago water and sewer bonds in the past week have been wastewater securities callable in January 2017, Bloomberg data show. A customer bought the debt Sept. 2 with a 1.57 percent yield, or about 1.2 percentage points above benchmark debt, the narrowest gap since July.

Chicago also plans to sell $301 million of second-lien wastewater bonds next week to fund sewer improvements, according to deal documents and Bloomberg data.

While the water system’s customer base and the city’s control over rates buoy the bonds, investors have to consider Chicago’s risk of fiscal distress, said Mansour, head of muni research in Hartford, Connecticut, at Conning, which oversees about $11 billion of local debt.

Association Eyed

“There has to be some premium associated with this credit because of the outside chance the city of Chicago’s ratings could fall again, and this credit could go along with it,” he said by telephone.

Chicago’s pension liabilities represented 678 percent of revenue in fiscal 2011, according to a Moody’s study released in September 2013. The city found a partial solution in June to address the $19.2 billion shortfall across its four retirement funds. Illinois lawmakers restructured two of the systems, which had a combined $9.4 billion in unfunded liabilities for about 60,000 municipal workers and retirees.

The water system pays into the pension fix, showing it's not immune to the city's financial pressures. The measures increase the system's yearly pension contributions, which were $13 million in fiscal 2013, by an average of 25 percent a year until fiscal 2019, bond documents show. The additional revenue from rate boosts is projected to "more than offset increases in retirement costs," the documents say.

"The water and wastewater credits are largely insulated from the city's general finances," Libby Langsdorf, a city spokeswoman, said in an e-mail.

Any yield premium on the water bonds may make the debt more attractive, said Ciccarone.

"The most important takeaway is they're revenue-based," Morrissey of Great Lakes Advisors said of the bonds. "There's so much less risk of people not paying their water bills here, and the revenue increases have already been put in place."

By Elizabeth Campbell and Brian Chappatta Sep 8, 2014 5:00 PM PT

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Judge Mulls SEC Limits on Political Donations.

A federal judge expressed strong doubts Friday about the constitutionality of the Securities and Exchange Commission's effort to rein in political donations from investment advisers who take business from state and local governments.

However, at an hourlong hearing, U.S. District Court Judge Beryl Howell expressed doubts that the lawsuit filed by the New York and Tennessee Republican parties was the correct vehicle to block the SEC's so-called "pay to play" rules. She said the state parties could lack the legal standing of someone more directly affected by the rules, like a candidate seeking to raise money or an investment adviser seeking to donate funds.

Howell also said that a technical legal issue might be fatal to the state parties lawsuit, at least in its current incarnation. The law appears to require those aggrieved by an SEC order to file suit within 60 days. The pay-to-play rules were adopted in 2010. The parties did not file their suit until last month.

"We believe that the rule exceeded the agency's statutory authority," said Jason Torchinsky, a lawyer for the state parties.

Howell repeatedly faulted the state parties for a lack of specifics in their legal papers, such as the names of candidates who could be affected or affidavits from investment advisers who claim they're holding back giving money.

"I'm a little troubled by the plaintiffs' standing here. It seems quite dependent on the actions of third parties," the judge said. "I'm a district court. I deal with facts. I need facts."

However, Howell said the SEC's rule—aimed at reining in donations intended to help investment advisers win business from state-controlled endowments or pension funds—was vague, especially when it comes to preventing indirect donations.

It's "very troubling that nobody understands the scope of the SEC's rule," the judge said, later referring to "the chilling nature of this catch-all" provision on indirect gifts.

SEC lawyer Jeffrey Berger defended the provision, saying it is aimed at donations routed through a spouse or family member. He also said it would be implemented only where the agency could prove an intent to circumvent the rule.

"There's an intent component to that," Berger said. "There's another layer of protection."

Berger also noted that political parties are not mentioned in the rule, which targets officials who can influence the selection of investment advisers.

However, Torchinsky said the provisions banning indirect support could discourage donations to state parties because of concerns that such a donation could be seen as an indirect gift to a covered candidate, if a state party later gives funds to that candidate.

Howell, an appointee of President Barack Obama, also expressed skepticism about the fact that the limits only apply to donations of more than $350. "The $350 seems like it came out of thin air," she said.

If the judge uses the 60-day time limit in SEC-related suits as a reason to turn down the state parties request for a preliminary injunction against the rule, it likely won't be the end of the matter. The parties could ask the SEC to reconsider the rule and then they could return to court.

However, Torchinsky asked the judge not to make the state parties go that route.

That "would be somewhat of a futile effort," he said, noting that the agency has made clear that it believes the rule is well-justified and that recent legal developments have not undermined it.

Howell issued no immediate ruling and did not say directly how she expected to decide the case, but she promised to publish a decision soon.

POLITICO
By JOSH GERSTEIN | 9/12/14 6:30 PM EDT

Moody's: Exclusion of Munis as HQLAs a Credit Negative.

WASHINGTON – Bank regulators may think excluding municipal securities from high-quality liquid assets in their liquidity rule is no big deal, but Moody's Investors Service issued a report on Friday saying it may negatively affect credit ratings in the muni market.

"The first minimum liquidity coverage requirements for U.S. banks is a credit negative for the municipal bond market because municipal bonds would not qualify as high-quality liquid assets that banks must hold to cover potential liquidity draw downs," Moody's said. "The exclusion presents one less reason for banks to buy municipal bonds and will likely increase funding costs in the municipal market as a result.”

The muni market shrunk this year while bank holdings of munis rose. Outstanding municipal debt during the first quarter of 2014 was $3.66 trillion, compared to $3.77 trillion as of December 2010. However, during that time, U.S. bank holdings of munis grew faster than any other investor category – increasing by $171 billion to $425 billion, according to the Federal Reserve Board’s Flow of Funds data.

The liquidity rule was adopted by bank regulators on Sept. 3 to implement Basel III and ensure banks have enough assets that can be converted into cash or easily marketed during a period of financial stress. Bank regulators said they did not include munis as HQLAs because generally munis are not liquid and are not easily marketable.

But dealer groups and individual dealers fought against the exclusion, arguing investment-grade munis have lower default rates than corporate bonds and are easily marketable. They warned that the exclusion of munis would raise borrowing costs for issuers, as well as decrease liquidity and increase volatility in the municipal market.

At a recent Senate Banking Committee, Sen. Schumer made the same points, urging the bank regulators to include investment grade munis as HQLAs.

The regulators from the Federal Reserve Board, Federal Deposit Insurance Corp. and Office of the Comptroller of the Currency, all told Schumer that they were open to the idea of adding munis as HQLA to the liquidity rule. But many market participants are skeptical they will change their minds, since they continue to say that banks don’t hold munis for liquidity.

Moody’s also said there is no guarantee that the liquidity rule will be changed.

“U.S. regulators have said they will continue to review municipal bonds to develop criteria under which some of them could be included as HQLAs, but at this time there is no indication of how these will be determined or when such revision will be implemented,” the rating agency said. “In the meantime, [the] exclusion will put downward pressure on banks’ purchase of municipal securities.”

THE BOND BUYER
BY LYNN HUME
SEP 12, 2014 1:14pm ET

Chamber of Commerce Argues Court Erred in Work Product Analysis.

The Chamber of Commerce of the United States of America filed an amicus brief in the Second Circuit arguing that a district court erred when it held that the work product doctrine didn’t apply to documents sought from Ernst & Young LLP in an IRS summons, arguing that the decision conflicts with Second Circuit precedent.

GEORG F.W. SCHAEFFLER, INA-HOLDING SCHAEFFLER GMBH & CO. KG,
SCHAEFFLER HOLDING GMBH & CO. KG, AND SCHAEFFLER HOLDING, LP,
Petitioners — Appellants,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES
AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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September 12, 2014

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, the Chamber of Commerce of the United States of America (the Chamber) is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent company and no publicly held company has ten percent or greater ownership in the Chamber.

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STATEMENT OF INTEREST

The Chamber of Commerce of the United States of America (the "Chamber") is the nation's largest federation of business companies and associations, with underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. A principal function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases raising issues of concern to the nation's business community.1

This case presents such an issue. The district court has interpreted the attorney work product doctrine in a way that effectively denies protection to documents created in the context of complex business transactions, even when the documents are created because of anticipated litigation and reveal mental impressions and opinions of counsel. The district court's decision is at odds with this Court's decision in United States v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998), which holds that "a document created because of anticipated litigation, which tends to reveal mental impressions, conclusions, opinions, or theories concerning the litigation, does not lose work product protection merely because it is intended to assist in the making of a business decision influenced by the likely outcome of the anticipated litigation." As in Adlman¸ the district court's decision in this case presents companies with an "untenable choice." 134 F.3d at 1200. If a company obtains a thorough and candid analysis "reflecting the company's litigation strategy and its assessment of its strengths and weaknesses," it will be prejudiced when that analysis is turned over to its litigation adversaries. Id. If, on the other hand, the company "scrimps on candor and completeness to avoid prejudicing its litigation prospects, it subjects itself . . . to ill-informed decisionmaking." Id. In this case, as in Adlman, "nothing in the policies underlying the work-product doctrine or the text of the Rule itself" justifies "subjecting a litigant to this array of undesirable choices." Id.

SUMMARY OF THE ARGUMENT

1. The district court misapplied this Court's decision in Adlman. The district court acknowledged that litigation was highly probable and that the document at issue contained legal strategy and analysis. The district court nevertheless denied work protection by leaping much too quickly from a determination that the company would have sought legal advice even if it had not anticipated litigation to an unjustified conclusion that the advice would have taken the same form regardless of whether litigation was anticipated.

2. The district court's holding is contrary to the policy goals underlying the work product doctrine, as set forth in Adlman and Hickman v. Taylor, 329 U.S. 495 (1947). The court reasoned that the complexity of the transaction at issue, as well as the novel legal issues it raised, necessarily meant that the company would have sought detailed and lengthy tax advice from outside counsel even if it did not anticipate litigation. If these factors were sufficient to eliminate work product protection, legal advice concerning complex commercial transactions would virtually always go unprotected, effectively eliminating the protection of the work product doctrine in the arena in which it is most needed.

The district court's decision is also likely to have an adverse effect on the quality of legal advice. As both Hickman and Adlman recognize, a basic purpose of the protection is to provide lawyers with a zone of privacy in which they may freely develop their case. Under the district court's holding, however, lawyers will hesitate to give candid guidance for fear that their work product will later be revealed to opposing counsel. As a result, businesses will make commercial decisions without the full benefit of uninhibited legal advice, hurting their interests as well as those of their customers.

ARGUMENT

I. THE DISTRICT COURT'S APPROACH TO THE WORK PRODUCT DOCTRINE IS

CONTRARY TO THIS COURT'S DECISION IN ADLMAN.

A. The District Court's Analysis Departs From Adlman.

1. The Second Circuit Has Adopted A "Because Of" Litigation Test.

The work product doctrine, recognized in Hickman v. Taylor, 329 U.S. 495 (1947), and codified in Federal Rule of Civil Procedure 26(b)(3), provides a qualified protection against disclosure for documents prepared by an attorney in anticipation of litigation. The doctrine is designed "to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." Adlman, 134 F.3d at 1196 (quoting Hickman, 329 U.S. at 510-11). The principal focus is on encouraging careful and thorough preparation by the attorney and preventing the attorney's efforts from redounding to the benefit of the opposing party. Hickman, 329 U.S. at 511.

This Court has held that the work product doctrine applies to all documents prepared "because of" litigation. In United States v. Adlman, 134 F.3d 1194 (2d Cir. 1998), the Circuit rejected a narrower formulation of the doctrine under which documents would be protected only if they are prepared "primarily to assist in" litigation, and not if the "primary, ultimate, or exclusive purpose is to assist in making a business decision." See Adlman, 134 F.3d at 1198. In rejecting that narrower formulation, this Court joined other courts in holding that "[w]here a document is created because of the prospect of litigation . . ., it does not lose protection under this formulation merely because it is [also] created in order to assist with a business decision." Id. at 1203. Thus, for example, the work product doctrine protects a report concerning the company's litigation prospects that is written to inform a bank's lending policy to a company, as well as a memorandum prepared for an independent auditor to determine the amount of reserves for projected litigation. See id. at 1200.

As the Court noted in Adlman, the work product protection is not absolute. Although a document that satisfies the "because of" litigation test is eligible for protection, this shield may be overcome if a district court determines that the opposing party has shown a substantial need for the document and is unable to obtain its contents elsewhere without undue hardship. Id. at 1195. In addition, the court may find that only certain sections of a document require protection. Id. The Court explained, however, that "opinion work product" (documents that tend to reveal the attorney's mental processes) "receive special protection not accorded factual material," because a "core" purpose of the work product doctrine is to "shelter[ ] the mental processes of the attorney, providing a privileged area within which he can analyze his client's case." Adlman, 134 F.3d at 1197 (quoting United States v. Nobles, 422 U.S. 225, 238 (1975)).

2. The District Court's Approach Conflicts With the "Because Of" Test.

Under Adlman, the key issue is whether a document was prepared "because of" anticipated litigation. In the instant case, the district court recognized "that Schaeffler believed that litigation was highly probable in light of the significant and difficult tax issues that were raised by the planned refinancing and restructuring." Op. at 28. In addition, the court acknowledged that a tax memorandum prepared by Ernst & Young (the "EY Tax Memo") set forth the legal issues and analyzed the potential arguments that could be made by the parties should the IRS audit the company's return. Op. at 27. Based on these determinations, the court should have concluded that the work product doctrine applied to the EY Tax Memo.

Instead, the court applied a two-part test, based upon the statement in Adlman that work protect protections do not extend to "documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation." 134 F.3d at 1202.

First, the district court considered whether the company would have sought out the type of tax advice provided by Ernst and Young if it had not anticipated an audit or litigation. Op. at 29. Second, the court asked whether the advice given would have been different in content or form had the company known that no audit or litigation would ensue. Op. at 30.

As Appellant explains in its brief, this analysis departs from Adlman, which specifically provided that, "[w]here a document is created because of the prospect of litigation . . ., it does not lose protection under this formulation merely because it is [also] created in order to assist with a business decision." 134 F.3d at 1203. Thus, the Court's reference to documents that "would have been created in essentially similar form irrespective of the litigation" simply refers to documents that, while potentially prepared with litigation on the horizon, are not core work product; i.e., documents that do not "reveal mental impressions, conclusions, opinions, or theories concerning . . . litigation." Id. at 1195 (emphasis added).

B. The District Court Failed To Properly Analyze Whether the Legal Advice Would Have Taken the Same Form Absent Litigation.

In addition to applying the wrong standard in determining the application of work product protection, the district court also erred by denying work product protection based on factors that will be present in virtually any complex business transaction. After determining that the company would have sought tax advice even if had not anticipated an audit or litigation, the court jumped far too readily to the conclusion that the tax advice would have been essentially identical in form and content even if litigation not been anticipated. In determining whether a document "would have been created in essentially similar form irrespective of the litigation," courts must require more than the district court required in this case, or this single phrase in Adlman will effectively negate the work product rule in complex transactions.

The court noted that "the complexity of the tax issues surrounding the relevant transactions engendered the need to hire outside attorneys and advisors as well as the need to generate the lengthy and detailed analysis contained in the EY Tax Memo." Op. at 29. The district court then asserted that all legal advice considers the relevant legal authorities and analyzes how those authorities would be applied to a particular set of facts. On this basis, the court reasoned that it is of "no significance" that the EY Tax Memo evaluates the chances that specific tax positions will succeed in litigation, and specifically identifies and evaluates arguments that the IRS might advance. Op. at 31.

The district court's reasoning ignores the reality that the breadth and depth of an attorney's legal and factual analysis can vary considerably depending upon whether litigation is anticipated. To be sure, it may be difficult to determine what an attorney's opinion would have looked like in a counterfactual scenario that did not include a risk of litigation. That is particularly true in a case such as this one, where the factors the district court relied on — the size, complexity, and novelty of the transaction — created a prospect of litigation. But such difficulties cut against any conclusive determination that work product would have taken "essentially similar form" absent a prospect of litigation. The purpose of the work product doctrine is to protect the attorney's specific "mental impressions, conclusions, opinions, or theories concerning . . . litigation." 134 F.3d at 1195. Given this purpose, a court should not eliminate the work protection absent convincing evidence that substantially the same impressions, conclusions, opinions, or litigation theories would have been conveyed even if litigation had not been anticipated.

Rather than engaging in an analysis of the EY Tax Memo's detailed identification of significant issues and examination of potential arguments and counter-arguments, the district court effectively assumed that the complex nature of the transaction vitiated the work product protection. Under the district court's approach, only specific signifiers, such as a discussion of "actions particular to the litigation process" or a section on settlement strategies, would be sufficient to demonstrate that a document was prepared "because of" litigation. By this logic, documents addressing the practical steps of a court case will receive protection, while those considering the core of any litigation — the legal theories and arguments — will be disclosed to adversaries on demand. That would eliminate the heart of the work product doctrine — surely not a result this Court intended to endorse in Adlman.

C. The District Court's Conclusion Is Based On A Misunderstanding Of Tax Practice.

In concluding that all tax advice regarding a complex transaction would be created in essentially the same form regardless of litigation, the district court relied on a quotation from Circular 230 that prohibits tax practitioners from taking the possibility of audit into account when providing tax advice. Op. at 30 (citing 31 C.F.R. § 10.37(c)(3)(iii) (2014)). The court's reliance on this language reflects a basic misconception about the practice of tax law. The federal income tax system depends on self-assessment. For this reason, tax practitioners are not permitted to provide advice that would circumvent the self-assessment system by suggesting to taxpayers that the determination of whether to assess should turn not on whether the tax is properly assessable, but instead on whether the client is likely to get caught if it wrongly carries out its self-assessment duties.

This requirement — that advice be provided without regard to the likelihood that the facts underlying the assessment question at issue would be discovered — is irrelevant when considering the prospect of litigation. For example, an advisor may expect that certain items, if not assessed by the taxpayer, will never be discovered on audit and never give rise to litigation, but nonetheless quite clearly are assessable. On the other hand, other items may be certain to be discovered on audit but never give rise to litigation or controversy because the IRS would agree that assessment would be improper. Finally, in some situations an advisor may expect that if an item is discovered on audit (which may be likely or unlikely), controversy may ensue. In short, Circular 230 standards do not imply that all tax advice by definition is prepared for controversy, but only that the self-assessment system duty requires that tax issues be considered on their merits and not on the basis of whether the taxpayer will get caught.

Even if the Court were to assume, contrary to fact, that all tax advice is prepared in anticipation of controversy or litigation, that premise would not imply that no tax advice is protected by the work product doctrine. Indeed, subject to a compelling need analysis, exactly the opposite conclusion would be appropriate — namely, that all tax advice would qualify for the protection. Neither bright-line test makes sense, however, because advice on tax law, like other legal advice, may be prepared to provide the recipient a basis by which a legal duty may be determined, but may also may be prepared as part of the process of preparing for an anticipated controversy. A categorical rule that all tax advice is necessarily given as if litigation were contemplated cannot be squared with reality. And a rule that excludes all tax advice from the work product protection is equally untenable.

II. THE DISTRICT COURT'S APPROACH IS CONTRARY TO THE POLICIES UNDERLYING THE WORK PRODUCT DOCTRINE.

A. The District Court's Holding Removes Work Product Protection For Complex Transactions.

The district court's approach to the work product doctrine effectively eliminates work product protection for tax opinions provided for complex transactions. As a result, businesses selected for audit by the IRS would be placed at a significant disadvantage in the process if their legal counsel's mental impressions and strategies were disclosed to the government.

The court relied on the fact that the EY Tax Memo concerned "enormously complex transactions" raising "'complex' and 'novel' federal tax issues" as support for its conclusion that the company would have sought tax advice even absent the threat of litigation. Op. at 29. Most businesses, especially sophisticated businesses, however, seek advance guidance before entering into significant transactions that raise complex and novel issues. Thus, the district court's reasoning effectively strips work product protection from tax advice given in the context of complicated transactions.

This outcome is contrary to the basic purposes of the work product doctrine. See Adlman, 134 F.3d at 1500 ("Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." (quoting Hickman, 329 U.S. at 516 (Jackson, J., concurring))). Moreover, the mental impressions of taxpayer's counsel need not be shared in order for the IRS to prepare its case and the taxpayer's assessment to be adjudicated fairly. The IRS has nearly 90,000 employees, including a host of talented highly specialized tax law experts.2 It is capable of doing its job without relying on the mental impressions of opposing counsel. Indeed, the district court's approach could hinder an efficient and productive audit process. A tax opinion may identify legal theories and litigation strategies that the IRS would not have otherwise asserted. In some cases, counsel may believe that the theories lack merit. Nevertheless, an IRS agent, after reading these theories, may choose to investigate or even argue these positions, slowing the process and delaying a final assessment. This unnecessary conflict is a classic example of the government seeking to build its case on the wits of opposing counsel. As a matter of public policy, barriers should not be erected to taxpayers having full access to all the potential issues associated with a tax return position before exercising their duties as the primary assessors of the income tax.

As the Court recognized in Adlman, the policies underlying the work-product doctrine and the text of Rule 26(b)(3) strongly support application of the doctrine in this context. The government imposes on taxpayers a duty to apply and interpret an extraordinarily complicated set of rules and laws to myriad complex transactions, but would limit access to candid advice of counsel by seeking to obtain that advice and turn it against the taxpayer. Where advice is provided to evaluate a taxpayer's defenses and strategies in litigation, revealing it to litigation adversaries undermines the basic purpose of the work product doctrine. In appropriate cases, the needs of the government may outweigh these policy concerns, but here the government has not asserted such needs. As the government would have it, a taxpayer must ascertain the law, which is often uncertain, and commit to a position on a tax return, choosing either to guess as to how it would defend the position in litigation or to reveal in advance its defense strategy to the government. As in Adlman, neither the purpose nor the text of the work product doctrine counsels in favor of such a result.

The adverse consequences of the district court's formulation of the work product doctrine extend beyond the tax realm. In denying protection to the EY Tax Memo, the court asserted that businesses had reasons other than the prospect of litigation to obtain legal advice, including a desire to lower their tax bills. Op. at 29-30. As a result, the court concluded that the company would have sought out the same type of advice even in the absence of anticipated litigation. Op. at 30. This rationale could operate to deny protection to many forms of prospective legal advice received by businesses. For example, a business that collects consumer data and is the victim of a data breach may revise its data security procedures to prevent further breach while also complying with Section 5 of the Federal Trade Commission Act. See 15 U.S.C. § 45. In addressing such a breach, the business will likely seek the advice of counsel to assess its data security procedures. Although this legal guidance may be provided in anticipation of litigation with the FTC, the business would also have other incentives to obtain advice, such as maintaining good customer service. Under the district court's approach, however, the fact that advice prepared in anticipation of litigation may benefit a company in other arenas will weigh against such advice being protected from disclosure.

B. The District Court's Holding Creates Perverse Incentives for Legal Advisors.

The district court's opinion significantly narrows the scope of work product protection for tax opinions. This narrowing of the protection will create pressure to shift the standard practice of those providing tax advice. If work product has little or no chance of qualifying for protection, tax practitioners will face pressure to be less candid in counseling their clients. Because their memos and opinions may be disclosed to adversaries, they may refrain from "showing their work" in reaching their conclusions and may choose not to discuss litigation strategies should they conclude that a transaction is likely to be challenged.

Such perverse incentives are not limited to the tax arena. In other contexts, such as the data security context described above, attorneys may also withhold their candid assessment.

Adlman recognized the potential for such negative effects and specifically noted this possibility as a reason for the test it adopted:

If the company declines to [candidly discuss litigation strategies, appraisal of the likelihood of success, and the feasibility of reasonable settlement] or scrimps on candor and completeness to avoid prejudicing its litigation prospects, it subjects itself and its co-venturers to ill-informed decisionmaking. On the other hand, a study reflecting the company's litigation strategy and its assessment of its strengths and weaknesses cannot be turned over to litigation adversaries without serious prejudice to the company's prospects in litigation. . . . We perceive nothing in the policies underlying the work — product doctrine or the text of [Rule 26(b)(3)] itself that would justify subjecting a litigant to this array of undesirable choices.

Adlman, 134 F.3d 1194, 1200 (2d Cir. 1998) (citing Hickman, 329 U.S. at 516). Adlman adopted a test that ensures attorneys a zone in which they can consider the facts, analyze the authorities, and formulate a legal strategy. To uphold the district court's interpretation of the doctrine would significantly constrict that space in a manner that would be "demoralizing" to attorneys, Hickman, 329 U.S. at 512, and injurious to clients.

CONCLUSION

The decision of district court should be reversed.
Respectfully submitted,

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September 12, 2014

CERTIFICATE OF COMPLIANCE

I CERTIFY, pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7) that the foregoing Brief contains 3,751 words, excluding the parts of the Brief exempted under Federal Rule of Appellate Procedure 32. In accordance with Federal Rule of Appellate Procedure 32(a)(5)-(6), this Brief has been prepared in 14-point Times New Roman font.

Dated: September 12, 2014

Robert A. Long
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I CERTIFY that on this 12th day of September, 2014, a true and correct copy of the foregoing Brief was served on all counsel of record via CM/ECF pursuant to Local Rule 25.1(h).

Dated: September 12, 2014

Robert A. Long
Counsel for Amicus Curiae

FOOTNOTES

1 Pursuant to Federal Rule of Appellate Procedure 29, the Chamber certifies that no party's counsel authored this brief in whole or in part, no party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person, other than the Chamber, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

2 Table 30, Internal Revenue Service Data Book 2013, available at http://www.irs.gov/pub/irs-soi/13databk.pdf.

END OF FOOTNOTES

IRS Issues Guidance on Changes to Pension Funding Stabilization Rules.

The IRS has issued guidance (Notice 2014-53) on changes to the funding stabilization rules for single-employer pension plans under the tax code and ERISA that were made by the Highway and Transportation Funding Act of 2014 (HTFA).

The interest rates used for purposes of minimum funding requirements are a set of three segment rates. Section 430(h)(2)(C)(iv) provides that each of the three segment rates for a plan year is adjusted to fall within a specified range that is determined based on an average of the corresponding segment rates for the 25-year period ending on September 30 of the calendar year preceding the plan year's first day. For plan years beginning in 2012, each segment rate is adjusted so that it is between 90 and 110 percent of the corresponding 25-year average segment rate. Before HTFA, this range was scheduled to gradually increase for later plan years so that the segment rates for plan years beginning after 2015 would have been between 70 and 130 percent of the corresponding 25-year average segment rates.

HTFA extends the period during which the narrowest range of the 25-year average segment rates applies when determining the segment rates that are used to apply sections 430 and 436. Thus, for plan years beginning in 2012 through 2017, each segment rate is adjusted so that it is between 90 and 110 percent of the corresponding 25-year average segment rate. For later plan years, this range is scheduled to gradually increase so that the segment rates for plan years beginning after 2020 are between 70 and 130 percent of the corresponding 25-year average segment rates.

HTFA also provides that the limitation on interest rates based on the corresponding 25-year average segment rates does not apply for purposes of section 436(d)(2) regarding limitations on accelerated benefit distributions for a plan sponsored by an employer in bankruptcy. Changes to section 430(h)(2)(C)(iv) apply for plan years beginning after December 31, 2012. Under HTFA, a plan sponsor can elect not to have the changes to section 430 apply to any plan year beginning in 2013, either for all purposes or solely when determining the plan's adjusted funding target attainment percentage for that plan year.

Notice 2014-53 provides procedures for electing to defer use of the HTFA segment rates until the 2014 plan year; rules for elections and designations regarding the minimum funding requirements applicable to a plan for a plan year beginning in 2013; and the reporting requirements if the HTFA segment rates apply to the 2013 plan year. The guidance also provides special rules on the application of the benefit restrictions under section 436 and related rules for a plan year beginning after December 31, 2012, and before October 1, 2014, for a plan for which the HTFA changes are applied when determining its adjusted funding target attainment percentage for the plan year.

Guidance on Pension Funding Stabilization under the
Highway and Transportation Funding Act of 2014 (HATFA)

I. PURPOSE

This notice provides guidance on the changes to the funding stabilization rules for single-employer pension plans under the Internal Revenue Code (Code) and the Employee Retirement Income Security Act of 1974 (ERISA)1 that were made by section 2003 of the Highway and Transportation Funding Act of 2014 (HATFA), Pub. L. No. 113-159, which was enacted on August 8, 2014.

II. BACKGROUND

Section 430 specifies the minimum funding requirements that generally apply to singleemployer defined benefit pension plans pursuant to § 412. Section 430(h)(2) specifies interest rates that are used for purposes of calculating the minimum required contribution. The interest rates that are used for this purpose are a set of three segment rates described in § 430(h)(2)(C)(i), (ii) and (iii), or, alternatively, a full yield curve described in § 430(h)(2)(D)(i).

Section 430(h)(2)(C)(iv), which was added by the Moving Ahead for Progress in the 21st Century Act of 2012 (MAP-21), Pub. L. No.112-141, provides that each of the three segment rates described in § 430(h)(2)(C)(i), (ii) and (iii) for a plan year is adjusted as necessary to fall within a specified range that is determined based on an average of the corresponding segment rates for the 25-year period ending on September 30 of the calendar year preceding the first day of that plan year. For plan years beginning in 2012, each segment rate is adjusted so that it is no less than 90% and no more than 110% of the corresponding 25-year average segment rate. Under § 430(h)(2)(C)(iv)(II) as in effect prior to its modification by HATFA, this range was scheduled to gradually increase for later plan years, so that the segment rates for plan years beginning after 2015 would have been no less than 70% and no more than 130% of the corresponding 25-year average segment rates.

Notice 2012-61, 2012-42 I.R.B. 479, provides guidance regarding the changes to the minimum funding requirements and related rules made by MAP-21. Notice 2012-61 includes general guidance relating to the application of the modified segment rates (referred to in Notice 2012-61 and this notice as the MAP-21 segment rates), measurements for which the modified segment rates do not apply, transition issues, elections, reporting, and other issues.

HATFA extends the period during which the narrowest range around the 25-year average segment rates applies for purposes of determining the segment rates that are used to apply §§ 430 and 436. Under the modifications to § 430(h)(2)(C)(iv) made by HATFA, for plan years beginning in 2012 through 2017, each segment rate is adjusted so that it is no less than 90% and no more than 110% of the corresponding 25-year average segment rate. For later plan years, this range is scheduled to gradually increase, so that the segment rates for plan years beginning after 2020 are no less than 70% and no more than 130% of the corresponding 25-year average segment rates. The segment rates as modified by HATFA are referred to in this notice as the HATFA segment rates.

Section 436 sets forth a series of limitations on the accrual and payment of benefits under an underfunded plan. These limitations are applied during a plan year based on the plan's adjusted funding target attainment percentage (AFTAP). Section 2003(c) of HATFA provides that the limitation on interest rates based on the corresponding 25-year average segment rates does not apply for purposes of § 436(d)(2) (relating to limitations on accelerated benefit distributions for a plan sponsored by an employer in bankruptcy).

Section 2003(e)(1) of HATFA provides that the modifications to § 430(h)(2)(C)(iv) apply with respect to plan years beginning after December 31, 2012. Under section 2003(e)(2) of HATFA, a plan sponsor can elect not to have the modifications to § 430 apply to any plan year beginning in 2013, either for all purposes or solely for purposes of determining the plan's AFTAP for that plan year (which is used to apply the benefit restrictions under § 436).

This notice provides guidance on certain issues relating to HATFA. Notice 2012-61 continues to apply except to the extent the statutory provisions have changed.

III. ELECTION TO DEFER USE OF HATFA SEGMENT RATES UNTIL THE 2014 PLAN YEAR

This section III sets forth the procedures for elections made pursuant to section 2003(e)(2) of HATFA that relate to a plan year beginning in 2013.

A. Procedure for electing to defer use of HATFA segment rates

Except as provided in section III.B of this notice (which provides for a deemed election to defer the use of the HATFA segment rates for purposes of both §§ 430 and 436 based on the filing of Form 5500 under some circumstances), a plan sponsor elects to defer the use of the HATFA segment rates, either for all purposes or solely for purposes of § 436, until the first plan year beginning on or after January 1, 2014, by providing written notice to the enrolled actuary for the plan and to the plan administrator. The notice must specify the name of the plan, employer identification number and plan number, and whether the use of the HATFA segment rates is deferred for all purposes or only for determination of the AFTAP used to apply benefit restrictions under § 436.

The election described in this section III.A is irrevocable, and must be made no later than the later of: (1) the deadline for filing the Form 5500, Form 5500-SF or Form 5500-EZ (including extensions) for the plan year beginning in 2013; or (2) December 31, 2014.

B. Deemed election to defer use of the HATFA segment rates for purposes of both §§ 430 and 436

through filing of Form 5500, Form 5500-SF or Form 5500-EZ

With respect to a plan year beginning in 2013, if, on or before December 31, 2014, the Form 5500, Form 5500SF or Form 5500EZ is filed and the Schedule SB reflects the MAP-21 segment rates, then an election to defer use of the HATFA segment rates for purposes of both §§ 430 and 436 until the first plan year beginning on or after January 1, 2014 is deemed made. If an election is deemed made pursuant to this section III.B, the election is permitted to be revoked by filing, no later than December 31, 2014, an amended Form 5500, Form 5500-SF, or Form 5500-EZ for the plan year, with a revised Schedule SB that reflects the use of the HATFA segment rates. Alternatively, the deemed election is permitted to be revoked by either providing written notice of the revocation (which includes the name of the plan, employer identification number and plan number) to the enrolled actuary for the plan and to the plan administrator or by making the election described in section III.A of this notice to defer the use of HATFA segment rates only for purposes of § 436, but only if (1) a copy of the notice of the revocation or of the election is e-mailed to the Pension Benefit Guaranty Corporation (PBGC) at revoke.deemed.HATFA.election@pbgc.gov on or before December 31, 2014 (including in the subject line of the e-mail the plan sponsor's employer identification number, the plan number, and the name of the plan), and (2) at the time of the revocation of the deemed election, the plan sponsor is not a debtor in a case under title 11, United States Code, or similar federal or state law. If the plan sponsor revokes the deemed election using this alternative method, then an amended Form 5500, Form 5500-SF, or Form 5500-EZ2 for the plan year must be filed no later than the date on which Form 5500, Form 5500-SF or Form 5500-EZ is timely filed for the following plan year, and the revised Schedule SB must reflect the use of the HATFA segment rates.

If the plan sponsor revokes the deemed election, the plan sponsor can also elect to defer use of the HATFA segment rates only for purposes of § 436 under the rules of section III.A of this notice. An election that is deemed made pursuant to this section III.B is irrevocable if it is not revoked in the time and manner set forth in this section III.B.

IV. SECTION 430 ELECTIONS AND REDESIGNATIONS AVAILABLE FOR THE 2013 PLAN YEAR

This section IV sets forth rules regarding elections and designations relating to the minimum funding requirements applicable to the plan for the plan year beginning in 2013. Any action otherwise permitted in this section IV is not permitted to the extent it (1) would result in the imposition of benefit restrictions under § 436 for the plan year beginning in 2013 or 2014 that would otherwise not be imposed, or (2) would result in an unpaid minimum required contribution for any plan year beginning before 2014. The procedural and timing rules governing the acts permitted under this section IV are in section IV.E of this notice.

A. Reversal of an election to reduce funding balances

A plan sponsor is permitted to elect to reverse all or part of any election under § 1.430(f)-1(e) to reduce the plan's funding standard carryover balance or prefunding balance as of the first day of a plan year beginning in 2013 if (i) the HATFA segment rates apply for purposes of determining the minimum required contribution for that plan year, and (ii) the reduction election was made on or before September 30, 2014. It is expected that the regulations under § 430(f) will be revised to permit this exception to the general rule that any election to reduce the plan's funding standard carryover balance or prefunding balance is irrevocable.

Under § 1.436-1(a)(5), there may have been deemed elections to reduce the funding standard carryover balance or prefunding balance to avoid or remove benefit restrictions under § 436 for the plan year beginning in 2013. If the HATFA segment rates are applied retroactively for purposes of §

436 for a plan year beginning in 2013, the election to reverse a reduction under this section IV.A also applies to such a deemed election that was made in conjunction with a certification of the plan's AFTAP for the plan year. However, any reduction election that was made to avoid or remove benefit restrictions under § 436 during the period before the date of the original AFTAP certification for the 2013 plan year cannot be reversed even if the HATFA segment rates apply retroactively for purposes of § 436 for the plan year. This is because the AFTAP based on the HATFA segment rates will not apply to that portion of the plan year and therefore the reversal of any reduction election that was made to avoid or remove benefit restrictions under § 436 during that period would result in the imposition of new restrictions.

B. Late elections to add excess contributions for the 2013 plan year to the prefunding balance

If the HATFA segment rates apply for purposes of determining the minimum required contribution for a plan year beginning in 2013, the plan sponsor is permitted to make (or increase) the election under § 1.430(f)-1(b)(1)(ii) to add excess contributions for that plan year to the plan's prefunding balance as of the first day of the following plan year. It is expected that the regulations under § 430(f) will be revised to permit this extension of time to make this election.

C. Redesignation of a section 436 contribution

If the HATFA segment rates are applied retroactively for purposes of § 436 for a plan year beginning in 2013, any section 436 contribution within the meaning of § 1.436-1(j)(7) that was made in connection with the certified AFTAP for that plan year is applied toward the minimum required contribution for that plan year to the extent the contribution is no longer required to avoid or remove the benefit restriction. However, no change is permitted with respect to section 436 contributions that were made in connection with a presumed AFTAP before the AFTAP was certified for the plan year.

D. Redesignation of a contribution originally designated for 2013

Despite the general position of the IRS that a contribution designated for a particular plan year cannot be redesignated to apply for another plan year after the Schedule SB is filed, the plan sponsor may choose to redesignate all or a portion of a contribution that was originally designated as applying to the plan year beginning in 2013 to apply to a plan year that begins in 2014. This rule applies only to contributions made after the end of the 2013 plan year and on or before September 30, 2014 and applies only if the original designation is on a Schedule SB for the 2013 plan year that is filed on or before December 31, 2014.3

E. Procedural and timing rules

Any reversal of an election, election made after the generally applicable deadline, or redesignation of contributions under this section IV is made by the plan sponsor by providing written notification to the plan's enrolled actuary and plan administrator, and must be made no later than the last day of the plan year beginning in 2014. The written notification must specify the name of the plan, the employer identification number and plan number, and must set forth the relevant details, including the specific dollar amount involved. A conditional or formula-based election does not satisfy this requirement.

V. REPORTING REQUIREMENTS IF THE HATFA SEGMENT RATES APPLY TO THE 2013 PLAN YEAR

With respect to the plan year beginning in 2013, if the plan uses the segment rates and the plan sponsor has not elected to defer the use of the HATFA segment rates in accordance with section III.A or III.B of this notice, then the Schedule SB for that plan year must reflect the use of the HATFA segment rates.

VI. APPLICATION OF § 436 AND RELATED RULES FOR A PLAN YEAR BEGINNING AFTER DECEMBER 31, 2012 AND BEFORE OCTOBER 1, 2014

This notice provides special rules relating to the application of the benefit restrictions under § 436 and related rules for a plan year beginning after December 31, 2012 and before October 1, 2014 for a plan for which the modifications made by HATFA to § 430(h)(2)(C)(iv) are applied for purposes of determining the plan's AFTAP for the plan year. A plan year to which this section VI applies is referred to in this section VI as an applicable plan year.

A. Presumptions apply based on prior year AFTAP

The benefit restrictions under § 436 for an applicable plan year are applied based on the presumed AFTAP before the date, if any, that the AFTAP is certified for that applicable plan year. Thus, the application of the HATFA segment rates does not affect the application of the presumption rules under § 436(h) for the first plan year for which those rates apply to the plan for purposes of § 436 (but affects the application of those presumption rules for the subsequent plan year).

B. Rules if first certification uses HATFA segment rates

If the first AFTAP certification for an applicable plan year (which may be a range certification pursuant to § 1.436-1(h)(4)(ii)) is made using the HATFA segment rates, the benefit restrictions under § 436 apply based on that AFTAP in accordance with the rules of §§ 1.4361(g) and (h).

C. Rules if first certification uses MAP-21 segment rates

If, on or before September 30, 2014, the AFTAP for an applicable plan year is certified using the MAP-21 segment rates, the AFTAP for that applicable plan year must be determined using the HATFA segment rates. If the change in the AFTAP using the HATFA segment rates rather than the MAP-21 segment rates results in a material change to the AFTAP, then the AFTAP must be recertified. In such a case, the plan sponsor can choose to apply any resulting change in the application of the benefit restrictions under § 436 either (i) prospectively, as described in section VI.D of this notice or (ii) retroactively to the date that the AFTAP was originally certified, as described in section VI.E of this notice. If the HATFA segment rates are applied to determine the certified AFTAP for the plan year beginning in 2013, then the option to apply any change in the application of § 436 as a result of recertification of the AFTAP using the HATFA segment rates prospectively is not available for the plan year beginning in 2014. For the first plan year for which the HATFA segment rates apply for purposes of § 436, if the AFTAP using the HATFA segment rates is certified before the end of the plan year, then in the absence of an affirmative election to apply the changes retroactively as described in section VI.E of this notice, the plan sponsor will be treated as having elected to apply any changes prospectively as described in section VI.D of this notice. All plan operations and elections must be consistent with this choice of whether to apply the AFTAP using the HATFA segment rates retroactively or prospectively, and any plan operations that were inconsistent with this choice must be corrected as described in section VI.F of this notice.

If any AFTAP certification for an applicable plan year using the MAP-21 segment rates is made after September 30, 2014, then the rules regarding a change in the AFTAP set forth in § 1.436-1(h)(4)(iii) and (iv) apply with respect to the determination of the AFTAP for that plan year that must be made using the HATFA segment rates.

D. Prospective application of change in benefit restrictions reflecting HATFA segment rates

If the AFTAP is certified for an applicable plan year using the MAP-21 segment rates, then any subsequent change to that certification (including a certification based on the HATFA segment rates) is subject to the rules regarding a change in the AFTAP set forth in §1.436-1(h)(4)(iii) and (iv).

Section 1.436-1(h)(4)(iii) sets forth rules relating to changes in certified AFTAPs and provides a special rule that deems a change in the AFTAP attributable to certain events as "immaterial," even if the change would otherwise be a material change. The effect of having an event for which the change in AFTAP is deemed immaterial is that a plan administrator can reflect the event on a prospective basis beginning with the date of the event, provided that the AFTAP is recertified as soon as practicable thereafter. It is expected that § 1.436-1(h)(4)(iii)(C) will be amended to provide that additional events can be added to the list of deemed immaterial events in guidance of general applicability.

If (1) on or before September 30, 2014, the AFTAP is certified for an applicable plan year using the MAP-21 segment rates, (2) a certification for that applicable year is subsequently made using the HATFA segment rates, and (3) the plan sponsor does not choose to apply any change in those restrictions retroactively as described in section VI.E of this notice; then the change in AFTAP attributable to the use of the HATFA segment rates for an applicable plan year under this section VI.D is treated as a deemed immaterial change. The date of the event is October 1, 2014 (or the date of the revised AFTAP certification, if earlier). Accordingly, if the plan sponsor chooses to apply any changes in the § 436 restrictions prospectively for an applicable plan year as described in this section VI.D, any change in benefit restrictions resulting from the updated AFTAP determination using the HATFA segment rates must be effective as of the earlier of (1) October 1, 2014, or (2) the date the AFTAP for the applicable plan year is recertified using the HATFA segment rates.

The requirement that the AFTAP be recertified to reflect the HATFA segment rates as soon as practicable after the event giving rise to the deemed immaterial change will not be satisfied if the recertification occurs later than December 31, 2014.

E. Retroactive application of change in benefit restrictions reflecting HATFA segment rates

If (1) on or before September 30, 2014, the AFTAP is certified for an applicable plan year using the MAP-21 segment rates, (2) a certification for that applicable year is subsequently made using the HATFA segment rates, and (3) the plan sponsor elects to apply the AFTAP determined using the HATFA segment rates retroactively as described in this section VI.E; then the operations of the plan must be conformed to that updated AFTAP for the period beginning when the AFTAP for the plan year was originally certified. In addition, if the HATFA segment rates apply for purposes of determining the AFTAP for the plan year beginning in 2013, then operations of the plan during the plan year beginning in 2014 must be conformed to apply the rules of § 1.436-1(g) and (h) using the redetermined 2013 AFTAP as the AFTAP for the preceding plan year, during the period beginning on the first day of the plan year beginning in 2014 and ending when the AFTAP for that plan year was originally certified.

F. Reversal of an election to reduce funding balances and redesignation of section 436 contributions for the 2014 plan year

Sections IV.A and IV.C of this notice permit the reversal of an election to reduce a funding balance and the redesignation of a section 436 contribution for an applicable plan year beginning in 2013. Under this section VI.F, a reversal of an election made on or before October 1, 2014 to reduce a funding balance or a redesignation of a section 436 contribution made on or before October 1, 2014 is permitted for the plan year beginning in 2014.

Any reversal of an election or redesignation of a section 436 contribution under this section VI.F is not permitted to the extent it would result in the imposition of benefit restrictions under § 436 for the plan year beginning in 2014 that would otherwise not be imposed. Accordingly, if the plan year beginning in 2014 is the first applicable plan year, any reduction election that was made to avoid or remove benefit restrictions under § 436 during the period before the date of the original AFTAP certification for that plan year cannot be reversed. This is because the AFTAP based on the HATFA segment rates will not apply to that portion of the plan year and therefore the reversal of any reduction election that was made to avoid or remove benefit restrictions under § 436 during that period would result in the imposition of new restrictions. Similarly, if the plan year beginning in 2014 is the first applicable plan year, no change is permitted with respect to section 436 contributions that were made in connection with a presumed AFTAP before the AFTAP was certified for the plan year.

G. Corrections

Once a plan's AFTAP for an applicable plan year has been certified using the HATFA segment rates, the plan administrator must take any corrective actions necessary to conform plan operations to this certified AFTAP, if applying this certified AFTAP would have changed the application of the § 436 restrictions for the period (1) beginning with the date of the immaterial event described in section VI.D of this notice (if the AFTAP certification applying the HATFA segment rates applies prospectively under section VI.D) or (2) beginning with the date the AFTAP for the year was first certified, as applicable (if the AFTAP certification applying the HATFA segment rates applies retroactively under section VI.E). If the plan year beginning in 2013 is an applicable plan year, the period for potential correction also includes the period during the 2014 plan year before the AFTAP for that plan year beginning in 2014 was originally certified.

If the corrective actions described in this section VI.G are taken to reflect the application of the new certified AFTAP, then the plan's operations are treated as having been consistent with the provisions of the plan document relative to the requirements of § 436. For this purpose, the provisions of the Employee Plans Compliance Resolution System (EPCRS), as set forth in Rev. Proc. 2013-12, 2013-4 I.R.B. 313, apply, except that a plan is eligible for self-correction under sections 7, 8, and 9 of Rev. Proc. 2013-12 without regard to the requirements of sections 4.03 (requiring a favorable IRS determination letter) and 4.04 (requiring certain established practices and procedures) of that revenue procedure.

Consistent with § 1.436-1(a)(4)(iii), if unpredictable contingent event benefits due to an event occurring during a plan year beginning in 2013 or 2014 are not permitted to be paid because of restrictions under § 436(b), but are later permitted to be paid as a result of a new certification of the AFTAP for the plan year reflecting the HATFA segment rates, then those unpredictable contingent event benefits must become payable, retroactive to the period those benefits would have been payable under the terms of the plan (other than plan terms implementing the requirements of § 436(b)).

Consistent with § 1.436-1(a)(4)(iv), if a plan amendment with an effective date during a plan year beginning in 2013 or 2014 does not take effect because of the limitations of § 436(c), but is later permitted to take effect as a result of a new certification of the AFTAP for the plan year reflecting the HATFA segment rates, then the plan amendment must automatically take effect as of the first day of that plan year (or, if later, the original effective date of the amendment).

For any prohibited payment that was not permitted to be paid during a plan year beginning in 2013 or 2014 because of the restrictions under § 436(d), but is permitted to be paid as a result of a new certification of the AFTAP reflecting the HATFA segment rates, the plan has taken adequate corrective action if it makes the prohibited payment available to participants or beneficiaries who would have been eligible for the prohibited payment (including a prohibited payment that is available on a restricted basis under § 436(d)(3)) on or after the dates described in the first paragraph of this section VI.G.

For any accruals that were not permitted to accrue during a plan year beginning in 2013 or 2014 because of restrictions under § 436(e), but are permitted to accrue as a result of a new certification of the AFTAP reflecting the HATFA segment rates, the plan has taken adequate corrective action if it restores benefits that accrue during the period that begins on the date described in the first paragraph of this section VI.G.

In the case of a participant or beneficiary who, as a result of any of the changes described in this section VI.G is entitled to increased benefits, to benefits payable at a special early retirement date, or to benefits payable in a different form of payment (and who elects such different form of payment, with spousal consent, if applicable), the required correction is to provide the benefit payments in the increased amount or other form of payment commencing with a new prospective annuity starting date. However, if payments have already commenced, the correction is to provide the participant with (1) future benefit payments that are paid in the same manner and amount as if the participant had begun receiving the corrected payment at his or her original annuity starting date, and (2) a make-up for past underpayments. The make-up for past underpayments is equal to the aggregate difference between the past payments actually received and the amounts that would have been received had the benefit commenced in the correct form of payment at the participant's original annuity starting date, plus interest to the date of the correction (in accordance with EPCRS), and may be paid as either (i) a single-sum payment, or (ii) an actuarially equivalent increase in the amount of future benefit payments.

VII. PAPERWORK REDUCTION ACT

The collections of information contained in this notice have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. § 3507) under control number 1545-2095.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collections of information in this notice are in sections III, IV, and VI of this notice. The collections of information are required to implement the application of the funding relief under section 2003 of HATFA. The collections of information are mandatory for those plan sponsors making various elections when applying the amendments made by HATFA to a plan and any plan sponsor of a plan for which the 2014 AFTAP was certified using MAP-21 segment rates.

For the collections in section III of this notice (relating to the election and possible amendment of Schedule SB for the 2013 plan year), the estimated total number of respondents is 39,600 plans. The estimated annual burden per respondent varies from 15 minutes to 1 hour and 45 minutes, depending on individual circumstances, with an estimated average of 23 minutes. The estimated total annual reporting and/or recordkeeping burden is 15,200 hours.

For the collections in sections IV and VI of this notice (relating to elections regarding the application of benefit restrictions under § 436), the estimated total number of respondents is 37,000 plans. The estimated annual burden per respondent varies from 15 minutes to 45 minutes, depending on individual circumstances, with an estimated average of 37 minutes. The estimated total annual reporting and/or recordkeeping burden is 22,800 hours.

Estimates of the annualized cost to respondents are not relevant, because each collection of information in this notice is a one-time collection.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by § 6103.

VIII. DRAFTING INFORMATION

The principal authors of this notice are Tonya B. Manning and Carolyn E. Zimmerman of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this notice, please contact the Employee Plans taxpayer assistance answering service at 1-877-8-9-5500 (a toll free number) or e-mail Ms. Manning or Ms. Zimmerman at RetirementPlanQuestions@irs.gov.

FOOTNOTES

1 Under section 101 of Reorganization Plan No. 4 of 1978 (43 FR 47713) and section 3002(c) of ERISA, the Secretary of the Treasury has interpretive jurisdiction over the subject matter addressed in this notice for purposes of ERISA, as well as the Code. Thus, the provisions of this notice pertaining to §§ 430 and 436 of the Code also apply for purposes of sections 303 and 206(g) of ERISA.

2 Schedule SB is not required to be filed for plans for which Form 5500-EZ is filed and certain plans for which Form 5500-SF is filed. For these plans, the Schedule SB must be completed (including being signed by the enrolled actuary) and delivered to the plan administrator, who must retain it. With respect to these plans, references in section III.B of this notice to the filing of an amended Form 5500, Form 5500-SF, or Form 5500-EZ with a revised Schedule SB are applied by substituting the completion and delivery of the revised Schedule SB for the filing of the amended form.

3 With respect to a plan for which the Schedule SB need not be filed, as described in footnote 2 of this notice, the reference to filing of the Schedule SB is replaced by the completion and delivery of the Schedule SB.

END OF FOOTNOTES

Many Underwriters Reported Deals by MCDC Deadline.

WASHINGTON — A large number of dealer firms have voluntarily reported to the Securities and Exchange Commission deals they underwrote where issuers failed to disclose noncompliance with their continuing disclosure agreements, the SEC’s top cop said Wednesday.

The deadline for dealers to participate in the Municipalities Continuing Disclosure Cooperation Initiative was Sept. 10, though issuers will still have until Dec. 1 to report any deals during the last five to 10 years in which official statements were misleading about past continuing disclosure compliance.

Under the terms of the initiative, the SEC's enforcement division will recommend to the commission favorable settlement terms for both underwriters and issuers who self-report.

"The enforcement staff is currently reviewing the large number of self-reports we have received from municipal securities underwriters under the MCDC initiative," said enforcement division director Andrew Ceresney. "This marks an important milestone in the success of the initiative, which we believe will improve the quality of information in the municipal securities market for the benefit of the investing public."

Market participants also said they believed there was broad participation by underwriter firms. Most muni underwriters probably reported at least some deals under the initiative, but it is unclear how many firms reported enough transactions to hit the civil penalty cap, said one source who asked not to be identified.

Underwriter penalties under the MCDC are capped at $500,000 for firms that reported total revenue of more than $100 million for fiscal 2013 on their annual audited report; $250,000 if they reported fiscal 2013 revenue of between $20 million and $100 million; and $100,000 if they reported fiscal 2013 revenues of less than $20 million. If the caps are not met, underwriters will have to pay $20,000 per offering of $30 million or less with continuing disclosure failures and $60,000 for offerings of more than $30 million with such failures.

Michael Decker, co-head of municipal securities at the Securities Industry and Financial Markets Association, said dealers who think they will pay the max cap, have little reason not to be very inclusive in the deals they self-report.

"There is an incentive for underwriters, once they hit their civil penalty cap, to be more inclusive," Decker said. He predicted that because issuers have more time to investigate those deals than underwriters did, it is likely that new information will come to light that will cast doubt on whether some of those transactions should have been reported at all.

Bond Dealers of America senior counsel and senior vice president for federal regulatory policy Jessica Giroux said her group was disappointed that the SEC did not extend the underwriter deadline or base the penalty caps strictly on muni business revenues.

"Ultimately, this was a costly and burdensome exercise for our member firms," she said.

THE BOND BUYER
BY KYLE GLAZIER
SEP 10, 2014 2:40pm ET

Schumer Urges Regulators to Include Munis in Liquidity Rule.

WASHINGTON — Sen. Chuck Schumer, calling municipal securities the "lifeblood" of U.S. infrastructure development, pressed regulators to revise federal banking liquidity rules to classify certain munis as high-quality liquid assets.

"I hope all three agencies will reassess the final rule," Schumer, D-NY, said at a Senate Banking Committee hearing Tuesday. He noted that corporate securities can be used as HQLA, while even highly-rated munis cannot.

Dealers have said the rule, which implements Basel III to ensure banks will have adequate assets that can be easily converted to cash to cover expected net cash outflows in periods of financial stress, will cause banks to reduce their muni holdings, increasing borrowing costs for issuers, and reducing liquidity while adding to volatility in the muni market. The rule requires banks to have a liquidity coverage ratio that includes holding a certain amount of HQLAs, but does not define munis as HQLAs.

Schumer said he has yet to hear a convincing argument for excluding them.

Representatives of the Federal Reserve Board of Governors, Federal Deposit Insurance Corp., and the Comptroller of the Currency said they would be open to including investment-grade municipal bonds as HQLA after Schumer pressed them on the issue. Fed governor Daniel Tarullo said that he has asked staff to analyze muni liquidity with an eye toward determining what bonds could qualify as HQLA. When the rule was adopted earlier this month, Tarullo said it needed to be put forward now without the muni change in order to give banks time for compliance by Jan. 1.

“If they really are liquid, we want banks to be able to take that into account,” Tarullo said.

But Martin Gruenberg, chairman of the Federal Deposit Insurance Corp., had said in his prepared testimony that the Fed would only modify the rule “if necessary.” He later told Schumer he was open to changing it. Thomas Curry, the Comptroller of the Currency, said he was open to including munis if Fed research supported that conclusion.

“A number of commenters have expressed concern about the exclusion of municipal securities from HQLA in the final rule,” Gruenberg told the committee in his prepared testimony. “It is our understanding that banks do not generally hold municipal securities for liquidity purposes. We will monitor closely the impact of the rule on municipal securities and consider adjustments if necessary.”

Schumer said it has become clear from hearing from state and local stakeholders that the rule will negatively impact the muni market and ultimately stunt economic growth and job creation. He said some of his constituents were “howling” about the muni exclusion. He pressed the regulators to move forward in altering the rule.

“I hope you’ll go ahead and do it, because it’s really important,” he said.

The Senate panel also heard from SEC chairman Mary Joe White about the priorities of the SEC’s Office of Municipal Securities, over the next year. The Muni office will spend much of its time implementing the final municipal advisor registration rule, reviewing Municipal Securities Rulemaking Board MA regulations, overseeing MA exams and monitoring muni market issues, White said.

White focused her testimony on the SEC’s progress in implementing rules mandated by the 2010 Dodd-Frank Act. That law mandated that the commission’s muni securities office be independent and report directly to the chairman. It also imposed a fiduciary duty on all MAs to put clients’ interests firsts and subjected non-dealer MAs for the first time to federal regulatory oversight and rules.

The office will be scrutinizing other hot topics in the muni market, White told the panel.

“OMS also continues to monitor current issues in the municipal securities market (such as pension disclosure, accounting, and municipal bankruptcy issues) and to assist in considering further recommendations to the commission with respect to disclosure, market structure, and price transparency in the municipal securities markets,” she said in her testimony.

THE BOND BUYER
BY KYLE GLAZIER
SEP 9, 2014 11:49am ET

USDA Announces Loan Guarantee to Help Innovative Company Turn Waste Into Renewable Jet Fuel.

LAS VEGAS, Sept. 4, 2014 – Agriculture Secretary Tom Vilsack today announced that USDA has closed on a loan guarantee to Fulcrum Sierra Biofuels, LLC to build a biorefinery to produce jet fuel from municipal solid waste.

“This represents a huge step forward in the development of clean, renewable, job-creating American fuels,” Vilsack said during a speech at the National Clean Energy Conference. “The nation is entering a new energy age that will make us more energy independent, cut carbon pollution and strengthen our economy, especially in rural communities where clean fuels will be produced.”

USDA is awarding Fulcrum a $105 million Biorefinery Assistance Program loan guarantee through Bank of America, N.A. to construct a facility in McCarran, Nev., to convert municipal solid waste to biodiesel jet fuel. USDA Rural Development’s loan guarantee represents less than half of the $266 million project cost. The plant is expected to produce 11 million gallons of fuel annually.

This is the first loan guarantee USDA has made for the production of bio jet fuel.

Fulcrum will produce synthesis gas from 147,000 tons of municipal solid waste and catalytically convert it to synthetic paraffinic kerosene/jet fuel through a proprietary technology. The plant will be the first of what the company expects to be several bio jet fuel plants throughout the country.

Last month, Cathay Pacific Airways announced that it is investing in Fulcrum Bioenergy Inc., the parent company of Fulcrum Sierra BioFuels, LLC, and has negotiated a long-term supply agreement with Fulcrum for 375 million gallons of sustainable aviation fuel over 10 years. This would represent about 2 percent of the airline’s annual fuel consumption.

USDA awarded the first loan guarantee in 2009 to Sapphire Energy in New Mexico. Sapphire has already paid off its $54.5 million loan guarantee. The program’s current portfolio includes Fremont Community Digester, located in Fremont, Mich., which received a $12.8 million loan in 2011 to convert food and agricultural waste to biogas that is used as fuel to generate electricity. INEOS New Plant Bioenergy, located in Vero Beach, Fla., received a $75 million loan in 2011 to produce cellulosic ethanol from woody biomass and municipal solid waste.

USDA is negotiating three additional loans for biorefineries in Iowa, North Carolina and Oregon. These loans would provide financing to produce renewable fuels from woody biomass, municipal solid waste and energy grasses such as switch grass, miscanthus and arundo donax. One of these ventures will retrofit an existing corn ethanol facility to produce cellulosic ethanol.

Biorefineries have broad economic and environmental implications. They lower greenhouse gas emissions, reduce dependence on foreign oil, give businesses and consumers more energy options and create jobs.

Congress established the Biorefinery Assistance Program in the 2008 Farm Bill. It reauthorized and extended the program in the 2014 Farm Bill. The 2014 Bill expands the program to include bio-based renewable chemicals and bio-based product manufacturing. USDA staff are working on regulations to set forth upcoming application terms for additional loan guarantees under the program.

The 2014 Farm Bill builds on historic economic gains in rural America over the past five years, while achieving meaningful reform and billions of dollars in savings for taxpayers. Since enactment, USDA has made significant progress to implement each provision of this critical legislation, including providing disaster relief to farmers and ranchers; strengthening risk management tools; expanding access to rural credit; funding critical research; establishing innovative public-private conservation partnerships; developing new markets for rural-made products; and investing in infrastructure, housing and community facilities to help improve the quality of life in rural America. For more information, visit www.usda.gov/farmbill.

Send Letters to Congress Supporting the Modernizing American Manufacturing Bonds Act.

Call to Action:

CDFA has begun a targeted letter-writing campaign. We ask that industry stakeholders send letters to the House and Senate members to support CDFA's Modernizing American Manufacturing Bonds Act and the suggested reforms to modernize and revolutionize Qualified Small Issue Manufacturing Bonds. To make this process easier, we have created sample letters for your use.

Download the sample letters provided below and modify them to fit your letterhead. Email and fax letters to your representatives ASAP. Please also copy CDFA on any correspondence, and we will follow-up with the appropriate office holder.

The following letters should be used to help CDFA's legislative efforts:

Sample House Letter

When sending letters please follow these instructions:

- Use this sample text to craft your letter.
- Letters should be tailored to reflect your state/city and placed on your organization's letterhead.
- For full Congressional office contact information go to www.house.gov or www.senate.gov.
- Letters should be faxed to your Congressional first.
- Mail letters AFTER you fax them. They will take several days to reach the Capitol office.
- For assistance with crating your letters, do not hesitate to contact CDFA.
- Send a copy of your letter to CDFA @ kwhite@cdfa.net.
- Be sure to remove this header from your letters.

Cleveland Clinic To Issue Rare 100-Year Bond.

The Cleveland Clinic is seven years away from celebrating its centennial, but apparently it's already pretty sure it's going to be around for another hundred years, as it's gearing up to sell $400 million worth of 100-year bonds. It will become "the first not-for-profit healthcare system, and one of the few in the US municipal market, to issue century bonds," according to Moody's Investors Service, which is assigning an Aa2 rating to the bonds that will mature in the year 2114. Moody's writes today that the Cleveland Clinic has what it takes to pull off a rare century bond:

The Cleveland Clinic Health System's national reputation, high demand for advanced patient services and exceptional fundraising capabilities support the staying power needed to meet a 100-year obligation. Given the rapidly changing and challenging dynamics of the healthcare industry, very few hospitals and health systems in the country exhibit these strong characteristics to manage the risks related to an ultra-long obligation….

CCHS's strong investment position and moderate amount of century bonds relative to total debt mitigate risks related to the expensive call provisions of century bonds and decreased balance sheet flexibility. The modest amount of century bonds is a key factor in minimizing the risk for healthcare systems; higher exposure to century bonds, even for a large healthcare system with similar characteristics as CCHS, would be viewed as a negative credit factor. Among the largest not-fo--profit healthcare systems in the country, Cleveland Clinic has the strongest relative investment position, providing ample resources to call the bonds if needed.

Moody's says issuing century bonds today will lock in historically low interest rates but notes that such bonds "are extremely expensive to call because make-whole provisions are more costly than call provisions for tax-exempt debt." Moody's again:

The bonds are structured with an optional redemption allowing the system to redeem the outstanding bonds at a "make-whole redemption price," which is typically the present value of the remaining scheduled payments of principal and interest to the maturity date, discounted at a stated spread above Treasuries. In contrast, traditional tax-exempt debt is usually structured with a 10-year call feature that would enable an issuer to redeem the debt at par after 10 years.

As you'd expect, few issuers are able to convince investors they'll be around a century from now, and century bonds tend to be confined to sovereign governments, large public institutions and a few select corporations and financial institutions with investment-grade ratings and loooooonnng track records. Past issuers include Mexico, the University of California system, Dutch agriculture bank Rabobank, and U.S. companies such as Norfolk Southern Corp., Walt Disney, Coca Cola, Ford, and JC Penney.

BARRONS
By Michael Aneiro

Feds Step Up Quest for Private Infrastructure Financing.

The Obama administration is pushing ahead with its campaign to draw more private dollars to narrow the huge U.S. infrastructure-finance gap, announcing on Sept. 9 a flurry of project-funding actions.

Officials made the announcements at a Washington, D.C., "summit," at which Cabinet secretaries heard ideas from public and private officials on further ways to spark increased private investment in highways, bridges and other infrastructure.

Transportation Secretary Anthony Foxx told attendees at the meeting that his department had approved a $950-million Transportation Infrastructure Finance and Innovation Act loan for the Interstate 4 project in Orlando, Fla. The loan is the largest to a public-private-partnership project in the TIFIA program's 16-year-history.

Foxx also said DOT had approved a $1.2-billion allocation of federal private-activity bonds to the Pennsylvania Dept. of Transportation for its ambitious program to replace 600 bridges in 42 months, using a single public-private partnership (P3).

Moreover, he said DOT is providing $20 million for a new transit-oriented-development pilot program.

Other agencies are taking infrastructure-related action, too. Treasury Secretary Jacob Lew said his department will commission an independent report to identify planned transportation and water infrastructure projects that are judged to have the greatest economic impact.

The White House said that the Agriculture Dept. had approved $518 million in loans for rural electricity projects.

In the nongovernment sector, the California State Teachers' Retirement System is forming a consortium with other pension funds to invest in U.S. infrastructure, Christopher Ailman, chief investment officer, said at the summit, which was held at Treasury's headquarters.

The White House also said the Ford and Rockefeller foundations are teaming up on a new effort to stimulate innovation in infrastructure projects.

As part of President Obama's "Build America Investment Initiative," announced on July 17, he directed Lew and Foxx to lead an interagency infrastructure-finance working group to identify ways to overcome hurdles to private financing and to speed projects to completion.

They are to produce recommendations by Nov. 14. The summit, part of the two secretaries' search for suggestions, drew more than 100 top infrastructure-finance officials from the public and private sectors.

Much of the discussion at the public portion of the meeting centered on the transportation sector, which has had more P3 and related types of private participation than other markets.

Infrastructure's financial needs are immense. Lew said the U.S. faces a $1-trillion infrastructure-funding gap by 2020, counting all major sectors.

Commerce Secretary Penny Pritzker, who also addressed the gathering, said the stock of all public infrastructure was valued at nearly $10.8 trillion in 2012, according to Commerce's Bureau of Economic Analysis. It will take $360 billion per year just to maintain that infrastructure's current condition, she added.

Lew said that "while direct federal spending on infrastructure is indispensible, we recognize the reality that budget limitations at every level of government make it all the more important to come up with fresh, innovative ways to unlock capital and get more projects under way."

Summit participants gave the meeting positive reviews. Ananth Prasad, secretary of the Florida DOT—a leader in transportation P3s—told ENR that the summit was helpful in hearing what private investors are looking for from owners. Those factors, hes said, include creating a marketplace for P3-type projects and agreeing on "some sort of standardization" in that sector.

Private investors don’t view all projects as good prospects, Prasad notes. “So project selection is key, engaging the industry…and early, and trying to have a predictability is the bottom line of success,” he says.

Some panel members at the conference outlined projects on which they had worked. Jim Tymon, American Association of State Highway and Transportation Officials director of management and program finance, says it was beneficial to hear about individual projects that went well. But moving forward, he says, “Let’s find ways to take those successes and replicate them nationwide.”

Jane Garvey, North American fund chairman of Meridiam, New York City, says that the meeting elicited “some very concrete suggestions, specific ideas.”

Garvey, former chief of the Federal Aviation Administration and acting head of the Federal Highway Administration, adds that the next step is “translating that into action items…many of which can be acted on administratively,” rather than through a probably lengthy legislative process.

Former U.S. DOT Secretary Rodney Slater, now a partner with law firm Squire Patton Boggs LLP, says that after the meeting, “I think that you’re probably going to see something happen on the private side, where they say, ‘Look, with all this effort on the public side, what can we do to match that energy?’”

Tyler Duvall, a principal in McKinsey & Co.’s Washington office, says he thinks the Lew-Foxx report will include recommendations on project prioritization and projects’ pre-development phases.

Duvall, a former top U.S. DOT policy official, sees the main challenges for innovative financing center on management, process, and politics.

“I don’t think we need 50 new financing tools,” he adds. “I think we’ve got a good set of tools today. And we’ve got a lot of people who want to invest in this country.”

ENGINEERING NEWS-RECORD

09/09/2014

By Tom Ichniowski

Moody's Predicts Huge Potential for Public-Private Partnerships.

Public-private partnerships are still relatively new for most U.S. states, but analysts anticipate they will become more common.

The United States could soon become the biggest market for public-private partnerships in the world, analysts from Moody’s Investors Service said in a recent analysis of trends around the globe.

Thirty-three states now permit the partnerships for transportation projects, the credit rating agency noted, and many of those states adopted those laws within the last five years.

The way those partnerships are structured is also shifting. Many high-profile partnerships, such as the Indiana Toll Road, allow investors to make money based on the how well their asset performs. If a lot of people use a toll road, the investors make a handsome profit. But if traffic doesn’t meet expectations, the investors could lose money instead.

Increasingly, though, U.S. governments are using an arrangement that is more common in Britain and Canada, where P3s are more common than in the U.S. Under the arrangement, governments regularly pay operators fees, called availability payments. That makes the arrangement less risky for investors but more risky for the government.

Nine deals in the U.S. using that arrangement have been inked. Three of them — the Long Beach courthouse in California, Miami's port tunnel and the I-595 managed lanes in south Florida — are operational. Another nine projects are expected to close in the next 18 months, according to Moody's.

Moody's analysts predicted that public-private partnerships would become more common for "social infrastructure," like schools and courthouses and, eventually for water-related projects. The ratings agency also noted that private investors are developing more expertise on public-private partnerships, which they use when interacting with state finance and transportation agencies.

GOVERNING.COM

BY DANIEL C. VOCK | SEPTEMBER 9, 2014

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A Better Way to Manage Government's Underutilized Property.

A startup emerging from academia wants to help cities get more value from publicly owned land.

Government owns 10 to 30 percent of the footprint of most cities, and the public sector is the nation's largest property owner. But property management is hardly a core function of government, so it's not surprising that many jurisdictions don't even have an accurate inventory of their own property. The data is often scattered across the various agencies in charge of different parcels.

Much public land is underutilized and expensive for taxpayers. The Office of Management and Budget estimates, for example, that it costs about $1.7 billion per year to maintain and secure underutilized federal properties. For municipal governments, there's also foregone property tax revenue and wasted opportunities to use the land to support local economic development.

A Boston-based start-up is looking to change all that. OpportunitySpace has its roots in the master's thesis of two Harvard Kennedy School students. It is a data hub and information platform that offers both municipalities and citizens consolidated, standardized data on government-owned land. Parcels are mapped geographically. By clicking on one, users can learn its square footage and assessed value.

The company has completed a pilot project with four Rhode Island municipalities including Providence, where the city's 1,363 publicly owned parcels are now posted online. OpportunitySpace is also operating in Louisville, Ky.

In addition to cutting municipal costs and boosting local tax revenues, the company hopes to increase transparency and the amount of creativity that surrounds development issues. In most cases, a sign in the ground is the only way to know a city is looking to sell a piece of property. At best, the property might be posted somewhere deep within a municipal website. OpportunitySpace hopes to make the information available to those who don't know their way around city hall or tax-assessor databases–to “democratize the sale of government-owned property,” in the words of co-founder Cristina Garamendia.

As the fledgling company nears the end of its incubation period at the Harvard Innovation Lab, it expects to begin charging municipal clients a manageable subscription fee. The plan is for more of its revenue to be generated by selling sophisticated information to the private sector.

OpportunitySpace is working on adding information to its database, such as how to connect with experts and gain a better understanding of potential funding sources and redevelopment incentives. It also is adding zoning maps and information about where public investments, subsidies and tax abatements are focused.

OpportunitySpace has received a couple of boosts recently. Last month it was the subject of a New York Times article. This month it is one of the ideas recognized in the annual Better Government Competition sponsored by the Pioneer Institute, a Boston-based public-policy think tank. (I am affiliated with Pioneer as a senior fellow but was not involved with the competition).

It grabs people’s attention when they can pay a highway toll electronically without slowing down. But technology is also enhancing government operations in ways that are less visible, though just as important. If it succeeds, OpportunitySpace will be a prime example of that, helping reduce municipal costs, hike revenues and broaden the marketplace of development ideas.

GOVERNING.COM

BY CHARLES CHIEPPO | SEPTEMBER 11, 2014

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Pensions' Unfunded Liabilities Still Going Up.

A new survey finds that pension funding levels across all states and major cities inched downward in 2013 and that cities are bearing a greater burden in their budgets than states.

A new survey has found that pensions’ unfunded liabilities across all states and major cities inched up in 2013 and that cities are bearing a greater financial burden than states.

State pensions averaged a funded level of 73.1 percent in 2013, down from 73.5 percent in 2012, a Loop Capital Markets report released this week found. In cities, that ratio of the value of money in the pension fund compared to the cost of benefits already promised to retirees was 65.3 percent, down from 65.6 percent in 2012. (Actuaries tend to rate anything above 80 percent funded as an acceptable level.)

Additionally, cities face about three times the pension burden in their budgets that states do, Managing Director Chris Meir said during a conference call with investors Wednesday. On average, annual pension payments make up 4 percent of state budgets and 12 percent of city budgets, the report found. The budget strain doesn’t correlate with how well a pension is funded. Cities like Philadelphia, Jacksonville and Phoenix all spend more than 20 percent of their budgets on pensions while Memphis and Little Rock spend 3 percent or less. All five of those cities have plans that are less than 75 percent funded.

Meir cautioned that a plan can appear healthy on paper but still be in trouble. For example, before filing for bankruptcy, Detroit had pension funds that were 91 percent funded and its pension payments accounted for 7 percent of the city budget. But Detroit had also assumed huge debt in 2006 to sell bonds that went directly into the city's pensions as a way to eliminate its then-unfunded liability. In essence, the city transferred its debt from one part of its books to another.

"Management skill and a culture of debt avoidance also very important factors," Meir said.

On the state level, funded ratios for 19 states improved in fiscal 2013, up from five states in 2012 and 14 states in 2011. Those that showed the biggest improvement (at least a 7 percentage point jump in funded levels) were Montana, Oregon, South Dakota and Ohio. The report found some similar attributes between these and other states that showed bigger improvements last year, including having a generally smaller population or one with lower union concentration (Ohio is an exception). "Right-to-work" states, in particular, tend to avoid such pension problems.

The report found fewer similar attributes between the 26 states that saw their funded levels decrease in 2013. But Meir said there are still some generalities among the states that saw the biggest declines. New Jersey pensions declined the most in 2013, dropping 7 percentage points in the average funded level. The next-biggest drops were in Massachusetts, New York and Virginia, which all dropped by 5 percentage points. Except for New York, states with funded ratios that have deteriorated the most in fiscal 2013 were weak pension performing states to begin with. And, the report noted, these are mostly "older" states in the Northeast and mid-Atlantic. More established states tend to have older — and therefore more expensive to maintain — infrastructure, which adds to their burden.

The conference call ended on an optimistic note. Meir noted that pension reforms have helped eat away at unfunded liabilities in many states and localities, albeit slowly. Thanks to each state's particular legal and economic structure, he said, the reform process has been a "state-by-state skirmish," thus dragging out the process.

"Therefore, we do not believe is a systemic problem," he said. "It is a state-by-state problem with a state-by-state solution."

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BY LIZ FARMER | SEPTEMBER 12, 2014

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Puerto Rico Utility Bond Agreement Limits Disclosure, MMA Says.

An agreement between Puerto Rico's junk-rated power utility and investors holding the bulk of its debt gives the agency time to mend its finances. It also offers some bondholders non-public information, says Municipal Market Advisors' Bob Donahue.

The Puerto Rico Electric Power Authority, called Prepa, the main supplier of electricity on the island, last month entered into an agreement with investors who collectively hold more than 60 percent of the utility's $8.3 billion of debt. For signing on to the contract, those bondholders will receive monthly cash statements and financing plans, according to the document for the deal, known as a forbearance agreement.

Such an arrangement is typical in the $3.7 trillion municipal-bond market, yet the amount of Prepa’s obligations makes the situation unique, said Donahue, managing director at Concord, Massachusetts-based MMA. If the utility restructures its debt, it would be the biggest ever in the municipal market.

“The many disclosures that they will receive, that will create a real asymmetry in the market between those in the agreement and those outside,” he said.

Lawmakers in June approved a law that would allow certain public corporations, including Prepa, to ask bondholders to take a loss. The commonwealth and its agencies have $73 billion of debt. The island’s economy has struggled to expand since 2006, fueling speculation that Puerto Rico will be unable to repay all of its obligations on time and in full.

Restructuring Chief

Prepa last week picked Lisa Donahue, managing director at New York-based turnaround firm AlixPartners LLP, as chief restructuring officer to cut expenses and improve its finances. As part of its agreement with creditors, Prepa must release a five-year business strategy by Dec. 15 and create a debt-restructuring plan by March 2.

Members of the forbearance group can sell only to other bondholders in the group or to investors who agree to join it, according to the agreement.

Being privy to detail on Prepa’s finances gives investors insight into other Puerto Rico credits, said Daniel Solender, who helps manage $15.5 billion of munis at Lord Abbett & Co. in Jersey City, New Jersey.

“It makes it a strange way to approach it, given how many different types of bonds are outstanding,” Solender said. “If you have privileged information on Prepa, it affects the trading of all Puerto Rico bonds.”

Prepa Rally

Lord Abbett held Prepa debt as of July 31, Solender said. He declined to say if the firm is part of the forbearance group.

Prepa has rallied since Donahue’s appointment. The bonds are gaining in part because the universe of investors who can trade the securities has become limited by the agreement, MMA’s Donahue said.

Prepa bonds maturing in July 2040 traded yesterday at an average price of 57.03 cents on the dollar, the highest since June 18, data compiled by Bloomberg show.

With Prepa’s debt load and its financial challenges, the utility should disclose information to all investors at the same time through the Electronic Municipal Market Access website, known as EMMA, MMA’s Donahue said.

“Given the high stakes and the difficulty that Prepa’s facing, transparency would be the best antidote,” he said.

David Millar, a New York-based spokesman for Puerto Rico’s Government Development Bank, which handles commonwealth debt sales, didn’t immediately respond to an e-mail and phone message. Abimael Lisboa Felix, a spokesman for Prepa in San Juan, didn’t immediately respond to an e-mail and phone message.

By Michelle Kaske Sep 12, 2014 10:39 AM PT

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Chicago at Brink of Swaps Fee as Bond Ratings Fall: Muni Credit.

Chicago's deteriorating credit quality has pushed taxpayers to the brink of paying almost $400 million to Wall Street banks on derivatives contracts that are backfiring.

The city and Chicago Public Schools, both at risk of rating reductions as pension obligations mount, agreed to interest-rate swaps with companies including Bank of America Corp., Goldman Sachs Group Inc. (GS) and Loop Capital Markets LLC last decade as part of debt sales. The accords were designed to cap expenses in case interest rates rose. The deals went awry as the Federal Reserve cut borrowing costs during the recession.

The issuers' combined bill to exit the deals has reached about $400 million, almost two-thirds more than the metropolis spent on streets and sanitation in 2013. The contracts on the derivatives stipulate that the banks can demand payment when the issuers' credit rating falls to a specified level. For the city, that trigger is one level away on most contracts after Moody's Investors Service cut it to three steps above junk.

"These governments are in a precarious position," said Laurence Msall, president of the Civic Federation, a Chicago watchdog on government finance. "Hundreds of millions of dollars are at stake."

Derivatives Trail

States and cities in the $3.7 trillion municipal market have paid at least $5 billion to banks to end interest-rate swaps, data compiled by Bloomberg show. The contracts contributed to the bankruptcies of Detroit and Jefferson County, Alabama.

In Chicago this week, Alderman Roderick Sawyer introduced a resolution in the city council calling for Mayor Rahm Emanuel to file an arbitration claim with the Financial Industry Regulatory Authority to recover payments the city and school district have made on swaps. That could generate more than $600 million and eliminate the need for termination payments, said Jackson Potter, an official with the Chicago Teachers Union.

"The mayor has made a commitment that the city will not enter into any new debt swaps of this kind and has enacted measures to modify and reduce risk to protect the taxpayers of Chicago," Carl Gutierrez, spokesman for the city's budget office, said in an e-mailed statement.

"We monitor our swap liability carefully and are in continuing conversations with our swap counterparties to manage the risks of our derivative portfolio," Bill McCaffrey, a schools spokesman, said via e-mail.

March Cut

The city had its general-obligation rating lowered to Baa1 in March by Moody’s, which cited “massive” pension liabilities. The company also assigned a negative outlook, meaning more cuts are possible. A credit grade one level lower could trigger swaps termination fees of about $173 million, according to documents for a March bond sale.

The school system, the nation’s third-largest, has more breathing room. It needs two rating companies to reach a predetermined rating level for a possible payment of about $224 million. It’s Moody’s rating is two levels from that point.

The potential payments increase pressure on state lawmakers, Governor Pat Quinn and Emanuel to reduce pension obligations, said Richard Ciccarone, Chicago-based president of Merritt Research Services. As the city and school system use reserves to balance budgets, they may have to look for new tax revenue, he said.

“There’s not a lot of room for comfort at the schools or the city,” Ciccarone said. “The parties need to work together to resolve a very pressing issue. Politics will just make it more difficult.”

Illinois Bill

Quinn, a Democrat seeking re-election this year, signed a bill in June that partially addresses Chicago’s $19.2 billion pension shortfall. The law, which cuts benefits and makes employees pay more for retirement, restructures two of the city’s plans, for about 60,000 municipal workers and retirees. The law doesn’t affect the police or firefighter obligations or lower retirement costs for the schools.

While those changes haven’t faced legal challenges, a state judge halted the implementation in May of an overhaul of the state retirement system after unions questioned its constitutionality.

‘Political Mess’

The political calendar may complicate matters.

Emanuel, a first-term Democrat, faces a potential challenge in February elections from Karen Lewis, president of the teachers union. Emanuel closed 49 underperforming elementary schools last year, hurting his approval rating, according to a Chicago Tribune poll released last month. That signals the difficulty he may face in addressing the district’s budget and pension issues.

Duane McAllister, who helps oversee about $5 billion of munis at BMO Asset Management Corp. in Milwaukee, said the pressures are keeping his company from buying.

“Chicago is sort of still mired in the political mess that seems to be Illinois politics,” said McAllister.

Some city debt is gaining in the face of the stress. Bonds maturing in January 2040 traded yesterday at an average yield of 4.72 percent, compared with an average of about 5 percent since March, according to data compiled by Bloomberg. Yesterday’s yield was about 2.6 percentage points above benchmark debt.

Moody’s in August warned of the “narrow distance to rating triggers” for the school system’s swaps. The district has 10 fixed-rate swaps with potential triggers if two of the three biggest rating companies cut the debt to the equivalent of Baa3, which is one step above junk, or lower.

Triggers Below

Moody’s grades it Baa1, two levels above the trigger. Fitch Ratings is at A-, three levels above the trigger, and Standard & Poor’s is at A+, which is five levels above. Moody’s and Fitch both have negative outlooks.

“There will be formidable pressure going forward,” said Mark Lazarus, a Moody’s analyst in Chicago. “It’s something you factor into future ratings.”

Hitting the trigger levels wouldn’t automatically mean the city or school district would have to pay to end the swaps; the banks would have the option to force payment. The companies could also take steps such as having the issuers put up collateral to secure the payments, as banks did to Detroit with taxes on its casinos.

Goldman Sachs declined to comment on the contracts, said Michael DuVally, a spokesman in New York. William Halldin at Charlotte-based Bank of America also declined to comment. James Reynolds, chief executive officer at Chicago-based Loop, didn’t respond to e-mails and a phone call seeking comment.

Reserve Stash

For Chicago, a termination payment would be manageable, said Ty Schoback, a senior analyst in Minneapolis at Columbia Management Advisors, which oversees $30 billion of munis.

“Chicago has got quite a bit of reserves stashed away,” Schoback said.

The city has reserves of about $625 million from leasing a tollway and parking system, according to a February S&P report.

Chicago’s payments for pensions are set to reach $1.1 billion in 2015 from about $478 million in 2014, according to financial documents.

The “aggregate amounts are not catastrophic,” said Arlene Bohner, a senior director at Fitch. Though “it is of concern given the other spending pressures they’re under.”

School Burden

For the school system, a termination payment would be “far more burdensome,” Schoback said.

The district, with about 400,000 students, has tapped reserves to balance its budget as pension costs rose. Swaps payments of $224 million would exceed the $216 million it has in debt-service reserves, according to Moody’s. The system is using about $862 million of budgetary reserves in its fiscal 2015 budget, leaving it with about $300 million, projections show.

Its pension contributions in fiscal 2014 and 2015 tally more than $600 million each year, up from about $200 million the previous three years, according to budget documents.

The city has modified some swaps, according to Bohner and its 2013 financial report, released in June. In March, it reduced the rating at which two of its 11 general-obligation swaps could be triggered, by one level to Baa3, according to the disclosure statement.

The efforts are a “work in progress,” said Fitch’s Bohner. “It’s definitely on their radar screen.”

By Darrell Preston and Elizabeth Campbell

Sep 11, 2014 5:00 PM PT

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Fitch: California Proposition 13 Costs San Diego Hotel Tax.

Fitch Ratings-New York-12 September 2014: A recent state appellate court ruling that invalidated a hotel tax in San Diego offers the latest example of the far-reaching effects of Proposition 13 on California's local governments, Fitch Ratings says. The tax was intended to fund a major expansion of the city's convention center and was struck down on the basis that it had not been approved by local voters as required since its enactment in 1978.

The San Diego ruling will likely affect only a small number of potential future financings, but highlights the enduring impact of Proposition 13. California's local governments continue to face obstacles to raising new revenues as a result of this 35-year old voter initiative while expenditure requirements, fueled by population growth and rising employee pension and health care costs, continue to soar. The resulting imbalance between revenue and expenditure growth remains a defining feature of local government finance in the state.

The San Diego case involved a class of financing put in place by California's legislature in 1982 as a means for local governments to support growth despite the new limitations of Proposition 13. Named for its legislative sponsors, Henry Mello and Mike Roos, the Mello-Roos law enabled local governments to establish community facilities districts with authority to issue debt backed by taxes on future property owners to fund schools, parks, infrastructure, and municipal services. The financing mechanism has been especially popular in the state's fastest growing communities. More than $20 billion in Mello-Roos financings were completed in California between 1992 and 2012.

Most Mello-Roos districts are established for undeveloped land with no residents, and are unaffected by the new decision. In districts with existing residents the original Mello-Roos law required an affirmative vote of two-thirds of the electorate for the imposition of new taxes, but allowed such elections to be limited to landowners when the tax was borne by them alone. In San Diego's case, the new tax was limited to hotel owners and lessees, but the court determined that under Proposition 13 all registered voters in the city should have a say in the election. A previous, similar hotel financing for a San Jose convention center appears to be grandfathered.

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The above article originally appeared as a post on the Fitch Wire credit market commentary page. The original article, which may include hyperlinks to companies and current ratings, can be accessed at www.fitchratings.com. All opinions expressed are those of Fitch Ratings.

The State of Nonprofit Governance.

This report provides a snapshot of nonprofit governance policies and practices among operating public charities. Using IRS Form 990 data, we find that many public charities have good governance policies and practices in place. In 2010, more than 60 percent of organizations had a conflict of interest policy, an independent audit and a compensation review and approval process for their chief executive. We also find that organizational characteristics such as size, type of organization, government funding, age, board size and board independence all appear related to whether or not a public charity chooses to adopt these recommended practices.

Read the Report.

Amy Blackwood, Nathan Dietz, Thomas H. Pollak
September 11, 2014

Reinventing Democracy through Participatory Budgeting.

For all the hype surrounding democracy as a concept, in practice it has fallen short of expectations. Americans are proud of the strength and resilience of their democratic institutions, and yet they are deeply distrustful of their elected officials and turning out to vote at ever lower rates. But the lofty goal of reinventing democracy appears infinitely more achievable when we have a mechanism for doing so. Participatory budgeting is coming to the fore as one of the most promising ways to change the relationship between citizens and government, as part of a wave of new democratic innovations.

Participatory budgeting offers a fundamentally different interpretation of democracy than what we have become accustomed to. What if instead of voting to give officials the right to make decisions on our behalf, there were forums that put decision-making authority directly into the hands of citizens? Participatory budgeting, or PB, is a process that allows ordinary people to decide how part of a public budget should be spent.

A PB process begins with community meetings where residents are invited to come together and share their ideas. Next, volunteers take on the task of refining those ideas to develop project proposals. Finally, residents vote for the projects that they most wish to see funded. The results of the vote are binding, making PB a significant departure from forums that involve consultation but not action.

The Participatory Budgeting Project (PBP) has supported processes that have allocated over $45 million from public purses across the U.S. Those funds have brought to life more than 250 individual projects, designed by residents and chosen by over 50,000 voters.

Born in the Brazilian city of Porto Alegre in 1989, PB is now practiced in over 1500 cities around the world, and in over 40 communities across the US. In Chicago, where the US experience of PB began in 2009, more than 250,000 residents now have the opportunity to decide the allocation of $5 million.

In New York City, PB started in 2011 with the discretionary capital works budgets of four inspired city council members. It has since grown to include nearly half of the city's council districts. A city-wide youth PB process has been launched in Boston, giving young Bostonians aged 12–25 the opportunity to decide how to spend $1 million.

But PB is more than raw numbers: it matters who participates. Partnerships with local community organizations and targeted outreach have been crucial to ensuring that PB does not merely attract the "usual suspects" – residents who are white, middle to upper class, and highly educated. Instead, PB aims to give real decision-making power to all members of the community.

Furthermore, the process itself is as meaningful as the outcomes it generates. PB provides neighbours with the opportunity to learn from one another. It ignites discussions around whose interests are being served, and whose aren't. It provides a platform for residents to develop leadership skills that can be taken and applied in new contexts. Research in the U.S. to date suggests that these experience have powerful impacts on many PB participants, including those who don't typically get involved in political processes.

PB processes are growing across the U.S. Since we first worked with Chicago Alderman Joe Moore in Chicago in 2009, we have partnered with dozens of other elected officials to launch PB in their community. Last fall, the White House began promoting PB as a best practice of civic engagement, and we have worked with the U.S. Department of Housing and Urban Development to share PB resource on their website.

At the Participatory Budgeting Project, we are proud to continue to partner with national and local organizations to develop new tools, launch new PB processes, and improve existing PB processes, because we believe that transparent and engaged democracy makes our communities stronger. Join us in Austin to learn how to bring this exciting innovation in democracy to your communities, to engage constituents in making real decisions about real money.

SEPTEMBER 8, 2014
By Josh Lerner and Madeleine Pape

Josh Lerner will serve as a presenter and facilitator for the interactive NLC University Seminar, "Participatory Budgeting – How to Build Deep Community Engagement in Real Budget Decisions (201)" at the Congress of Cities and Exposition on November 19th in Austin, Texas.

WSJ: Detroit to Transfer Water Department to Regional Authority.

DETROIT—The Motor City moved one step closer to settling the details of its historic bankruptcy, sealing a deal Tuesday to put its water and sewer system that falls outside city limits under regional control.

The deal calls for Detroit to maintain its own water and sewer system within the city. A new regional authority with appointees from the suburbs would lease its portion of the system from the city at a cost of $50 million a year for the next four decades. The authority also would set up a $4.5 million annual fund to aid residents who have trouble paying their water bills.

Annual rate increases will be capped for all customers at 4.5% over the next 10 years. Members of the new Great Lakes Water Authority will need a supermajority—five of six votes—to make its biggest decisions, including any move to increase customer rates or approve major contracts.

The authority's lease payments to the city could be used to issue as much as $800 million in new, state-backed bonds. That financing would help the city rebuild its aging infrastructure that saw 2,000 water-main breaks last year alone, according to Detroit officials.

The move to put a large chunk of one of the nation's largest water systems into the hands of an authority in southeast Michigan comes as the city considers unloading other assets to reach deals with outstanding creditors in its debt-cutting plan, according to a person familiar with the talks.

Time could be running short for Detroit Emergency Manager Kevyn Orr, whose term is set to expire at the end of the month. Detroit Mayor Mike Duggan said Tuesday that Mr. Orr could leave his post but remain as a bankruptcy adviser, adding that talks over Mr. Orr's future are active. It is unclear whether Michigan Gov. Rick Snyder, who appointed Mr. Orr, intends to appoint a successor while the city struggles to exit the nation's largest municipal bankruptcy.

After the city filed for Chapter 9 protection in July 2013, Mr. Orr said an outright sale of Detroit's water department, which serves nearly 40% of Michigan's population, was unlikely. His preferred plan called for leasing the water system to a new regional authority, which he said would bring in $47 million a year to the city for 40 years.

Until now, suburban leaders had balked at their potential share of future costs for system improvements and unpaid water bills, saying they were concerned any future contribution to the system would be used by the city to pay off its large debt owed to Detroit pension holders.

In an interview, Oakland County Executive L. Brooks Patterson said the 1.2 million people he represents had grave concerns about assuming responsibility for the city's water problems. But they also wanted a greater say over the parts of the system stretching through the northern county.

Under pressure from a federal judge, Detroit's mayor and leaders of the city's three suburban counties unveiled the pact at the federal courthouse where the city is defending its debt-cutting plan at a bankruptcy trial. Presiding Judge Steven Rhodes, who officials feared had the power to force changes to the water department unilaterally, has been encouraging the city and its suburbs to reach a compromise during months of closed-door talks.

Messrs. Snyder and Orr also endorsed the terms of the deal, which must be finalized by Oct. 10 by local legislative approvals.

"The extraordinary bipartisan cooperation is aimed at creating a sustainable, regional water system that also provides necessary and crucial updates to the aging infrastructure, brings relief to residents and taxpayers by capping future rate increases and creates a fund to help customers in need throughout the region," said Mr. Snyder, a Republican running for re-election this November.

The Detroit Water and Sewerage Department provides about 600 million gallons of water a day to Detroit and 127 suburban communities in seven counties. It has nearly $1 billion in annual revenue.

But like its city, the department has faced challenges. Until last year, it operated for decades under federal court oversight sparked by alleged violations under the Clean Water Act. A former department director pleaded guilty in 2012 to conspiracy as part of the corruption investigation into convicted ex-mayor Kwame Kilpatrick. Thousands of delinquent customers in Detroit have seen their water shut off in unpaid-bill disputes.

Before Tuesday's announcement, the system had been planning five-year capital-improvement projects to replace water mains and upgrade treatment plants and pumping stations expected to cost roughly $1.4 billion. Lawyers for surrounding suburbs challenged Detroit at its bankruptcy trial over how the city planned to finance those improvements without massive rate hikes, but those objections are now expected to be withdrawn, officials said.

Last month, Detroit sold about $1.8 billion in bonds tied to its water system to buy back existing debt and make system improvements, likely saving money through lower interest rates, according to city officials.

THE WALL STREET JOURNAL
By MATTHEW DOLAN
Updated Sept. 9, 2014 4:21 p.m. ET

WSJ: Regulators Open to Counting Muni Bonds in Bank Assets.

WASHINGTON—Federal banking regulators said they plan to revisit a decision to exclude municipal securities from a postcrisis rule aimed at ensuring banks have enough cash on hand to survive a crisis, saying they are open to allowing some debt issued by states and localities to count as a "safe" asset.

Top officials from three bank regulators—the Federal Reserve, Office of the Comptroller of the Currency and the Federal Deposit Insurance Corp.—told Senate lawmakers Tuesday they would consider altering a rule completed last week that requires banks to hold enough cash or cash-like assets to fund their operations for 30 days. Previously, only the Fed had expressed a willingness to alter the rule.

Municipal securities currently don’t count as a “high-quality liquid asset” under the rule, which means they won’t qualify under the new funding requirements. State and local officials have said the exclusion could prompt banks to retreat from the municipal debt markets, forcing governments to scale back spending on roads, schools and other infrastructure projects financed with municipal bonds. Banks play an increasingly important role in the market, having nearly doubled their ownership of municipal securities over the past decade to more than 11%, according to Fed data.

“I hope all three agencies will reassess the final rule,” said Sen. Charles Schumer (D., N.Y.), who slammed the current restrictions at a Senate Banking Committee hearing. Mr. Schumer said excluding municipal bonds from the rule could crimp bank purchases of the debt and increase borrowing costs for states and localities.

At Tuesday’s hearing, Fed Gov. Daniel Tarullo said he has asked his staff to analyze the trading of municipal securities to determine which bonds would meet the definition of a “high-quality liquid asset.” The comments are similar to those he made last week when finalizing the rule, saying there is evidence some state and local debt is frequently traded and may be “comparable to that of the very liquid corporate bonds” that qualify as high-quality and liquid.

Martin Gruenberg, chairman of the FDIC, said his agency would support revising the rule “if there’s reason to make adjustments.”

Thomas Curry, the Comptroller of the Currency, said any decision to alter to the rule would rest on the Fed’s analysis.

“We’re open but we need to talk with our colleagues,” he said.

The Fed’s decision to reconsider whether to fully exclude municipal securities was first reported by The Wall Street Journal last week. By law, the Fed could amend the definition of safe assets unilaterally, though banking experts said it is unlikely they would act without the support of the two other regulators.

THE WALL STREET JOURNAL
By ANDREW ACKERMAN
Sept. 9, 2014 1:43 p.m. ET

Judge Agrees to Delay Detroit Bankruptcy Trial.

A federal judge agreed on Wednesday to delay Detroit’s bankruptcy trial to give the city and its fiercest opponent a chance to finish a major settlement that could speed an end to the city’s court fight over its future.

A tentative deal with Syncora Guarantee, a bond insurer that said its exposure in Detroit amounted to hundreds of millions of dollars, was announced Tuesday, and Judge Steven W. Rhodes agreed to halt the trial, which began last week, until Monday so details of the deal could be worked out. A final settlement with Syncora could permit Detroit, the largest American city ever to file for bankruptcy, to emerge from court far more quickly and smoothly than expected.

For months, as the city reached deals with other creditors, including city employees and retirees, Syncora had been the most forceful and public critic, and its legal objections to the city’s plan for eliminating $7 billion in debts threatened to keep Detroit in litigation for months, even years.

Describing “an agreement in principle” between the city and Syncora, newly filed court documents emphasized the significance of the deal, noting, “if this agreement is finalized within this time period as we expect, it will profoundly alter the course of the proceeding and the litigation plans of the remaining parties.”

There remain significant objectors to the city’s plan, and the still-unfinished details of Syncora’s agreement could prove vexing, but city officials expressed optimism. “Anything that shortens the time that we’re in court, that limits the objectors that we have, is good for the city,” said Bill Nowling, a spokesman for Detroit’s emergency manager, Kevyn D. Orr. “We’re not just giving Syncora anything. They’re going to have to make investments.” In a written statement, James H. M. Sprayregen, a partner in the Chicago law office of Kirkland & Ellis who has worked on behalf of Syncora, described the agreement as “an acceptable resolution for all concerned.”

A person with information about the negotiations, which have taken place under strict, court-ordered secrecy rules, described an unusual set of circumstances that ultimately became the basis of Syncora’s deal — one that will give the insurer a stake in vehicle tolls from the tunnel that runs between Detroit and Windsor, Ontario, as well as some nearby land.

As a creditor in an earlier bankruptcy of a company called American Roads, Syncora settled its claims by taking ownership of the company in a debt-for-stock exchange. One of American Roads’ assets was a five-year lease on the Detroit-Windsor tunnel. Under the new agreement with Detroit, Syncora would extend its concession by 20 years, to 2040. Some additional land adjacent to the tunnel would also go to Syncora, giving the insurer the chance to cash in on prime riverfront development projects.

A memo summarizing the agreement for Detroit’s City Council, signed by Mr. Orr, described some elements as options available to Syncora. The insurer would have the option of leasing a parking garage for 30 years, for instance, if it would invest $13.5 million in repairs over the first five years of the lease. That lease would give Syncora a 40 percent return on its investment, the memo said, and one-fourth of that would be shared with Detroit.

Syncora now stands to get a recovery rate of 20 percent to 25 percent on its bankruptcy claims.

That would be a little more than double what Detroit had offered Syncora and another bond insurer with similar claims, the Financial Guaranty Insurance Company, of New York. Both insurers stood to receive 10 cents on the dollar, or less, under Detroit’s proposed bankruptcy-exit plan, one of the lowest recoveries in the blueprint.

It was uncertain as of Tuesday evening whether Financial Guaranty would accept the new terms. And negotiations with other parties in the coming days will determine whether the deal goes through. Two banks that underwrote the 2005 borrowing that Syncora helped insure, Bank of America and UBS, must still decide whether to release Syncora from its obligations as an insurer.

All along, the city’s plan to emerge from bankruptcy had drawn objections from creditors who said they were to receive vastly different recoveries on their claims. Those involved with $1.4 billion of certificates the city issued in 2005 — like Syncora — could have come away with little or nothing, while city workers with pensions would take comparatively smaller losses. Yet if settlements with Syncora and others are completed, this case may not provide a judge’s reasoned answer to a question some in the municipal bond industry have been awaiting: whether a city may shelter municipal retirees even as it forces tougher losses on bondholders and other financial-markets creditors.

Earlier on Tuesday, Detroit reached an agreement with its suburban neighbors to lease its water system to a new regional authority, a move that, like the tentative agreement with Syncora, could remove further opposition to Detroit's bankruptcy plan.

Under the lease agreement, the city would receive $50 million a year for 40 years, then use the money to repair the vast, aging water and sewer system. Detroit would still hold title to its more than 7,000 miles of water mains and sewer pipes, while the newly created Great Lakes Water Authority would give officials of three nearby counties more say over how the system is run and what it charges customers.

The deal also calls for using $4.5 million a year to help struggling Detroit residents stay current on their water bills. Detroit cannot afford such an assistance program on its own, and city officials in recent months have been sharply criticized for turning off some residents' water when they fell too far behind.

THE NEW YORK TIMES
By MONICA DAVEY
SEPT. 10, 2014

NYT: Detroit's Bankruptcy Deal Hinges on 2 Banks.

The future of Detroit's pensioners may depend on an insurer's resolution of a dispute with Bank of America and UBS.

Syncora Guarantee, Detroit's most vociferous adversary in bankruptcy, is close to a breakthrough settlement with the city, but before it can close the deal it must resolve a related dispute with two big banks, Bank of America and UBS.

The bankruptcy judge, Steven Rhodes, has adjourned a trial in the case until Monday. If Syncora cannot reach an agreement with the banks by then, it will face a breakdown of its whole deal with Detroit, which would give it a stake in vehicle tolls from the tunnel that runs between Detroit and Windsor, Ontario, as well as some nearby land.

Syncora's dispute with the banks goes back to a $1.4 billion borrowing by Detroit in 2005. The city was already in dire financial straits and did not have enough to make its required pension contributions. After city unions sued, Detroit decided to borrow the money, and UBS and a precursor to Bank of America underwrote the deal. Syncora insured it along with another bond insurer, the Financial Guaranty Insurance Company.

The $1.4 billion did not solve Detroit's problems, though — it merely bought the city some time and labor peace. Ultimately, it increased the amount of debt Detroit now has to deal with in its historic Chapter 9 bankruptcy case. In the bankruptcy framework, the borrowing has turned out to be so messy and intractable for the municipal bond market that it almost seems to stand as an example of why it is a bad idea to fund public pensions with borrowed money. Such deals continue to be done in many places, however.

In bankruptcy, Detroit's approach to the 2005 debt has been to argue that the whole borrowing was illegal from the start because the city had reached its debt ceiling. It contends the deal should be voided, which would result in hundreds of millions of dollars in losses for both Syncora and Financial Guaranty.

In fact, until Syncora's announcement on Tuesday that it had an agreement in principle with Detroit, both insurers stood to receive one of the lowest recoveries of the bankruptcy. That outcome would have significant negative implications for the municipal bond industry because it would leave Detroit's pensioners higher on the creditors' pecking order than the investors who bought Detroit's debt in 2005.

The investors had no idea Detroit would later call the borrowing illegal, because the underwriters obtained legal opinions from both the state and independent bond counsel that the debt was valid, binding and enforceable.

It would be highly unusual for a government to repudiate debt marketed with such assurances. Municipal bond analysts have been warning that if Detroit prevails, it will cast a shadow over every other city bringing debt to market in the future.

Complicating matters, when Detroit borrowed in 2005, it tried to hold down the cost by issuing variable-rate debt, then hedging it with a type of derivative called interest-rate swaps. The swaps were intended to protect Detroit if interest rates rose — but if they fell, the city would have to pay the swap counterparties, which happened to be Bank of America and UBS.

The two insurers wrote guarantees for both the debt instruments, called certificates of participation, and for the interest-rate swaps. That protected the investors who bought the certificates and Bank of America and UBS from any missed payments on the swaps.

The borrowing was considered so innovative in 2005 that it won a Deal of the Year award from The Bond Buyer, a trade publication, and was said to have solved Detroit's pension problem once and for all. But by 2009, interest rates had plunged, and Detroit's mandatory swap payments to the two banks ballooned beyond anybody's expectations.

With cash flying out the door, the city's fiscal problems grew bad enough to activate provisions requiring it to terminate the swaps — but that required Detroit to buy out the two banks at the full present value of all the swap payments it would otherwise have to make for the life of the certificates. Once again, it did not have the money.

Detroit bought some time by restructuring the swaps and backstopped its obligations to the banks by pledging the cash it receives from a tax on casinos, an important source of revenue for the city.

After that, Detroit kept right on paying the swaps, even after declaring bankruptcy last year, when it estimated the cost of terminating its swaps at about $345 million. The city and the banks did reach a proposed settlement of $165 million, but the judge rejected it.

"It's just too much money," Judge Rhodes said at the time, and he ordered both sides to negotiate a lower deal. A few weeks later, the banks accepted $85 million.

Syncora's lawyers saw that the banks planned on turning their losses on the swaps into insurance claims that it and Financial Guaranty would be expected to pay.

That is what Syncora and the two banks will be thrashing out in their closed-door sessions this week. Financial Guaranty is not participating in those talks but has been in touch with Detroit about other possible settlements.

Both insurers say that if the 2005 borrowing was in fact illegal, as the city says, then they were fraudulently induced to insure it. If so, then their policies are also void, they say, and they do not owe the banks any money.

No one wants to touch the third rail underlying all this: If the 2005 borrowing was truly illegal, and must therefore be voided, then the city pension system should be required to give the investors back the $1.4 billion they provided back in 2005. That would sink Detroit's hard-won exit strategy.

THE NEW YORK TIMES
By MARY WILLIAMS WALSH
SEPTEMBER 10, 2014 7:10 PM

- MSRB Webinar: Request for Comment on Extending MSRB Rule G-37 to Municipal Advisors.
- SIFMA Advanced Muni Bond School.
- NAST, NASACT Make 11th Hour Appeal on Munis to Regulators.
- Fed: Some Munis May Become HQLA in Liquidity Rule.
- Lawmakers Threaten SEC with Ultimatum on MCDC.
- Muni Managers Unearth Secondary Market for Price Discovery.
- Driving Muni Bond Rally: Communities Reluctant to Borrow.
- IRS Approves Proposed Allocations of Build America Bond Proceeds.
- *Gary Community School Corp. v. Indiana Dept. of Local Government Finance* – Tax Court holds that state Department of Local Government Finance exceeded its authority in reducing School Corporation's exempt debt service fund levy because the statutory framework for reviewing such levies did not authorize the DLGF to consider other sources of funding available to the school (e.g., its general fund).
- And finally, the judge in *Citizens for Restoration of L Street v. City of Fresno* noted the following in an historic preservation matter: "[The house] had lost the majority of its historic integrity because of the loss of original woodwork, enclosure of the original front porch, alteration of a character-defining bay window, installation of vinyl sash windows, replacement of the original roof, and other inappropriate restoration and alteration elements. Inspections showed the interior was 90 percent gutted, the upstairs ceiling was collapsing, and the presence of fungus, dry rot, feline and human feces, lead paint and asbestos." In other words, much like the rest of the Fresno housing stock.

EMPLOYMENT - ALASKA

Adamson v. Municipality of Anchorage

Supreme Court of Alaska - August 29, 2014 - P.3d - 2014 WL 4258361

Firefighter, who developed prostate cancer, filed a workers' compensation claim under a new statute creating a presumption that certain diseases in firefighters, including prostate cancer, were work related when specific conditions were met. The Workers' Compensation Board decided that the firefighter was eligible for benefits, and appeal was taken. The Workers' Compensation Appeals Commission agreed that the firefighter had attached the presumption, but reversed the Board's decision disallowing the expert testimony. Both parties petitioned for review.

The Supreme Court of Alaska held that:

- In order to give effect to the legislature's intent that prior toxic exposures were covered by statutory presumption of compensability and to avoid an unrealistic result, firefighter could attach the presumption through substantial compliance with statute;
- Firefighter produced sufficient evidence that he had substantially complied with the statutory

requirements for medical examinations;
- Statute does not require a firefighter to show exposure to a carcinogen that has been shown to cause a specific cancer;
- Firefighter is free to retain and use an expert, but firefighter is not required to do so pursuant to statute;
- Substantial evidence supported the Workers' Compensation Board's decision that firefighter attached the presumption in statute; and
- Evidence rebutting statutory presumption that firefighter's cancer is compensable under workers' compensation law must be personal to firefighter.

LAND USE - CALIFORNIA

Citizens for Restoration of L Street v. City of Fresno

Court of Appeal, Fifth District, California - August 29, 2014 - Cal.Rptr.3d - 2014 WL 4254492

The City of Fresno approved a residential infill development project in downtown Fresno to build 28 two-story townhouses. The project site contained vacant parcels and two lots with houses built in the early 20th century. A citizens group interested in historical resources in downtown Fresno challenged the City's approval of the townhouse project, particularly its decision to issue demolition permits for the two houses. The trial court decided the City violated certain procedural requirements of the California Environmental Quality Act (CEQA) in approving the project, but applied the correct legal standards in determining the two houses were not "historical resources" protected by CEQA. Both sides appealed.

The Court of Appeals concluded that CEQA allows a local lead agency, such as the City, to delegate the authority to approve a mitigated negative declaration and a project to a nonelected decisionmaking body such as the Preservation Commission. In this case, however, the Fresno Municipal Code did not actually authorize the Preservation Commission to (1) complete the environmental review required by CEQA and (2) approve the mitigated negative declaration. As a result, the Preservation Commission's approval of the mitigated negative declaration did not comply with CEQA.

As to historical resources, the Court concluded that the substantial evidence test, rather than the fair argument standard, applies to a lead agency's discretionary determination of whether a building or district is an historical resource for purposes of CEQA. Therefore, the trial court did not err when it applied the substantial evidence test to the City's determination that no historical resources were impacted by the project.

TAX - DISTRICT OF COLUMBIA

District of Columbia v. 17M Associates, LLC

District of Columbia Court of Appeals - September 4, 2014 - A.3d - 2014 WL 4361554

Tenant filed petition claiming that the District of Columbia violated lease by imposing possessory interest tax. The Superior Court entered summary judgment in favor of tenant. District appealed.

The Court of Appeals held that:

- Board of Real Property Assessments and Appeals (BRPAA) lacked jurisdiction to decide if lease exempted tenant from the tax, and
- Lease did not exempt tenant from possessory interest tax.

"Real property classification" in statute permitting lessee or user disputing possessory interest tax assessment to appeal from a notice of proposed assessed value and real property classification in the same manner and under the same conditions as an owner referred to classes of taxable real property, not taxpayer's exemption status under lease, and, thus, BRPAA lacked jurisdiction to decide if lease exempted District of Columbia tenant from the tax.

Tenant's leasehold interest in District of Columbia land was a species of personal property, not part of "demised premises," within meaning of lease requiring tenant to pay any new tax imposed upon the demised premises, if the tax was based on or arose out of the ownership, use, or operation of tenant's improvements, and, thus, lease did not exempt tenant from possessory interest tax, even though it was measured by value of the property. Leased defined "demised premises" as including the District-owned land and the improvements, ways, easements, air and surface rights for that land, District could not have demised tenant's possessory interest to it, and lease did not indicate that tenant was liable only for expressly authorized taxes.

ZONING - ILLINOIS

Gurba v. Community High School Dist. No. 155

Appellate Court of Illinois, Second District - September 3, 2014 - N.E.3d - 2014 IL App (2d) 140098

Owners of land adjacent to school football stadium brought action against school district and board of education, alleging bleachers constructed pursuant to district decision violated municipal zoning and stormwater ordinances. Board brought third-party action against city and superintendent, seeking declaratory judgment that bleacher project was not subject to such ordinances. The Circuit Court entered judgment finding that project was subject to ordinances. Board appealed.

The Appellate Court held that:

- As a matter of apparent first impression, constitutional provisions tasking state government with provision of public education did not preclude enforcement of municipal zoning ordinances against school district and board of education, and
- Pursuant to School Code, board was required to follow city zoning ordinances.

IMMUNITY - ILLINOIS

O'Toole v. Chicago Zoological Soc.

Appellate Court of Illinois, First District, Fourth Division - August 28, 2014 - N.E.3d - 2014 IL App (1st) 132652

Visitor who had tripped and fallen at zoo located in county forest preserve district brought action against zoological society, seeking damages for personal injuries. The Circuit Court dismissed the action on limitations grounds, and visitor appealed.

The Appellate Court held that zoological society was not "local public entity" and thus one-year limitations period under Local Governmental and Governmental Employees Tort Immunity Act did not apply to action.

Zoological society, a not-for-profit corporation located in county forest preserve district, was not a “local public entity,” and thus one-year limitations period under Local Governmental and Governmental Employees Tort Immunity Act did not apply to negligence action arising when visitor tripped and fell at zoo, since zoological society did not conduct “public business.” Contract between zoo and district gave zoological society entire control and management of the zoo, including control over daily operations, maintenance of zoo building and collections, over 90% of zoological society’s board of trustees and governing members were neither employees nor elected officials of the district, and zoo employees were not entitled to a state pension or state workers’ compensation.

PUBLIC FINANCE - INDIANA

[Gary Community School Corp. v. Indiana Dept. of Local Government Finance]

Tax Court of Indiana - August 29, 2014 - N.E.3d - 2014 WL 4258826

Gary Community School Corporation entered into an agreement with the Gary Community School Building Corporation to build/lease-back two elementary schools.

To pay its obligations under the lease, the School Corp. issued a bond and secured two common school loans. In the ensuing years, the School Corp. used surplus monies from its general fund to pay its rental obligations, but the surplus dwindled more rapidly than anticipated. Accordingly, the School Corp. incorporated an exempt debt service fund levy into its 2011 Budget. The School Corp. subsequently submitted the budget to the Indiana Department of Local Government Finance (DLGF) for review.

The DLGF reduced the School Corp.’s exempt debt service fund levy by removing all the amounts related to the payment of the rental obligations. The DLGF explained that it had done so: 1) because there was no indication that the School Corp. had used an exempt debt service fund levy to pay its rental obligations in the past; 2) School Corp. had not availed itself of the taxpayer remonstrance process; and 3) School Corp. had not established that there were insufficient funds in the general fund to satisfy its obligations. School Corp. appealed.

The Tax Court held that:

- DLGF exceeded its authority in reducing School Corp.’s exempt debt service fund levy because the statutory framework for reviewing such levies did not authorize the DLGF to consider other sources of funding (e.g., its general fund).
- Although the original DLGG-approved lease indicated that the School Corp.
- did not need a property tax levy beyond that provided under Indiana Code § 6–1.1–19 to pay its bond obligations, that did not preclude the Corp. from ever seeking a property tax levy to pay its rental obligations.
- DLGF lacked the authority to reduce the School Corp.’s exempt debt service fund levy to redress its avoidance of the taxpayer remonstrance process.

ZONING - LOUISIANA

Maw Enterprises, L.L.C. v. City of Marksville

Supreme Court of Louisiana - September 3, 2014 - So.3d - 2014-0090 (La. 9/3/14)

Property owner/commercial lessor brought action against city, seeking to recover damages for city's denial of retail alcoholic beverage permit to lessee, which was convenience store operator. The District Court entered judgment in favor of landlord. City appealed.

The Supreme Court of Louisiana held that:

- City owed no duty to lessor to issue alcoholic beverage permit to lessee, and
- Harm caused to lessor was not within scope of protection afforded by duty breached.

City did not owe duty to lessor to issue retail alcoholic beverage permit to lessee of lessor's property, and therefore city was not liable to lessor for negligence stemming from denial of permit. Applicable statute's reference to "premises" spoke to where a business engaged in the sale of alcohol could be located, it did not confer an independent right to a permit on the premises where the business was to be located, and statute made clear that the permits were directed to persons engaged in the business of manufacturing, supplying, or dealing in alcoholic beverages, not the property owner of the property on which the business was conducted.

Harm cause to lessor by city's denial of retail alcoholic beverage permit to lessee that operated convenience store was not within the scope of protection afforded by the duty allegedly breached, and therefore city was not liable to lessor for negligence. It was highly unlikely that the moral, social, and economic considerations underlying the imposition of a duty to issue a retail alcoholic beverage permit to a qualified applicant encompassed the risk that a third party who had contracted with the applicant would thereby suffer an economic loss, especially when that loss was not even directly tied to the sales of alcohol the timely issuance of a permit would have allowed, but instead was based on decrease of gasoline sales at the store.

SCHOOLS - NEW MEXICO

Herrera v. Santa Fe Public Schools

United States District Court, D. New Mexico - August 29, 2014 - F.Supp.2d -

Students brought § 1983 action against city public schools alleging that their Fourth Amendment rights were violated during pat-down searches at school dances. Temporary restraining order enjoining schools from conducting such searches was granted. Schools moved for summary judgment.

The District Court held that:

- Genuine issues of material fact existed as to whether allegedly inadequate training and supervision of security officers was official custom or practice;
- Genuine issues of material fact existed as to whether schools' alleged failure to train or supervise security officers caused students' alleged deprivation of their right not to be searched absent individualized suspicion;
- Genuine issues of material fact existed as to whether schools acted with deliberate indifference as to known or obvious consequences of pat-down searches;
- Schools' alleged custom of allowing security officers to conduct suspicionless searches was not moving force behind security officers' alleged touching of students' breasts and inner thighs; and

- Genuine issue of material fact existed as to whether students suffered compensable damages.

IMMUNITY - NEW YORK

Dixon v. City of New York

Supreme Court, Appellate Division, Second Department, New York - August 27, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 05946

Mother and infant son brought action against city and city fire department alleging infant's brain injuries were caused by negligence of ambulance dispatcher in sending wrong type of ambulance when mother experienced heavy vaginal bleeding and negligence of ambulance personnel in delaying transport of mother to hospital. The Supreme Court, Kings County, denied defendants' motion for summary judgment. Defendants appealed.

The Supreme Court, Appellate Division, held that:

- Actions of city's ambulance dispatcher were discretionary, and
- Actions of city's emergency medical technicians and paramedics were discretionary.

Actions of city ambulance dispatcher in sending basic life support (BLS) ambulance, instead of advanced life support (ALS) ambulance, to 911-report that pregnant woman was experiencing heavy vaginal bleeding were discretionary, and thus actions were protected by governmental immunity doctrine in personal injury lawsuit brought by woman and her infant child.

Actions of city's emergency medical technicians (EMTs) and paramedics in responding to 911-report that pregnant woman was experiencing heavy vaginal bleeding in calling for advanced life support (ALS) ambulance based on amount of blood loss, in declining assistance of police officers on scene, in requiring woman to wait for ALS paramedics in her apartment, and in administering IV prior to transport to hospital were discretionary, and thus actions were protected by governmental immunity doctrine in personal injury lawsuit brought by woman and her infant child.

LIABILITY - NEW YORK

Telsaint v. City of New York

Supreme Court, Appellate Division, Second Department, New York - August 27, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 05974

Pedestrian brought slip and fall action against city. Following jury verdict in favor of pedestrian, the Supreme Court, Kings County, granted city's motion to set aside verdict. Pedestrian appealed.

The Supreme Court, Appellate Division, held that:

- Jury rationally could have concluded that city had constructive notice of icy condition that caused pedestrian to slip and fall on sidewalk, and
- Damages award deviated materially from what would be reasonable compensation.

Damages awarded to pedestrian in slip and fall action against city in amount of $750,000 for past pain and suffering and $1,500,000 for future pain and suffering deviated materially from what would be reasonable compensation.

PUBLIC UTILITIES - OHIO

[In re Fuel Adjustment Clauses for Columbus S. Power Co. & Ohio Power Co.]

Supreme Court of Ohio - September 3, 2014 - N.E.3d - 2014 -Ohio- 3764

After conducting annual review of electric utility's recovery of fuel costs pursuant to fuel adjustment clause (FAC), the Public Utilities Commission entered order determining that a portion of proceeds utility had received in settlement agreement with fuel supplier should be credited against utility's underrecovery of its fuel costs. Utility appealed, and association of industrial energy users cross-appealed.

The Supreme Court of Ohio held that PUC's order was not unlawful retroactive ratemaking.

Order of PUC after review of electric utility's recovery of fuel costs pursuant to FAC, determining that a portion of proceeds utility had received in settlement agreement with fuel supplier should be credited against utility's underrecovery of its fuel costs, did not increase utility's generation costs for year prior to the reviewed year, such as would constitute unlawful retroactive ratemaking. Under settlement agreement, utility paid below-market price for coal until end of year prior to reviewed year, after which 20-year contract between utility and supplier was terminated, and PUC's audit report showed that, absent the settlement agreement, utility would have continued to pay below-market fuel costs during reviewed year.

Order of PUC after review of electric utility's recovery of fuel costs pursuant to FAC, determining that a portion of proceeds utility had received in settlement agreement with fuel supplier should be credited against utility's underrecovery of its fuel costs, did not seize proceeds that utility had booked under proper regulatory accounting principles for year prior to reviewed year, such as would constitute unlawful retroactive ratemaking. PUC, not utility, determined whether utility's proceeds had been booked properly.

BENEFITS - OHIO

[State ex rel. O'Grady v. Griffing]

Supreme Court of Ohio - August 28, 2014 - N.E.3d - 2014 -Ohio- 3687

City employee, who applied with Public Employee Retirement System (PERS) to commence receiving her vested statutory retirement benefits, sought writ of mandamus to compel city's fiscal officer to certify her final payroll. The Court of Appeals granted writ. City's fiscal officer appealed as of right.

The Supreme Court of Ohio held that, without direct evidence that city employee had actually resigned or been terminated, fiscal officer had no clear legal duty to file the form with employee's final-earnable-salary date for purposes of retirement benefits.

Without direct evidence that city employee had actually resigned or been terminated, city auditor could not know for sure that employee had carried out the intent expressed in the judge's letter, stating that employee was going to take her Ohio Public Employees Retirement System (OPERS) retirement, but would remain as a court employee in her present position, and thus, auditor had no clear legal duty to file the form with employee's final-earnable-salary date for purposes of retirement benefits. Employee never terminated her service for purposes of OPERS, because she failed to write a letter of resignation or get the judge to officially terminate her.

TAX - OHIO

[Worthington City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision]

Supreme Court of Ohio - August 27, 2014 - N.E.3d - 2014 -Ohio- 3620

Board of education (BOE) appealed real-property-valuation of the County Board of Revision (BOR) of a commercial building consisting of warehouse and office space. The Board of Tax Appeals (BTA) ordered that the auditor's valuation be reinstated. Taxpayer appealed.

The Supreme Court of Ohio held that:

- Record contained no support for finding that taxpayer's counsel prepared written valuation;
- Knowledgeable employee of taxpayer's corporate affiliate could give owner-opinion testimony as to property's value; and
- The BTA was precluded from reverting to auditor's valuation.

Board of Tax Appeals (BTA) was precluded from reverting to auditor's valuation of commercial real property consisting of warehouse and office space in spite of the its findings that taxpayer's opinion of value, under income approach, lacked market data, where county board of revision (BOR) adopted new value based on owner's opinion of value, which shifted burden of going forward with evidence to city board of education (BOE), and no new evidence was presented at the BTA.

BALLOT INITIATIVE - OHIO

[State ex rel. Columbus Coalition for Responsive Govt. v. Blevins]

Supreme Court of Ohio - August 29, 2014 - N.E.3d - 2014 -Ohio- 3745

Citizens group brought action seeking mandamus to compel city clerk to verify signatures on an initiative petition and submit the proposed initiative to city council.

The Supreme Court of Ohio held that city clerk had no duty to submit citizen coalition's precirculation copy of proposed initiative petition to city council, where city's charter was silent on the subject of precirculation requirements, which invoked statute requiring such petitions to be filed with city's auditor.

TAX - RHODE ISLAND

[Town of Johnston v. Federal Housing Finance Agency]

United States Court of Appeals, First Circuit - August 27, 2014 - F.3d - 2014 WL 4237996

The Town of Johnston, Rhode Island and the Commissioners of Bristol County, Massachusetts ("the municipalities") brought separate actions against the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and the Federal Housing Finance Agency ("FHFA") (collectively, "the entities"), alleging that the entities failed to pay taxes on the transfer of property.

Federal district courts in Massachusetts and Rhode Island granted the entities' motions to dismiss based on statutory exemptions from taxation.

The municipalities appealed, claiming that the transfer tax is a tax on “real property” and therefore falls outside the entities’ tax exemptions, and that the entities’ tax exemptions themselves are unconstitutional.

Court of Appeals wasn’t buying it.

ANNEXATION - TENNESSEE

State ex rel. Garrett v. City of Norris

Court of Appeals of Tennessee - August 28, 2014 - Slip Copy - 2014 WL 4260848

The City of Norris passed two annexation ordinances on the same day. The second territory to be annexed was contiguous to the city only through bordering the territory annexed earlier that same day.

A property owner in the second annexed territory sued Norris in a bid to stop the annexation of this second territory (the “Territory”).

The Trial Court eventually voided the annexation of the Territory on the basis that the Territory was not contiguous to the city. Norris appealed.

The Court of Appeals held that the annexation ordinance purporting to annex the Territory was void because at the time of the passage of the annexation ordinance, the first annexation was not yet operative and the Territory, therefore, was not contiguous to the city as required by law.

CONTRACTS - TEXAS

Zachry Const. Corp. v. Port of Houston Authority of Harris County

Supreme Court of Texas - August 29, 2014 - S.W.3d - 2013 WL 9600952

Construction contractor brought action against county port authority for breach of contract. The District Court entered judgment on jury verdict for contractor. Port authority and contractor appealed.

The Supreme Court of Texas held that:

- Local Government Contract Claims Act does not waive immunity from suit on a claim for damages not recoverable under section of Act that defines the scope of the waiver of immunity;
- Act waives immunity for a contract claim for delay damages not expressly provided for in the contract;
- No-damages-for-delay provision was unenforceable;
- Releases signed by contractor did not cover contractor’s breach of contract claims; and
- Evidence was sufficient to support verdict that port authority was entitled to an offset of $970,000 as damages for contractor’s use of defective wharf fenders.

SPECIAL ASSESSMENTS - WISCONSIN

Yankee Hill Housing Partners v. City of Milwaukee

Court of Appeals of Wisconsin - September 3, 2014 - Slip Copy - 2014 WL 4328201

Yankee Hill is a large residential apartment complex in Milwaukee that paid over $196,000 in BID special assessments for tax years 2005 through 2011. The City of Milwaukee added BID special assessments to Yankee Hill's property tax bill during those years because the South Tower of the Yankee Hill complex lies within a business improvement district.

Yankee Hill eventually discovered that the BID special assessments it paid were contrary to WIS. STAT. § 66.1109(5)(a), which prohibits a municipality from imposing such assessments on real property used exclusively for residential purposes. Yankee Hill contacted various City authorities and requested a refund. The City refused, not because it believed that it was correct to impose the assessments, but because it believed that, pursuant to WIS. STAT. § 74.35(5)(a), any challenges to a special assessment must be brought by January 31 for the year in which the tax is payable and Yankee Hill's challenges were not timely made.

The Court of Appeals disagreed, concluding that neither § 893.80(1d) nor any statute of limitations barred Yankee Hill's claim.

Yankee Hill was not required to comply with the notice of claim statute, WIS. STAT. § 893.80(1d), because it gave the City actual notice of the claim and the City had not been prejudiced.

MSRB Proposal to Establish Best-Execution Rule Published in Federal Register.

The Municipal Securities Rulemaking Board's (MSRB) request for approval from the Securities and Exchange Commission (SEC) of a proposal to require municipal securities dealers to seek the most favorable price possible when executing transactions for retail investors has been published in the Federal Register. The "best-execution" standard for transactions in the municipal market aims to protect investors and improve the structure and efficiency of the municipal market.

Read the notice of publication in the Federal Register.

Read the rule filing.

The deadline for submitting comments to the SEC is September 29, 2014.

MSRB Seeks Input on Strategic Priorities.

The Municipal Securities Rulemaking Board (MSRB), which oversees the $3.7 trillion municipal securities market, is seeking public input on its priorities to help guide the organization's strategic direction for the next several years. The mission of the MSRB is to protect investors, state and local government issuers, other municipal entities and the public interest by promoting a fair and efficient municipal market.

Comments should be submitted to the MSRB no later than October 23, 2014.

View the regulatory notice.

Read the full press release.

SIFMA Advanced Muni Bond School.

Bond Club of NYSIFMA and the Municipal Bond Club of New York invite you to participate in this year's Advanced Municipal Bond School. This weekly series will run from September 22 to October 27, 2014 at the SIFMA Conference Center in New York City. Webinar option available.

Join us for an innovative and informative program that guarantees your success and increases your industry knowledge while separating yourself from your peers. The Advanced Muni Bond School remains an important and integral building block for your career in municipal bonds not just through the educational process, but also by establishing a network for young professionals.

Educate – Classes include sessions on fundamental terminology, regulation, underwriting, trading, analysis, derivatives, public finance, portfolio management and market strategy.

Build – This annual course of instruction is designed to provide a comprehensive introduction to all phases of the business, with emphasis on the mastery of basic skills and knowledge.

Network – Attendance in the recent past has exceeded 100 enrolled students. Speakers include leaders in the Municipal Bond industry from all the leading firms.

Webinar will be fully interactive and Q&A will be available.

View the Program.

Register.

Please Note: The entire series (all 5 classes) must be purchased at time of registration (no partial weeks will be allowed).

IRS LTR: Utility Not Violating Normalization Rules.

The IRS ruled that a public utility would violate normalization rules by using any depreciation methodology other than the one it is using or by imputing incremental accumulated deferred income tax on account of reliability plant adjustment rules.

Citations: LTR 201436038

Third Party Communication: None
Date of Communication: Not Applicable
Person To Contact: * * *, ID No. * * *
Telephone Number: * * *

Index Number: 167.22-01
Release Date: 9/5/2014

Date: May 22, 2014

Refer Reply To: CC:PSI:B06 – PLR-148311-13

LEGEND:

Taxpayer = * * *
Parent = * * *
State A = * * *
State B = * * *
State C = * * *
Commission A = * * *
Commission B = * * *
Commission C = * * *
Year A = * * *
Year B = * * *
Date A = * * *
Date B = * * *
Date C = * * *
Date D = * * *
Date E = * * *
Case = * * *
Director = * * *

Dear * * *:

This letter responds to the request, dated November 25, 2013, of Taxpayer for a ruling on the application of the normalization rules of the Internal Revenue Code to certain accounting and regulatory procedures, described below.

The representations set out in your letter follow.

Taxpayer is a regulated public utility incorporated in State A and State B. It is wholly owned, through a limited liability company, by Parent. Taxpayer is engaged in the transmission, distribution, and supply of electricity in State A and State C. Taxpayer also provides natural gas and natural gas transmission services in State A. Taxpayer is subject to the regulatory jurisdiction of Commission A, Commission B, and Commission C with respect to terms and conditions of service and particularly the rates it may charge for the provision of service. Taxpayer's rates are established on a rate of return basis. Taxpayer takes accelerated depreciation, including "bonus depreciation" where available and, for each year beginning in Year A and ending in Year B, Taxpayer individually (as well as the consolidated return filed by Parent) has or expects to, produce a net operating loss (NOL). On its regulatory books of account, Taxpayer "normalizes" the differences between regulatory depreciation and tax depreciation. This means that, where accelerated depreciation reduces taxable income, the taxes that a taxpayer would have paid if regulatory depreciation (instead of accelerated tax depreciation) were claimed constitute "cost-free capital" to the taxpayer. A taxpayer that normalizes these differences, like Taxpayer, maintains a reserve account showing the amount of tax liability that is deferred as a result of the accelerated depreciation. This reserve is the accumulated deferred income tax (ADIT) account. Taxpayer maintains an ADIT account. In addition, Taxpayer maintains an offsetting series of entries — a "deferred tax asset" and a "deferred tax expense" — that reflect that portion of those 'tax losses' which, while due to accelerated depreciation, did not actually defer tax because of the existence of an net operating loss carryover (NOLC). Taxpayer, for normalization purposes, calculates the portion of the NOLC attributable to accelerated depreciation using a “with or without” methodology, meaning that an NOLC is attributable to accelerated depreciation to the extent of the lesser of the accelerated depreciation or the NOLC.

Taxpayer filed a general rate case with Commission B on Date A (Case). The test year used in the Case was the 12 month period ending on Date B. In computing its income tax expense element of cost of service, the tax benefits attributable to accelerated depreciation were normalized in accordance with Commission B policy and were not flowed thru to ratepayers. The data originally filed in Case was updated in the course of proceedings. In establishing the rate base on which Taxpayer was to be allowed to earn a return Commission B offset rate base by Taxpayer’s ADIT balance, using a 13-month average of the month-end balances of the relevant accounts. Taxpayer argued that the ADIT balance should be reduced by the amounts that Taxpayer calculates did not actually defer tax due to the presence of the NOLC, as represented in the deferred tax asset account. Testimony by various other participants in Case argued against Taxpayer’s proposed calculation of ADIT.

On Date C, a settlement agreement was filed with Commission B, incorporating the Taxpayer’s proposed treatment of the tax consequences of its NOLC. In an order issued on Date D, Commission B issued an order approving the settlement agreement and also ordered Taxpayer to seek a ruling on the effects of an NOLC on ADIT. Rates went into effect on Date E.

Taxpayer proposed, and Commission B accepted, that it be permitted to annualize, rather than average, its reliability plant additions and to extend the period of anticipated reliability plant additions to be included in rate base for an additional eight months. Taxpayer also proposed, and Commission B accepted, that no additional ADIT be reflected as a result of these adjustments inasmuch as any additional book and tax depreciation produced by considering these assets would simply increase Taxpayer’s NOLC and thus there would be no net impact on ADIT.

Taxpayer requests that we rule as follows:

1. Under the circumstances described above, the reduction of Taxpayer’s rate base by the full amount of its ADIT account balances offset by a portion of its NOLC-related account balance that is less than the amount attributable to accelerated depreciation computed on a “with or without” basis would be inconsistent with the requirements of § 168(i)(9) and § 1.167(l)-1 of the Income Tax regulations.

2. The imputation of incremental ADIT on account of the reliability plant addition adjustments described above would be inconsistent with the requirements of § 168(i)(9) and § 1.167(l)-1.

LAW AND ANALYSIS

Section 168(f)(2) of the Code provides that the depreciation deduction determined under section 168 shall not apply to any public utility property (within the meaning of section 168(i)(10)) if the taxpayer does not use a normalization method of accounting.

In order to use a normalization method of accounting, section 168(i)(9)(A)(i) of the Code requires the taxpayer, in computing its tax expense for establishing its cost of service for ratemaking purposes and reflecting operating results in its regulated books of account, to use a method of depreciation with respect to public utility property that is the same as, and a depreciation period for such property that is not shorter than, the method and period used to compute its depreciation expense for such purposes. Under section 168(i)(9)(A)(ii), if the amount allowable as a deduction under section 168 differs from the amount that-would be allowable as a deduction under section 167 using the method, period, first and last year convention, and salvage value used to compute regulated tax expense under section 168(i)(9)(A)(i), the taxpayer must make adjustments to a reserve to reflect the deferral of taxes resulting from such difference.

Section 168(i)(9)(B)(i) of the Code provides that one way the requirements of section 168(i)(9)(A) will not be satisfied is if the taxpayer, for ratemaking purposes, uses a procedure or adjustment which is inconsistent with such requirements. Under section 168(i)(9)(B)(ii), such inconsistent procedures and adjustments include the use of an estimate or projection of the taxpayer's tax expense, depreciation expense, or reserve for deferred taxes under section 168(i)(9)(A)(ii), unless such estimate or projection is also used, for ratemaking purposes, with respect to all three of these items and with respect to the rate base.

Former section 167(l) of the Code generally provided that public utilities were entitled to use accelerated methods for depreciation if they used a "normalization method of accounting." A normalization method of accounting was defined in former section 167(l)(3)(G) in a manner consistent with that found in section 168(i)(9)(A). Section 1.167(1)-1(a)(1) of the Income Tax Regulations provides that the normalization requirements for public utility property pertain only to the deferral of federal income tax liability resulting from the use of an accelerated method of depreciation for computing the allowance for depreciation under section 167 and the use of straight-line depreciation for computing tax expense and depreciation expense for purposes of establishing cost of services and for reflecting operating results in regulated books of account. These regulations do not pertain to other book-tax timing differences with respect to state income taxes, F.I.C.A. taxes, construction costs, or any other taxes and items.

Section 1.167(l)-1(h)(1)(i) provides that the reserve established for public utility property should reflect the total amount of the deferral of federal income tax liability resulting from the taxpayer's use of different depreciation methods for tax and ratemaking purposes.

Section 1.167(1)-1(h)(1)(iii) provides that the amount of federal income tax liability deferred as a result of the use of different depreciation methods for tax and ratemaking purposes is the excess (computed without regard to credits) of the amount the tax liability would have been had the depreciation method for ratemaking purposes been used over the amount of the actual tax liability. This amount shall be taken into account for the taxable year in which the different methods of depreciation are used. If, however, in respect of any taxable year the use of a method of depreciation other than a subsection (1) method for purposes of determining the taxpayer's reasonable allowance under section 167(a) results in a net operating loss carryover to a year succeeding such taxable year which would not have arisen (or an increase in such carryover which would not have arisen) had the taxpayer determined his reasonable allowance under section 167(a) using a subsection (1) method, then the amount and time of the deferral of tax liability shall be taken into account in such appropriate time and manner as is satisfactory to the district director.

Section 1.167(1)-1(h)(2)(i) provides that the taxpayer must credit this amount of deferred taxes to a reserve for deferred taxes, a depreciation reserve, or other reserve account. This regulation further provides that, with respect to any account, the aggregate amount allocable to deferred tax under section 167(1) shall not be reduced except to reflect the amount for any taxable year by which Federal income taxes are greater by reason of the prior use of different methods of depreciation. That section also notes that the aggregate amount allocable to deferred taxes may be reduced to reflect the amount for any taxable year by which federal income taxes are greater by reason of the prior use of different methods of depreciation under section 1.167(1)-1(h)(1)(i) or to reflect asset retirements or the expiration of the period for depreciation used for determining the allowance for depreciation under section 167(a).

Section 1.167(1)-(h)(6)(i) provides that, notwithstanding the provisions of subparagraph (1) of that paragraph, a taxpayer does not use a normalization method of regulated accounting if, for ratemaking purposes, the amount of the reserve for deferred taxes under section 167(l) which is excluded from the base to which the taxpayer's rate of return is applied, or which is treated as no-cost capital in those rate cases in which the rate of return is based upon the cost of capital, exceeds the amount of such reserve for deferred taxes for the period used in determining the taxpayer's expense in computing cost of service in such ratemaking.

Section 1.167(1)-(h)(6)(ii) provides that, for the purpose of determining the maximum amount of the reserve to be excluded from the rate base (or to be included as no-cost capital) under subdivision (i), above, if solely an historical period is used to determine depreciation for Federal income tax expense for ratemaking purposes, then the amount of the reserve account for that period is the amount of the reserve (determined under section 1.167(1)-1(h)(2)(i)) at the end of the historical period. If such determination is made by reference both to an historical portion and to a future portion of a period, the amount of the reserve account for the period is the amount of the reserve at the end of the historical portion of the period and a pro rata portion of the amount of any projected increase to be credited or decrease to be charged to the account during the future portion of the period.

Section 1.167(l)-1(h) requires that a utility must maintain a reserve reflecting the total amount of the deferral of federal income tax liability resulting from the taxpayer's use of different depreciation methods for tax and ratemaking purposes. Taxpayer has done so. Section 1.167(1)-(h)(6)(i) provides that a taxpayer does not use a normalization method of regulated accounting if, for ratemaking purposes, the amount of the reserve for deferred taxes which is excluded from the base to which the taxpayer's rate of return is applied, or which is treated as no-cost capital in those rate cases in which the rate of return is based upon the cost of capital, exceeds the amount of such reserve for deferred taxes for the period used in determining the taxpayer's expense in computing cost of service in such ratemaking. Section 56(a)(1)(D) provides that, with respect to public utility property the Secretary shall prescribe the requirements of a normalization method of accounting for that section.

In Case, Commission B has reduced rate base by Taxpayer's ADIT account, as modified by the account which Taxpayer has designed to calculate the effects of the NOLC. Section 1.167(1)-1(h)(1)(iii) makes clear that the effects of an NOLC must be taken into account for normalization purposes. Further, while that section provides no specific mandate on methods, it does provide that the Service has discretion to determine whether a particular method satisfies the normalization requirements. Section 1.167(1)-(h)(6)(i) provides that a taxpayer does not use a normalization method of regulated accounting if, for ratemaking purposes, the amount of the reserve for deferred taxes which is excluded from the base to which the taxpayer's rate of return is applied, or which is treated as no-cost capital in those rate cases in which the rate of return is based upon the cost of capital, exceeds the amount of such reserve for deferred taxes for the period used in determining the taxpayer's expense in computing cost of service in such ratemaking. Because the ADIT account, the reserve account for deferred taxes, reduces rate base, it is clear that the portion of an NOLC that is attributable to accelerated depreciation must be taken into account in calculating the amount of the reserve for deferred taxes (ADIT). Thus, the order by Commission B is in accord with the normalization requirements. The "with or without" methodology employed by Taxpayer is specifically designed to ensure that the portion of the NOLC attributable to accelerated depreciation is correctly taken into account by maximizing the amount of the NOLC attributable to accelerated depreciation. This methodology provides certainty and prevents the possibility of "flow through" of the benefits of accelerated depreciation to ratepayers. Under these facts, any method other than the "with and without" method would not provide the same level of certainty and therefore the use of any other methodology is inconsistent with the normalization rules.

Regarding the second issue, § 1.167(1)-(h)(6)(i) provides, as noted above, that a taxpayer does not use a normalization method of regulated accounting if, for ratemaking purposes, the amount of the reserve for deferred taxes which is excluded from the base to which the taxpayer's rate of return is applied exceeds the amount of such reserve for deferred taxes for the period used in determining the taxpayer's expense in computing cost of service in such ratemaking. Increasing Taxpayer's ADIT account by an amount representing those taxes that would have been deferred absent the NOLC increases the ADIT reserve account (which will then reduce rate base) beyond the permissible amount.

We rule as follows:

1. Under the circumstances described above, the reduction of Taxpayer's rate base by the full amount of its ADIT account balances offset by a portion of its NOLC-related account balance that is less than the amount attributable to accelerated depreciation computed on a "with or without" basis would be inconsistent with the requirements of § 168(i)(9) and § 1.167(l)-1 of the Income Tax regulations.
2. The imputation of incremental ADIT on account of the reliability plant addition adjustments described above would be inconsistent with the requirements of § 168(i)(9) and § 1.167(l)-1.

This ruling is based on the representations submitted by Taxpayer and is only valid if those representations are accurate. The accuracy of these representations is subject to verification on audit.

Except as specifically determined above, no opinion is expressed or implied concerning the Federal income tax consequences of the matters described above.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides it may not be used or cited as precedent. In accordance with the power of attorney on file with this office, a copy of this letter is being sent to your authorized representative. We are also sending a copy of this letter ruling to the Director.

Sincerely,

Peter C. Friedman
Senior Technician Reviewer,
Branch 6
(Passthroughs & Special Industries)

cc:
* * *

IRS LTR: Utility's Normalization Methodology Is Proper.

The IRS ruled that a utility company would violate section 167 normalization rules by using any depreciation methodology other than the one it is using, by increasing its accumulated deferred income tax account by specified amounts, or by reducing its tax expense element of cost of service to reflect its net operating loss carryover.

Citations: LTR 201436037

Third Party Communication: None

Date of Communication: Not Applicable
Person To Contact: * * *, ID No. * * *
Telephone Number: * * *

Index Number: 167.22-01
Release Date: 9/5/2014
Date: May 22, 2014

Refer Reply To: CC:PSI:B06 – PLR-148310-13

LEGEND:

Taxpayer = * * *
Parent = * * *
State A = * * *
State B = * * *
State C = * * *
Commission A = * * *
Commission B = * * *
Commission C = * * *
Year A = * * *
Year B = * * *
Date A = * * *
Date B = * * *
Date C = * * *
Case = * * *
Director = * * *

Dear * * *:

This letter responds to the request, dated November 25, 2013, of Taxpayer for a ruling on the application of the normalization rules of the Internal Revenue Code to certain accounting and regulatory procedures, described below.

The representations set out in your letter follow.

Taxpayer is a regulated public utility incorporated in State A and State B. It is wholly owned by Parent. Taxpayer is engaged in the transmission, distribution, and supply of electricity in State A and State C. Taxpayer is subject to the regulatory jurisdiction of Commission A, Commission B, and Commission C with respect to terms and conditions of service and particularly the rates it may charge for the provision of service. Taxpayer's rates are established on a rate of return basis. Taxpayer takes accelerated depreciation, including "bonus depreciation" where available and, for each year beginning in Year A and ending in Year B, Taxpayer individually (as well as the consolidated return filed by Parent) has or expects to, produce a net operating loss (NOL). On its regulatory books of account, Taxpayer "normalizes" the differences between regulatory depreciation and tax depreciation. This means that, where accelerated depreciation reduces taxable income, the taxes that a taxpayer would have paid if regulatory depreciation (instead of accelerated tax depreciation) were claimed constitute "cost-free capital" to the taxpayer. A taxpayer that normalizes these differences, like Taxpayer, maintains a reserve account showing the amount of tax liability that is deferred as a result of the accelerated depreciation. This reserve is the accumulated deferred income tax (ADIT) account. Taxpayer maintains an ADIT account. In addition, Taxpayer maintains an offsetting series of entries — a "deferred tax asset" and a "deferred tax expense" — that reflect that portion of those ‘tax losses’ which, while due to accelerated depreciation, did not actually defer tax because of the existence of an net operating loss carryover (NOLC). Taxpayer, for normalization purposes, calculates the portion of the NOLC attributable to accelerated depreciation using a “with or without” methodology, meaning that an NOLC is attributable to accelerated depreciation to the extent of the lesser of the accelerated depreciation or the NOLC.

Taxpayer filed a general rate case with Commission B on Date A (Case). The test year used in the Case was the 12 month period ending on Date B. In computing its income tax expense element of cost of service, the tax benefits attributable to accelerated depreciation were normalized in accordance with Commission B policy and were not flowed thru to ratepayers. The data originally filed in Case included six months of forecast data, which the Taxpayer updated with actual data in the course of proceedings. In establishing the rate base on which Taxpayer was to be allowed to earn a return Commission B offset rate base by Taxpayer’s ADIT balance, using a 13-month average of the month-end balances of the relevant accounts. Taxpayer argued that the ADIT balance should be reduced by the amounts that Taxpayer calculates did not actually defer tax due to the presence of the NOLC, as represented in the deferred tax asset account. Testimony by various other participants in Case argued against Taxpayer’s proposed calculation of ADIT. One proposal made to Commission B was, if Commission B allowed Taxpayer to reduce the ADIT balance as Taxpayer proposed, then Taxpayer’s income tax expense element of service should be reduced by that same amount.

Commission B, in an order issued on Date C, allowed Taxpayer to reduce ADIT by the amount that Taxpayer calculates did not actually defer tax due to the presence of the NOLC and ordered Taxpayer to seek a ruling on the effects of an NOLC on ADIT. Rates went into effect on Date C.

Taxpayer proposed, and Commission B accepted, that it be permitted to annualize, rather than average, its reliability plant additions and to extend the period of anticipated reliability plant additions to be included in rate base for an additional quarter. Taxpayer also proposed, and Commission B accepted, that no additional ADIT be reflected as a result of these adjustments inasmuch as any additional book and tax depreciation produced by considering these assets would simply increase Taxpayer’s NOLC and thus there would be no net impact on ADIT.

Taxpayer requests that we rule as follows:

1. Under the circumstances described above, the reduction of Taxpayer’s rate base by the full amount of its ADIT account balances offset by a portion of its NOLC-related account balance that is less than the amount attributable to accelerated depreciation computed on a “with or without” basis would be inconsistent with the requirements of § 168(i)(9) and § 1.167(l)-1 of the Income Tax regulations.

2. The imputation of incremental ADIT on account of the reliability plant addition adjustments described above would be inconsistent with the requirements of § 168(i)(9) and § 1.167(l)-1.

3. Under the circumstances described above, any reduction in Taxpayer’s tax expense element of cost of service to reflect the tax benefit of its NOLC would be inconsistent with the requirements of § 168(i)(9) and § 1.167(l)-1.

LAW AND ANALYSIS

Section 168(f)(2) of the Code provides that the depreciation deduction determined under section 168 shall not apply to any public utility property (within the meaning of section 168(i)(10)) if the taxpayer does not use a normalization method of accounting.

In order to use a normalization method of accounting, section 168(i)(9)(A)(i) of the Code requires the taxpayer, in computing its tax expense for establishing its cost of service for ratemaking purposes and reflecting operating results in its regulated books of account, to use a method of depreciation with respect to public utility property that is the same as, and a depreciation period for such property that is not shorter than, the method and period used to compute its depreciation expense for such purposes. Under section 168(i)(9)(A)(ii), if the amount allowable as a deduction under section 168 differs from the amount that-would be allowable as a deduction under section 167 using the method, period, first and last year convention, and salvage value used to compute regulated tax expense under section 168(i)(9)(A)(i), the taxpayer must make adjustments to a reserve to reflect the deferral of taxes resulting from such difference.

Section 168(i)(9)(B)(i) of the Code provides that one way the requirements of section 168(i)(9)(A) will not be satisfied is if the taxpayer, for ratemaking purposes, uses a procedure or adjustment which is inconsistent with such requirements. Under section 168(i)(9)(B)(ii), such inconsistent procedures and adjustments include the use of an estimate or projection of the taxpayer's tax expense, depreciation expense, or reserve for deferred taxes under section 168(i)(9)(A)(ii), unless such estimate or projection is also used, for ratemaking purposes, with respect to all three of these items and with respect to the rate base.

Former section 167(l) of the Code generally provided that public utilities were entitled to use accelerated methods for depreciation if they used a "normalization method of accounting." A normalization method of accounting was defined in former section 167(l)(3)(G) in a manner consistent with that found in section 168(i)(9)(A). Section 1.167(1)-1(a)(1) of the Income Tax Regulations provides that the normalization requirements for public utility property pertain only to the deferral of federal income tax liability resulting from the use of an accelerated method of depreciation for computing the allowance for depreciation under section 167 and the use of straight-line depreciation for computing tax expense and depreciation expense for purposes of establishing cost of services and for reflecting operating results in regulated books of account. These regulations do not pertain to other book-tax timing differences with respect to state income taxes, F.I.C.A. taxes, construction costs, or any other taxes and items.

Section 1.167(l)-1(h)(1)(i) provides that the reserve established for public utility property should reflect the total amount of the deferral of federal income tax liability resulting from the taxpayer's use of different depreciation methods for tax and ratemaking purposes.

Section 1.167(1)-1(h)(1)(iii) provides that the amount of federal income tax liability deferred as a result of the use of different depreciation methods for tax and ratemaking purposes is the excess (computed without regard to credits) of the amount the tax liability would have been had the depreciation method for ratemaking purposes been used over the amount of the actual tax liability. This amount shall be taken into account for the taxable year in which the different methods of depreciation are used. If, however, in respect of any taxable year the use of a method of depreciation other than a subsection (1) method for purposes of determining the taxpayer's reasonable allowance under section 167(a) results in a net operating loss carryover to a year succeeding such taxable year which would not have arisen (or an increase in such carryover which would not have arisen) had the taxpayer determined his reasonable allowance under section 167(a) using a subsection (1) method, then the amount and time of the deferral of tax liability shall be taken into account in such appropriate time and manner as is satisfactory to the district director.

Section 1.167(1)-1(h)(2)(i) provides that the taxpayer must credit this amount of deferred taxes to a reserve for deferred taxes, a depreciation reserve, or other reserve account. This regulation further provides that, with respect to any account, the aggregate amount allocable to deferred tax under section 167(1) shall not be reduced except to reflect the amount for any taxable year by which

Federal income taxes are greater by reason of the prior use of different methods of depreciation. That section also notes that the aggregate amount allocable to deferred taxes may be reduced to reflect the amount for any taxable year by which federal income taxes are greater by reason of the prior use of different methods of depreciation under section 1.167(1)-1(h)(1)(i) or to reflect asset retirements or the expiration of the period for depreciation used for determining the allowance for depreciation under section 167(a).

Section 1.167(1)-(h)(6)(i) provides that, notwithstanding the provisions of subparagraph (1) of that paragraph, a taxpayer does not use a normalization method of regulated accounting if, for ratemaking purposes, the amount of the reserve for deferred taxes under section 167(l) which is excluded from the base to which the taxpayer's rate of return is applied, or which is treated as no-cost capital in those rate cases in which the rate of return is based upon the cost of capital, exceeds the amount of such reserve for deferred taxes for the period used in determining the taxpayer's expense in computing cost of service in such ratemaking.

Section 1.167(1)-(h)(6)(ii) provides that, for the purpose of determining the maximum amount of the reserve to be excluded from the rate base (or to be included as no-cost capital) under subdivision (i), above, if solely an historical period is used to determine depreciation for Federal income tax expense for ratemaking purposes, then the amount of the reserve account for that period is the amount of the reserve (determined under section 1.167(1)-1(h)(2)(i)) at the end of the historical period. If such determination is made by reference both to an historical portion and to a future portion of a period, the amount of the reserve account for the period is the amount of the reserve at the end of the historical portion of the period and a pro rata portion of the amount of any projected increase to be credited or decrease to be charged to the account during the future portion of the period.

Section 1.167(l)-1(h) requires that a utility must maintain a reserve reflecting the total amount of the deferral of federal income tax liability resulting from the taxpayer's use of different depreciation methods for tax and ratemaking purposes. Taxpayer has done so. Section 1.167(1)-(h)(6)(i) provides that a taxpayer does not use a normalization method of regulated accounting if, for ratemaking purposes, the amount of the reserve for deferred taxes which is excluded from the base to which the taxpayer's rate of return is applied, or which is treated as no-cost capital in those rate cases in which the rate of return is based upon the cost of capital, exceeds the amount of such reserve for deferred taxes for the period used in determining the taxpayer's expense in computing cost of service in such ratemaking. Section 56(a)(1)(D) provides that, with respect to public utility property the Secretary shall prescribe the requirements of a normalization method of accounting for that section.

In Case, Commission B has reduced rate base by Taxpayer's ADIT account, as modified by the account which Taxpayer has designed to calculate the effects of the NOLC. Section 1.167(1)-1(h)(1)(iii) makes clear that the effects of an NOLC must be taken into account for normalization purposes. Further, while that section provides no specific mandate on methods, it does provide that the Service has discretion to determine whether a particular method satisfies the normalization requirements. Section 1.167(1)-(h)(6)(i) provides that a taxpayer does not use a normalization method of regulated accounting if, for ratemaking purposes, the amount of the reserve for deferred taxes which is excluded from the base to which the taxpayer's rate of return is applied, or which is treated as no-cost capital in those rate cases in which the rate of return is based upon the cost of capital, exceeds the amount of such reserve for deferred taxes for the period used in determining the taxpayer's expense in computing cost of service in such ratemaking. Because the ADIT account, the reserve account for deferred taxes, reduces rate base, it is clear that the portion of an NOLC that is attributable to accelerated depreciation must be taken into account in calculating the amount of the reserve for deferred taxes (ADIT). Thus, the order by Commission B is in accord with the normalization requirements. The "with or without" methodology employed by Taxpayer is specifically designed to ensure that the portion of the NOLC attributable to accelerated depreciation is correctly taken into account by maximizing the amount of the NOLC attributable to accelerated depreciation. This methodology provides certainty and prevents the possibility of “flow through” of the benefits of accelerated depreciation to ratepayers. Under these facts, any method other than the “with and without” method would not provide the same level of certainty and therefore the use of any other methodology is inconsistent with the normalization rules.

Regarding the second issue, § 1.167(1)-(h)(6)(i) provides, as noted above, that a taxpayer does not use a normalization method of regulated accounting if, for ratemaking purposes, the amount of the reserve for deferred taxes which is excluded from the base to which the taxpayer’s rate of return is applied exceeds the amount of such reserve for deferred taxes for the period used in determining the taxpayer’s expense in computing cost of service in such ratemaking. Increasing Taxpayer’s ADIT account by an amount representing those taxes that would have been deferred absent the NOLC increases the ADIT reserve account (which will then reduce rate base) beyond the permissible amount.

Regarding the third issue, reduction of Taxpayer’s tax expense element of cost of service, we believe that such reduction would, in effect, flow through the tax benefits of accelerated depreciation deductions through to rate payers even though the Taxpayer has not yet realized such benefits. This would violate the normalization provisions.

We rule as follows:

1. Under the circumstances described above, the reduction of Taxpayer’s rate base by the full amount of its ADIT account balances offset by a portion of its NOLC-related account balance that is less than the amount attributable to accelerated depreciation computed on a “with or without” basis would be inconsistent with the requirements of § 168(i)(9) and § 1.167(l)-1 of the Income Tax regulations.

2. The imputation of incremental ADIT on account of the reliability plant addition adjustments described above would be inconsistent with the requirements of § 168(i)(9) and § 1.167(l)-1.

3. Under the circumstances described above, any reduction in Taxpayer’s tax expense element of cost of service to reflect the tax benefit of its NOLC would be inconsistent with the requirements of § 168(i)(9) and § 1.167(l)-1.

This ruling is based on the representations submitted by Taxpayer and is only valid if those representations are accurate. The accuracy of these representations is subject to verification on audit.

Except as specifically determined above, no opinion is expressed or implied concerning the Federal income tax consequences of the matters described above.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides it may not be used or cited as precedent. In accordance with the power of attorney on file with this office, a copy of this letter is being sent to your authorized representative. We are also sending a copy of this letter ruling to the Director.

Sincerely,

Peter C. Friedman
Senior Technician Reviewer,
Branch 6

(Passthroughs & Special Industries)
cc:
* * *

FASB Advisory Group Expects Challenges With New Nonprofit Rules.

An advisory group of the Financial Accounting Standards Board on September 4 expressed general support for the board's efforts to improve nonprofit organizations' financial statements but also identified challenges that could result from the significant changes being proposed.

At a meeting in Norwalk, Connecticut, members of FASB's Not-for-Profit Advisory Committee (NAC) expressed concern about the complexity associated with the board's tentative decisions on the treatment of capital donations and the proposed disclosure of those gifted assets throughout the nonprofit entity's statement of activities.

NAC member John A. Mattie of PricewaterhouseCoopers LLP said one of the primary goals of the board's project was to improve the consistency and comparability of financial reporting across the nonprofit industry. Despite those benefits, the proposed rule changes could put more pressure on financial statement preparers regarding the footnote disclosures that must support the nonprofit's accounting decisions, he said, adding that FASB's guidance should provide several illustrative examples of those disclosures.

NAC member Michael B. Tarnoff of the Jewish Federation of Metropolitan Chicago said he believes that the rule changes under discussion would motivate nonprofit organizations and their governing boards to ensure that the financial statements reflect how they behave under the policies they've adopted. "I see it as an excellent result that we're moving toward," he said.

NAC member Bennett Weiner of the Better Business Bureau Wise Giving Alliance said the proposed footnote disclosure communicating information about a nonprofit's liquidity will provide value to the organization and users of its financial statements.

According to Weiner, the proposed disclosure requirement on liquidity could bring attention to an issue that has been neglected by several nonprofits for a variety of reasons.

However, Weiner expressed concern that some of the changes to nonprofit financial statements being proposed may create differences between the information provided in audited financials and Form 990, "Return of Organization Exempt From Income Tax," or other government filings. But those differences shouldn't necessarily dictate what the boards decide because the wheels of government turn slowly, and any change to those documents would represent a significant hurdle, he added.

Jeffrey Mechanick, an assistant director at FASB, said the staff will attempt to perform outreach with some government agencies to the extent that those organizations have the time and ability to contribute, adding that the IRS Tax-Exempt and Government Entities Division could provide valuable feedback on FASB's project on nonprofit reporting.

FASB member Lawrence Smith admitted that developing accounting standards for the nonprofit sector is particularly challenging because of the wide variety of nonprofits that exist. Although some are strictly nonprofit operations, others are funded by government agencies or operate like for-profit businesses, he noted.

Smith said that while FASB should consider the views of financial statement preparers, users, and auditors when making standard setting decisions, board members must keep the statement users at the front of their minds in deciding how to address a particular accounting issue.

FASB cannot gear nonprofit financial statements toward all users that could provide contributions to an organization, Mechanick said. He added that the board receives the most feedback from grant-making foundations and surrogates for donors, such as watchdog agencies and regulatory bodies.

Concerns With Revenue Standard

At a September 5 meeting with FASB, NAC members said they anticipated that the board's transition resource group may need to address the implementation problems that nonprofits have regarding the guidance in Accounting Standards Update No. 2014-09, "Revenue From Contracts With Customers (Topic 606)." NAC members expressed particular concern about applying the new revenue standard to healthcare payments and government grants such as social impact bonds.

FASB Chair Russell Golden said the board will provide staff resources to help nonprofit organizations better interpret the revenue recognition guidance, but he advised those entities to confirm whether their implementation problems apply to the existing guidance under U.S. generally accepted accounting principles, the new standard issued in May, or both.

Mechanick added that the implementation problems of healthcare entities and nonprofit organizations also may be examined by the industry task forces that were established by the American Institute of Certified Public Accountants to assist with application of the new guidance. The AICPA Financial Reporting Executive Committee plans to provide its own accounting guide on FASB's revenue standard, he said.

Thomas Jaworski

Fed: Some Munis May Become HQLA in Liquidity Rule.

WASHINGTON — Municipal securities will not qualify as high-quality liquid assets under a new federal liquidity coverage ratio rule slated to take effect on Jan. 1. Federal Reserve Board officials said they are working on a proposal to include some municipal bonds as HQLA at a later date, but municipal market participants were disappointed at the delay.

The rule unveiled and adopted unanimously by the Fed on Wednesday, would implement Basel III regulations. It would require large banks to maintain a certain ratio of HQLA to total net cash outflows. The idea is that the banks would then be able to easily and immediately convert those assets to cash during a period of liquidity stress.

Fed board member Daniel Tarullo said Wednesday that the Fed staff are at work on a proposal to allow some munis to qualify as HQLA, but that proposal is not ready and the agency wanted to finalize the rule now so that banks can begin to prepare to implement it.

A draft rule earlier this year alarmed the muni market, prompting groups to warn regulators that excluding munis from the definition of HQLA will increase borrowing costs for state and local governments, reduce liquidity and increase volatility in the muni market, and put muni issuers at a disadvantage to foreign governments in accessing the U.S. capital markets. Market advocates have argued doggedly that many munis can be sufficiently liquid to be included as HQLA.

“While it is true that most state and municipal bonds are not sufficiently liquid to serve the purposes of HQLA in stressed periods, public comments and staff analysis over the past several months suggest that the liquidity of some state and municipal bonds is comparable to that of the very liquid corporate bonds that can qualify as HQLA,” Tarullo said. “Staff has been working on ideas to develop some criteria for determining which such bonds fall into this category and thus might be considered for inclusion as HQLA. That work has not yet been completed, and it is important to get this final rule adopted now, so that the largest banks can begin to prepare for its implementation on Jan. 1. However, I anticipate that staff will be coming back to us with a report on efforts to develop a proposal along these lines.”

A staff presentation at the meeting said that a “limited number” of municipal securities exhibit liquidity characteristics comparable to the highly liquid corporate bonds that do satisfy the coverage ratio rule, and that the future proposal will include “the most liquid” munis.

Fed chair Janet Yellen said municipalities are fearful that their access to capital markets could be impacted by the failure to classify munis as HQLA, but Fed manager of credit, market, liquidity risk and policy David Emmel told her that staff believe the impact on local economies and bank behavior will be minimal.

Banks hold munis for reasons other than to have high-quality assets on hand, Emmel told Yellen, and staff expect banks to continue to hold munis.

“We don’t believe the impact will be significant,” Emmel said.

Market participants were disappointed with the outcome, especially after a full-scale campaign by dealers and issuers alike to pressure regulators into allowing at least some highly-rated munis to satisfy HQLA requirements under the rule. Thirty-one state treasurers signed onto an 11th-hour appeal sent to the board late last week. But the indication that some munis could be HQLA in the future did take some of the sting from the news.

“While it was disappointing to see munis not included in the final rule, it is encouraging to know that governors and Federal Reserve staff are committed to developing rule changes that will allow some muni securities to qualify as HQLA,” said Dustin McDonald, director of the Federal Liaison Center at the Government Finance Officers Association. ” GFOA will be reaching out to staff to discuss next steps.”

Tom Dresslar, spokesman for California State Treasurer Bill Lockyer, expressed concern at continuing statements about how most munis are not sufficiently liquid and said the Fed should take care not to exclude too many munis when it proposes the revision later.

“The exclusion of municipal bonds is wholly unjustified, so the commitment to adopt a subsequent rule that brings at least some of them under the tent is welcome,” Dresslar said. “But any future rule should not be stingy in welcoming munis. It should be generous. ”

Bond Dealers of America senior counsel and senior vice president for federal regulatory policy Jessica Giroux said the group was disappointed, but wanted details on the muni proposal.

“We would be interested to find out more of the specifics behind this consideration since our position is that muni’s generally should be included as HQLA,” Giroux said.

THE BOND BUYER
BY KYLE GLAZIER
SEP 3, 2014 2:01pm ET

MSRB Webinar: Request for Comment on Extending MSRB Rule G-37 to Municipal Advisors.

Join the MSRB for a free educational webinar about its recent proposal to amend MSRB Rule G-37 to address the potential for pay-to-play activities by municipal advisors.

Date: Thursday, September 11, 2014

Time: 3:00 p.m.- 4:00 p.m. EDT

Description: MSRB staff will review the request for comment on draft amendments to Rule G-37, the MSRB's pay-to-play rule for municipal securities dealers, that would extend the rule to municipal advisors.

Read the request for comment.

Register.

Lawmakers Threaten SEC with Ultimatum on MCDC.

WASHINGTON — A bipartisan House duo is threatening the Securities and Exchange Commission, warning it must further ease the Municipalities Continuing Disclosure Cooperation initiative for dealers before the Sept. 10 deadline for participation or they will step in with legislative action.

Reps. Steve Stivers, R-Ohio, and Kyrsten Sinema, D-Ariz., delivered the ultimatum to SEC chairman Mary Jo White in an Aug. 28 letter obtained by The Bond Buyer.

The pair of lawmakers told White that the MCDC, which allows both issuers and underwriters to get favorable settlements by voluntarily reporting instances in the past five years in which they sold or underwrote bonds with materially misleading official statements, is causing confusion and needs to have its deadlines and financial penalty structure changed again before the dealer self-reporting deadline just after midnight Sept. 9.

The SEC announced the MCDC in March and amended it July 31 after weeks of near constant requests from various muni market groups and Stivers to do so. The changes included pushing the issuer and borrower reporting deadline back to Dec. 1, and introducing a tiered approach to financial penalty caps for dealers based on the gross revenues of the firms.

Those changes mostly drew approval from the issuers, but dealer groups and some issuers said having different reporting deadlines would only increase tension between an underwriter and an issuer, who effectively report on each other under the MCDC initiative, if one reports a transaction and the other does not.

Stivers and Sinema told White that extending the deadline for dealers would improve the program. "There is simply no justification for separate reporting deadlines," the lawmakers wrote. "Giving dealers additional time to communicate with their issuer clients before self-reporting violations would promote cooperation and help ensure consistency in self-reports."

The legislators are also pushing the SEC to adopt a civil penalty structure based on the revenues of either a firm's muni bond underwriting business or its muni business in general, rather than its overall size. The high-level cap of $500,000 should remain in place, Stivers and Sinema wrote.

"Penalties based on the sizes of firms' municipal securities business would help ensure that fines are proportional to firms' footprints in the municipal market," they told the SEC.

The lawmakers closed their letter with the threat of action if the SEC does not address their concerns soon, and requested a response by Sept. 5.

Michael Decker, co-head of municipal securities at the Securities Industry and Financial Markets Association, said that SIFMA is glad to see Stivers and Sinema getting involved. Decker echoed the concerns in the Stivers/Sinema letter, saying that some firms want to participate but might not beat the clock. "Some firms are concerned they're not going to be able to review all their transactions by the reporting deadline," he said.

Stivers has been very active on muni issues and has benefited from $10,000 of SIFMA campaign contributions during the 2014 election cycle, records show.

It is unlikely that Congress would be able to act prior to the MCDC underwriter deadline. Though Decker said there is interest among lawmakers, legislation would have to be introduced and passed by both the Republican-controlled House and Democrat-controlled Senate before also getting a prompt signature from President Obama.

THE BOND BUYER
BY KYLE GLAZIER
AUG 29, 2014 12:28pm ET

August Muni Volume Rises 7%.

Municipal bond volume increased in August from the same month in 2013, raising expectations that issuance may inch closer to normal in the fourth quarter.

Monthly Data

Long term bond sales for August totaled $24.4 billion, a 7% increase from August last year, according to Thomson Reuters. This is the second time in three months that volume has come in higher than the same month of 2013, after June issuance rose 16%.

Municipal bond supply has been scarce all year, totaling $177.2 billion as of July 31, 15.3% below 2013's level for the same period, according to data provided by The Bond Buyer and Ipreo. Some analysts said that August's strength is an indication the drought will finally end and issuance will pick up during the fourth quarter.

"The amount of issuance this year has been startlingly low," Jim Colby, chief municipal strategist at Van Eck Global, said in an interview. "Given where rates are I can't imagine we won't see issuance pickup in Q4, with issuers taking advantage of rates."

Colby pointed to declines in municipal yields as an indication of a the seller's market that will exist for the rest of the year. The benchmark 10-year triple-A general obligation bond has fallen by 71 basis points to 2.08% as of Aug. 28, from Jan. 2, according to Municipal Market Data.

From Aug. 1 alone the benchmark 10-year bond's yield dropped by 21 basis points.

John Dillon, managing director at Morgan Stanley Wealth Management, said in an interview that he doesn't predict a substantial turnaround in volume for the rest of the year. Volume looks good only in comparison to a weak period for issuance last year, he said.

Volume plunged in the middle of 2013 as the Federal Reserve signaled it would end its economic stimulus program and Detroit's bankruptcy fanned credit concerns.

"I think given the major downshift we saw in volume in May and June of last year, gives us better optics now," he said. "So the market looks like there's better volume now. Its not August volume being good, just last year's comparison's being easier to beat."

He said, though, that the lower interest rates create an opportunity for refundings to pick up during the fourth quarter. Refundings totaled $9 billion in August, more than double the volume in the same month in 2013.

"We will continue to see refundings pick up a little bit more, especially during the end of the year, when we will have more refundings on the table," he said.

Refunding volume in August was boosted by the $1.8 billion Detroit Water and Sewage Department deal Citigroup priced on Aug. 26.

Many of the Detroit Water and Sewer bonds came wrapped in bond insurance from Assured Guaranteed and National Financial, helping boost bond insurance volume by 174.4% to $2.5 billion. Last year insured bond volume totaled $896.6 million for August.

"It could just be because of Detroit, that would obviously be a factor, but it's still positive momentum" for bond insurers, Dillon said.

New money issuance stayed low and was 15.3% below the August 2013 amount, totaling $10.1 billion.

Both negotiated and competitive issuance increased from the same period last year, by 18.3% to $18.2 billion and 2.8% to $5.8 billion, respectively.

Colby said issuance is likely to pick up after the midterm elections, as politicians, who had shied away from borrowings that could be portrayed during reelection campaigns as increasing the debt burden, return to the market.

He said during elections voters are often asked to approve additional funding for road repairs, schools, and other such projects.

"What does happen when you go into fourth quarter for the calendar year is that local and state officials start looking at what want to accomplish before end of calendar year and say 'we have all this authorized but unused capacity, maybe should raise our issuance level because interest rates are favorable and demand is there'," Colby said. "I've seen it occur in past years."

THE BOND BUYER
BY HILLARY FLYNN
AUG 29, 2014 1:42pm ET

IRS Approves Proposed Allocations of Build America Bond Proceeds.

The IRS ruled that the owner of a power plant can make allocations of Build America Bond proceeds, and the expenditure of earnings that accrue after the project period from the investment of sale proceeds of the bonds in a reasonably required reserve to pay principal and non-capital interest will not cause the bonds to fail to be qualified bonds.

Citations: LTR 201435013

Third Party Communication: None
Date of Communication: Not Applicable
Person To Contact: * * *, ID No. * * *
Telephone Number: * * *

Index Number: 148.00-00, 148.02-00, 141.01-01, 54AA.00-00
Release Date: 8/29/2014
Date: May 21, 2014

Refer Reply To: CC:FIP:05 – PLR-148383-13

LEGEND:

Issuer = * * *
Issue 1 = * * *
Issue 2 = * * *
Issue 3 = * * *
Issue 4 = * * *
Date 5 = * * *
Date 1 = * * *
Date 2 = * * *
Date 3 = * * *
Date 4 = * * *
a = * * *
Date 6 = * * *

Dear * * *:

This letter is in response to your request for rulings that (1) the Issuer can make certain proposed allocations related to Issue 2, Issue 3, and Issue 4 under sections 1.141-6(a) and 1.148-6 of the Income Tax Regulations as described below; (2) the expenditure of earnings that accrue subsequent to the project period (within the meaning of section 1.141-1) from the investment of sale proceeds of Issue 3 and Issue 4 in a reasonably required reserve to pay principal and interest that is not a capital expenditure (non-capital interest) on an issue will not cause Issue 3 and Issue 4 to fail to be qualified bonds within the meaning of section 54AA(g)(2); and (3) section 1.148-6(d)(3)(ii)(A)(7) may be applied to account for the expenditure of proceeds of Issue 3 and Issue 4.

FACTS AND REPRESENTATIONS

The Issuer makes the following representations. The Issuer has an undivided ownership interest in an electric generating facility (the Issuer's portion of this facility is referred to herein as the Project). The Project was not placed in service before Date 5. To finance the Project, the Issuer issued four issues of tax-advantaged bonds: (1) Issue 1, issued as tax-exempt bonds on Date 1, (2) Issue 2, issued as tax-exempt bonds on Date 2, (3) Issue 3, issued as direct pay build America bonds on Date 3, and (4) Issue 4, issued as direct pay build America bonds on Date 4 (Issue 2, Issue 3, and Issue 4 collectively, the Bonds). The Bonds are secured by a parity reserve fund which consists in part of some sale proceeds of Issue 3 and Issue 4. The Issuer represents that this parity reserve fund is a reasonably required reserve under section 148(d) and section 1.148-2(f) with respect to the Bonds. The Issuer expects the total costs of the Project to be lower than estimated as of the issue date of Issue 4 by $a, and thus the Issuer will have unspent proceeds in this amount (the Unspent Amount).

Prior to Date 6, the Issuer had allocated its capital expenditures to proceeds of Issue 1 and the Bonds such that an amount of proceeds of Issue 4 equal to the Unspent Amount was not allocated to any capital expenditure. The Issuer proposes to revise its allocations of expenses to proceeds of the Bonds as described in the Issuer's request for this ruling (the Proposed Allocations) no later than the date that is 18 months after Date 5 and the date that is 60 days after the fifth anniversary of the issue of the Bonds to which it will allocate its expenditures. At the time that each of the expenses comprising the Proposed Allocations was actually paid, the Issuer had on hand sufficient proceeds of the specific issue of the Bonds to which the expense is allocated under the Proposed Allocations to pay the expense. The Issuer will allocate investments to proceeds of the Bonds for arbitrage and rebate purposes in a manner that is consistent with the Proposed Allocations.

The Issuer also proposes to deposit earnings that accrue subsequent to the project period, as defined in section 1.141-1(b), from the investment of sale proceeds of Issue 3 and Issue 4 in a reasonably required reserve into a bona fide debt service fund and use those earnings to pay principal or interest.

LAW AND ANALYSIS

Revision of Allocations

Section 103(a) provides that, except as provided in subsection (b), gross income does not include interest on any state or local bond. Section 103(b)(1) provides that subsection (a) shall not apply to any private activity bond which is not a qualified bond (within the meaning of section 141). Section 103(b)(2) provides that subsection (a) shall not apply to any arbitrage bond (within the meaning of section 148).

Section 141(a) provides that the term "private activity bond" means any bond issued as part of an issue which (1) meets the private business use test of section 141(b)(1) and the private security or payment test of section 141(b)(2), or (2) meets the private loan financing test of section 141(c). Section 141(b)(1) provides, in general, that an issue meets the private business use test if more than 10 percent of the proceeds of the issue are to be used for any private business use.

Section 148(a) provides that the term "arbitrage bond" means any bond issued as part of an issue any portion of the proceeds of which are reasonably expected (at the time of issuance of the bond) to be used directly or indirectly (1) to acquire higher yielding investments, or (2) to replace funds which were used directly or indirectly to acquire higher yielding investments. Further, for purposes of section 148(a), a bond shall be treated as an arbitrage bond if the issuer intentionally uses any portion of the proceeds of the issue of which such bond is a part in a manner described in (1) or (2).

Section 148(f) provides, in part, that a bond is an arbitrage bond unless the issuer timely rebates to the United States the excess of the amount earned on certain nonpurpose investments over the amount that would be earned on those investments had those investments had a yield equal to the bond yield, plus any income attributable to the excess.

Section 1.141-6(a) provides that for purposes of sections 1.141-1 through 1.141-15, the provisions of section 1.148-6(d) apply for purposes of allocating proceeds to expenditures. Thus, allocations generally may be made using any reasonable, consistently applied accounting method, and allocations under sections 141 and 148 must be consistent with each other.

Section 1.148-6(a)(1) provides that an issuer may use any reasonable, consistently applied accounting method to account for gross proceeds, investments, and expenditures of an issue. However, under section 1.148-6(a)(3), if an issuer fails to maintain books and records sufficient to establish the accounting method for an issue and the allocation of the proceeds of that issue, the accounting and allocation rules under section 1.148-6 are applied using the specific tracing method.

Section 1.148-6(d)(1)(iii) provides that an issuer must account for the allocation of proceeds to expenditures not later than 18 months after the later of the date the expenditure is paid or the date the project, if any, that is financed by the issue is placed in service. This allocation must be made in any event by the date 60 days after the fifth anniversary of the issue date or the date 60 days after the retirement of the issue, if earlier.

Section 54AA(d)(1) provides that, for purposes of section 54AA, the term "build America bond" means any obligation (other than a private activity bond) if (A) the interest on such obligation would (but for section 54AA) be excludable from gross income under section 103; (B) such obligation is issued before January 1, 2011, and (C) the issuer makes an irrevocable election to have section 54AA apply.

The Issuer has requested that we rule on whether it can revise its allocations related to the Bonds under sections 1.141-6(a) and 1.148-6 as provided in the Proposed Allocations. The regulations under sections 141 and 148 apply to build America bonds as well as tax-exempt bonds because section 54AA(d)(1) defines a build America bond as other than a private activity bond and requires that, but for section 54AA, the interest on build America bonds be excludable from gross income under section 103. Accordingly, build America bonds cannot be private activity bonds under section 141 or arbitrage bonds under section 148 and are subject to the regulations under those sections to the extent that the regulations do not conflict with section 54AA.

By not requiring allocations to be determined when the expenditure is paid or incurred, the arbitrage regulations acknowledge that day-to-day practicalities require some flexibility regarding the timing of an issuer's allocations. We conclude that these practicalities also require flexibility to change allocations, so long as those changes are made within the time frame provided under section 1.148-6(d)(1)(iii). Here, at the time that each of the expenses described in the Proposed Allocations was actually paid, the Issuer had on hand sufficient proceeds of the specific issue of the Bonds to which the expense is allocated under the Proposed Allocations to pay the expense. The Issuer will also allocate investments to proceeds of the Bonds for arbitrage and rebate purposes in a manner that is consistent with the Proposed Allocations.

The Issuer tentatively made the Proposed Allocations within the time frame provided in section 1.148-6(d)(1)(iii). The Project was not placed in service before Date 5, which date is fewer than 18 months prior to Date 6, the date on which the Proposed Allocations were made. Date 6 occurred before the date that is 60 days after the fifth anniversary of any of the issues of the Bonds, and none of the issues of the Bonds have been retired. We conclude that, because the time frame provided in section 1.148-6(d)(1)(iii) had not yet closed and because there were sufficient proceeds on hand when the expenditures were made, Issuer can make the Proposed Allocations under sections 1.141-6(a) and 1.148-6.

Earnings on Sale Proceeds of BABs in Reserve

Section 54AA(a) provides that if a taxpayer holds a build America bond (BAB) on one or more interest payment dates of the bond during any taxable year, there shall be allowed as a credit against income tax for the taxable year an amount equal to the sum of the credits determined under section 54AA(b) with respect to such dates. Subject to limitations under section 54AA(c), section 54AA(b) provides that the amount of the credit with respect to any interest payment date for a build America bond is 35 percent of the amount of interest payable by the issuer with respect to such date.

Section 54AA(g) provides a special rule for qualified bonds issued before January 1, 2011. In the case of a qualified bond issued before January 1, 2011, in lieu of any credit allowed under Section 54AA with respect to such bond, the issuer of such bond shall be allowed a credit as provided in Section 6431.

Section 54AA(g)(2) provides that for purposes of Section 54AA(g), the term “qualified bond” means any BAB issued as part of an issue if (A) 100 percent of the excess of (i) the available project proceeds (as defined in Section 54A) of such issue, over (ii) the amounts in a reasonably required reserve (within the meaning of Section 150(a)(3)) with respect to such issue, are to be used for capital expenditures; and (B) the issuer makes an irrevocable election to have Section 54AA(g) apply.

Section 54A(e)(4) provides that the term “available project proceeds” means (A) the excess of the proceeds from the sale of an issue, over the issuance costs financed by the issue (to the extent that such costs do not exceed 2 percent of such proceeds), and (B) the proceeds from any investment of the excess described in (A).

Section 150(a)(3) provides that the term “net proceeds” means, with respect to any issue, the proceeds of such issue reduced by amounts in a reasonably required reserve or replacement fund.

Section 1.141-1(b) provides that for purposes of applying sections 1.141-1 through 1.141-16, the term “project period” means the period beginning on the issue date and ending on the date that the project is placed in service.

Section 1.148-6(d)(3)(i) provides that, except as otherwise provided in paragraph (d)(3) or paragraph (d)(4), proceeds of an issue may only be allocated to working capital expenditures as of any date to the extent that those working capital expenditures exceed available amounts (as defined in paragraph (d)(3)(iii)) as of that date (i.e., a “proceeds-spent-last” method). Section 1.148-6(d)(3)(ii)(A)(7) provides that the general rule in paragraph (d)(3)(i) does not apply to expenditures to pay principal or interest on an issue paid from investment earnings on a reserve or replacement fund that are deposited in a bona fide debt service fund.

The Issuer has requested that we rule on whether the expenditure of earnings that accrue subsequent to the project period (within the meaning of section 1.141-1) from the investment of sale proceeds of Issue 3 and Issue 4 in a reasonably required reserve to pay principal and non-capital interest on an issue will not cause Issue 3 and Issue 4 to fail to be qualified bonds within the meaning of section 54AA(g)(2). It has also requested that we rule on whether section 1.148-6(d)(3)(ii)(A)(7) may be applied to account for the expenditure of proceeds of Issue 3 and Issue 4.

The plain language of section 54AA(g)(2)(A) does not answer the question of whether investment earnings on the sale proceeds of Issue 3 and Issue 4 in a reasonably required reserve may be used to pay principal and non-capital interest. The answer turns on whether such investment earnings are included in “available project proceeds” under section 54AA(g)(2)(A)(i) or in “the amounts in a reasonably required reserve” under section 54AA(g)(2)(A)(ii). Although section 54AA(g)(2)(A)(i) cross-references the definition of “available project proceeds” in section 54A(e)(4), proceeds of bonds issued under section 54A may not be used to fund a reasonably required reserve. Accordingly, the definition of “available project proceeds” in section 54A does not address investment earnings on sale proceeds deposited in a reasonably required reserve.

If earnings on sale proceeds of Issue 3 and Issue 4 in a reasonably required reserve are included in “available project proceeds” under section 54AA(g)(2)(A)(i), then the Issuer would be required to spend those earnings on capital expenditures long after the Project is complete. We conclude, instead, that the earnings on the sale proceeds of Issue 3 and Issue 4 in a reasonably required reserve that accrue after the end of the project period, as defined in section 1.141-1(b), are not “available project proceeds” within the meaning of section 54AA(g)(2)(A)(i) and, therefore, may be used to pay principal and non-capital interest without causing Issue 3 and Issue 4 to fail to be qualified bonds under section 54AA(g)(2).

As stated above, Issue 3 and Issue 4 are build America bonds and, therefore, subject to the regulations under section 148 to the extent that the regulations do not conflict with section 54AA. For example, any working capital expenditures permitted under section 54AA must be allocated for arbitrage purposes to the proceeds of Issue 3 and Issue 4 using a proceeds-spent-last method, as provided in section 1.148-6(d)(3)(i). We conclude that section 1.148-6(d)(3)(ii)(A)(7) applies to preclude application of the proceeds-spent-last method of allocation to the payment of principal or interest from earnings on sale proceeds of Issue 3 and Issue 4 in the reasonably required reserve that accrue after the end of the project period and that are first deposited in a bona fide debt service fund.

CONCLUSION

Based strictly on the information submitted and representations made, we conclude that (1) the Issuer can make the Proposed Allocations under sections 1.141-6(a) and 1.148-6; (2) the expenditure of earnings that accrue subsequent to the project period (within the meaning of section 1.141-1) from the investment of sale proceeds of Issue 3 and Issue 4 in a reasonably required reserve to pay principal and non-capital interest on an issue will not cause Issue 3 and Issue 4 to fail to be qualified bonds within the meaning of section 54AA(g)(2); and (3) section 1.148-6(d)(3)(ii)(A)(7) may be applied as provided above to account for the expenditure of proceeds of Issue 3 and Issue 4.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, we express no opinion on any allocations related to Issue 1, whether Issue 1 or Issue 2 are tax-exempt under section 103, or whether Issue 3 or Issue 4 are build America bonds under section 54AA.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

Timothy L. Jones
Senior Counsel
(Financial Institutions & Products)

Muni Managers Unearth Secondary Market for Price Discovery.

Some municipal fund managers are finding it's possible to use the secondary market to help determine fair bond pricing after a drop in new issuance has limited their reliance on the primary market as a benchmark.

While many market participants prefer to gauge prices in the secondary market against large, recognizable, liquid new issues, they said current secondary trading levels and trade history provide a reasonable alternative, thanks to strong demand for paper.

"There is enough going on in the secondary market for reasonable price discovery," said Jim Colby, chief municipal strategist at Van Eck Global, in an interview Aug. 28. Price discovery in the secondary market often comes via the strength of the bid-offered side of the market – which Colby described as "pretty firm" from June through last week. "If we are evidencing demand by searching for bonds, that's every bit an effective and an important way of determining value," he said.

Long term bond issuance has declined 12% this year through August to $203.25 billion, according to Thomson Reuters figures, even after increases in two of the last three months. At the same time demand for tax-free yields has propelled inflows into muni funds for much of the year, including an eight week stretch through Sept. 3, according to Lipper FMI.

"Secondary market price discovery is not necessarily difficult because customers who are putting bonds out for the bid are getting pretty decent numbers," a New York trader at a Wall Street firm said. "It's hard to keep bonds on the shelf."

New issuance of familiar names is what really aids price discovery and establishes a benchmark, Colby said.

"When it's Texas, California, or New York, those issuers are trend-setters or market-setters in terms of valuation – everybody will readjust their views based on what those scales look like," Colby said.

"Those not involved on a day to day basis might think less of that process, but I'm looking for a big New York State or Maryland deal to be representative" of value, Colby said.

The New York trader agreed that most municipal participants view the primary market as the main driver of the municipal industry, when it comes to pricing and establishing relatively attractive levels to entice investors. "Most deals have been well-received and have later traded up in the secondary," the trader said.

"If there's a lot of relative value in the primary, investors will forgo the secondary," where he said higher prices can sometimes prevail in the absence of healthy new issue volume, the trader said.

Some participants, meanwhile, prefer to negotiate for what they deem a fair price in the secondary market based on recent trade history, thereby, creating the two-way, bid-wanted and bid-offered sides of the secondary market.

“There is a basis for narrowing down some sort of value and I think that can happen on any given day” in the secondary market – even when new issuance is lackluster, Colby said.

Others said price discovery and value in the secondary has recently been possible due to the strong investor appetite for municipal bonds and steady support from the bid-offered side of the market at a time when new issuance has lagged.

“I think with the Street not heavy and with last week clearly having a holiday feel and not a lot of issuance, it’s not necessarily difficult finding a bid for bonds,” the New York trader said.

“The market is pretty apathetic after last week,” he said on Tuesday, referring to the post-Labor Day market climate.

Meanwhile, the pace of the new-issue market often affects ebbs and flows of the secondary market, experts said.

“To the extent the volume is lower on the new-issue side, it tends to slow down activity in the secondary,” said Tom Dalpiaz, managing director at Granite Springs Asset Management LLC said in an interview on Thursday. “When new issuance is robust and there’s a lot of deals you tend to see more things out for the bid in the secondary market as people sell bonds to make room for new issues.”

He said traders, analysts, and investors are still able to uncover value in the secondary in the absence of large, benchmark deals in the primary market.

“When big deals are priced – people view it somewhat as a benchmark for levels, but with diligence you can find some good value in the secondary,” Dalpiaz said in an interview on Thursday.

Dalpiaz is part of a team that manages $200 million in total assets under management, two-thirds of which is municipal assets.

He focuses much of his attention in the secondary market, and said he tries to analyze comparisons to big new issues in the primary market -if and when available.

“The new issue market is a sign post which can be very active, or very quiet, but the secondary market grinds along and goes about its business,” regardless of the pulse of the primary market, Dalpiaz said.

In fact, many portfolio managers that do heavy credit surveillance, he said, are often less reliant on the “deal of the week” in the primary and are more accustomed to “looking under every rock” to reveal value in the secondary, Dalpiaz said.

In addition, many municipal players also use the benchmark scales published by Municipal Market Data to gauge the accuracy of pricing and value in the secondary market on a daily basis, managers said.

Others take their cue from municipal pricing and valuation services, like Interactive Data Corp. and Standard & Poor’s Securities Evaluation, often known by its original branding, J.J. Kenny, sources said.

IDC offer millions of independent evaluations of fixed income securities, while Standard & Poors Securities Evaluation offers advisory services, including evaluated pricing and model valuation of fixed-income securities.

The Municipal Securities Rulemaking Board also offers a price discovery tool on EMMA that allows retail investors to view the prices and yields of up to five securities in a side-by-side comparison, as well as daily highs and lows trading trends in a move that satisfies regulators' demand for more price transparency.

"Secondary market trading has flurries and moments of activity when new deals have come into the marketplace," Colby said. "Traders have supported that after-market activity and are very supportive of sellers looking to reposition or raise cash for new issues."

In addition, he said sellers can feel "pretty confident" putting bonds out for bid when they know there's not going to be "a wave of bonds coming into the new-issue marketplace that diminishes the bid side."

Dan Heckman, senior fixed income strategist at U.S. Bank Wealth Management, said investors can either use historical data to gauge the price and valuation of a bond, or use the new issue market as a benchmark.

"We would probably prefer price discovery via where new issues are," he said in an Aug. 29th interview. "We shy away from just solely accepting pricing in the secondary market [as a gauge of value] – unless we know what someone paid for it."

"We certainly would want to look at other benchmarks, like the new-issue market, because you can look at new issues today, yesterday, and last week that are pretty current as a better way of how pricing can get done," Heckman said.

THE BOND BUYER
BY CHRISTINE ALBANO
SEP 5, 2014 11:58am ET

As Promised, S&P Lowers Ratings on Tendered Detroit Water and Sewer Bonds.

In the world of municipal bonds, a promise is supposed to be a promise except, as some Detroit bondholders are finding, when a city goes through the largest municipal bankruptcy in history.

But a promise is a promise when it comes to the Standard & Poor's credit rating agency, which on Thursday made good on a previous announcement that it planned to lower the rating on Detroit water and sewer bonds that were turned in early by investors.

S&P had rated the bonds as "CC," which was already deep into junk status. But Thursday's drop to "D" status moves the bonds down another two notches to the junkiest of junk ratings.

The new rating — which S&P announced it would apply last week — is only on those classes of bonds that were submitted as part of the city's tender offer to redeem old water and sewer bonds for new ones. In some cases, the new bonds will pay less than the full value of the old bonds, and S&P considers it an impairment of the debt.

Since the tender offer was made under the threat that Detroit would lower the rate on the bonds and take the option to pay them off early without paying investors for such a "call provision," S&P considers those bonds to have been tendered in a "distresses exchange."

In general, bonds rated lower than "BBB" by S&P are considered non-investment grade, and many large institutional investors, mutual funds and others won't buy them.

The bonds were exchanged after the city announced a surprise tender offer on Aug. 7 aimed at refinancing $5.2 billion of outstanding water and sewer bonds. About $1.5 billion of those bonds were tendered for exchange to new bonds, and the city then dropped its threat to impair the rest of the untendered bonds.

The move is expected to lower the Water Department's cost of borrowing and free up as much as $50 million in cash from bond reserves. Overall, the water department says the tender offer will save the water department more than $107 million in today's dollars over the life of the new bonds.

The old, untendered bonds will continue to be paid as scheduled by the city, and won't be considered distressed, S&P said. Those bonds also have been removed from the city's bankruptcy proceedings. The ratings service will grade those bonds "BBB," its lowest investment-grade rating.

Besides refinancing the tendered bonds, the city's new bond issue includes $190 million in additional bonds to pay for capital improvements to the water system.

The Detroit News
Brian J. O'Connor

Munis in Limbo Awaiting Clarity on Bank Liquidity Regulations.

Yesterday the Fed and other regulators announced a new rule detailing what easy-to-sell investments big banks need to hold in reserve in case of a crisis. When it came to deciding if municipal bonds should be eligible for this category of so-called high-quality liquid assets, regulators basically punted. Munis aren't eligible for now, but Fed Governor Daniel Tarullo went to the trouble of releasing a separate statement saying that while most muni bonds "are not sufficiently liquid to serve the purposes of HQLA in stressed periods," regulators are still "working on ideas" to figure out how some munis could eventually be considered for inclusion in the HQLA club.

The announcement didn't cause any real drop in muni-bond prices, but analysts say munis could suffer in the long run if they're not eventually granted HQLA membership.

"The potential impact of this decision is difficult to assess but none of it is good for the municipal bond market," writes J.R. Rieger, global head of fixed income at S&P Dow Jones Indices, today. "Discouraging banks from buying or holding municipal bonds most likely will have the consequence of reducing the liquidity of certain municipal bonds normally pursued by the banking community."

Chris Mauro, head of U.S. municipals strategy at RBC Capital markets, says most investment-grade munis, particularly those of regular muni-bond issuers, ought to qualify, and fears the issue will hang over the market for a while. From Mauro today:

[W]e believe that the blanket exclusion of munis from the definition of HQLAs would have negative long-term implications for the municipal market, potentially dampening demand and liquidity for the asset class. Additionally, it could have the effect of reducing the amount of bank liquidity available to fund credit and liquidity support for Variable Rate Demand Note (VRDNs) programs, bank direct purchase programs, and tender option bond programs…. [W]e fear that the proposed new rule will award the HQLA designation to only a narrow slice of the municipal market….

While we are encouraged by the regulators openness to discuss including municipals as an HQLA, we are worried that the final ruling may extend beyond the January 1, 2015 effective date of the LCR rule, thus introducing an added element of uncertainty to the municipal market.

September 4, 2014, 4:44 P.M. ET

By Michael Aneiro

Barrons

NAST, NASACT Make 11th Hour Appeal on Munis to Regulators.

WASHINGTON — State treasurers and financial officers are urging federal banking regulators to identify quantitative liquidity standards or characteristics that would allow at least some municipal securities to qualify as high-quality liquid assets in a rule to be released on Wednesday.

"It is unreasonable to treat an entire asset class of securities in the same way, as securities of different issuers will have different characteristics," the National Association of State Treasurers and the National Association of State Auditors, Comptrollers, and Treasurers warned the Treasury, Federal Reserve Board, and Federal Deposit Insurance Corporation said in an Aug. 29 letter. "A more reasonable approach would be for the rule to identify quantitative liquidity standards or characteristics that should be met in order for that particular security to be defined as an HQLA."

Excluding munis from the definition of HQLA will increase borrowing costs for state and local governments, reduce liquidity for and increase volatility of the muni market, and put muni issuers at a disadvantage to foreign governments in accessing the U.S. capital markets, the two groups warned the regulators.

The liquidity coverage ratio [LCR] rule that is due out on Wednesday would implement Basel III regulations. It would require large banks to maintain a certain ratio of HQLA to total net cash outflows. The idea is that the banks would then be able to easily and immediately convert those assets to cash during a period of liquidity stress.

But press reports stating the rule will not classify most or any munis as HQLA have caused issuers, rating agencies and dealers alike to raise concerns like those NAST and NASACT wrote about in their letter last week.

The two groups argued that muni bonds are low-risk, high-volume securities with transparent pricing and that they are readily marketable. Because of this, they argued, there is no reason to adopt a rule that will adversely impact the market.

Fed chair Janet Yellen told a Senate panel in July that munis did not approve to be liquid enough to qualify as HQLA.

But the groups told banking regulators: "We believe the proposed LCR rule will (1) increase borrowing costs for municipal issuers; (2) reduce market liquidity and increase volatility; and (3) disadvantage U.S. municipalities relative to foreign governments in accessing the U.S. capital markets, which NAST believes is not only unjustifiable but against the broader policy interests of the United States."

Dealer groups and lawmakers have also weighed in on the need to allow muni bonds to be HQLA. Citigroup Inc. managing director and senior municipal strategist George Friedlander predicted that bank appetite for bonds would shrink if munis are not HQLA under the rule. Banks have been major drivers of the market, and their holdings of munis have grown sharply since 2009.

More important, if munis are excluded as HQLA, then during periods of liquidity stress, if a bank's liquidity coverage ratio is constrained, it would not be able to provide any support or any marginal demand to the municipal securities market., thereby inducing additional market stress, Citi said in a research paper released last week.

THE BOND BUYER
BY KYLE GLAZIER
SEP 2, 2014 1:24pm ET

Atlantic City's Casino Closings Squeeze Homeowners: Muni Credit.

Atlantic City, the junk-rated New Jersey gambling destination, is increasing pressure on homeowners to meet municipal-bond payments as one third of the seaside resort's casinos go dark.

The $261.4 million municipal budget for 2014, with 14 percent of revenue dedicated to debt service, includes a 29 percent increase in property taxes. That's atop a 22 percent boost approved last year for the struggling city of 40,000.

Republican Mayor Don Guardian plans to sell $140 million of debt by year-end to satisfy tax appeals for casinos, which opened in Atlantic City in 1978 and pay about 70 percent of property levies. Residents still paid an average of $5,273 annually in 2013, and as the gambling resorts shut the city is leaning more on those property owners.

"The city is stressed," said Howard Cure, head of muni research at New York-based Evercore Wealth Management LLC, which oversees $5.2 billion. "The remaining casinos, are they going to also appeal their taxes and is the city prepared for that?"

State Backing

The planned financing will probably be costlier than a $62.9 million issue in November, said Michael Stinson, Atlantic City's finance and revenue director. New Jersey will back the securities under its Qualified Bond Act, with payments tied to $20 million in state aid. The program will earn the bonds a credit grade that is one level below the state's, even though Moody's Investors Service cut the city's debt to junk in July.

"The borrowing costs are going to be attributable to the market and what the rating agencies have rated the city's debt," Stinson said by phone on Aug. 26. "We're certainly not a non-investment grade enterprise, especially with the Qualified Bond Act — it's going to be a help."

Revel Casino Hotel, which closed yesterday, is the third gambling destination to shut this year, after Caesars' Showboat on Aug. 31 and the Atlantic Club in January, as new facilities in nearby states siphon away business. Trump Plaza, to be shuttered Sept. 16, will be the fourth, leaving eight establishments operating. The three most recent closings will eliminate about 7,300 jobs, according to UNITE HERE Local 54.

The city faces payments to casinos that have appealed tax bills after the recession that ended in 2009 eroded property values.

Poverty Level

About 30 percent of residents live in poverty in the city, where the homeownership rate is 34 percent, about half the state average, according to Census data. Some owners are Vietnamese immigrants who will lose their jobs as poker dealers and expect to join the ranks of the city's unemployed. The 9.5 percent June jobless rate compares with the 6.6 percent state average.

"Choosing between paying the taxes and buying food, I'm sure most people will choose to buy food for their family," Emily Vu, a certified public accountant who has led the Vietnamese community to form a group called the Atlantic City Tax Appealers, said by phone on Aug. 18.

Atlantic City was the No. 2 U.S. gambling destination until 2012, when it was overtaken by Pennsylvania. Moody's on July 23 cut the city two steps to Ba1, the highest speculative grade, with a negative outlook, citing pressure from gambling in neighboring states, closing casinos and tax appeals. The rating applies to $245 million of general obligations.

Bond Declines

The extra yield investors require on some city debt has risen since the downgrade. Investors last week demanded 2.7 percentage points of yield spread to own tax-exempt Atlantic City bonds maturing in December 2025 rather than benchmark debt, up from an average of about 1.6 percentage points from January through June, data compiled by Bloomberg show.

The city's bonds may cheapen more as officials try to diversify the economy beyond gambling, reduce workers and cut spending, said Justin Land, who helps manage $3.5 billion of munis at Naples, Florida-based Wasmer Schroeder & Co.

Further declines may create a buying opportunity, Land said. New Jersey's Division of Local Government Services has a history of helping fiscally stressed cities such as Camden and Newark function and pay bondholders, he said.

"New Jersey has a pretty defined and strict oversight over local municipalities in terms of support when they get into trouble," Land said.

Revenue Erosion

Total Atlantic City casino revenue for the first six months of 2014 was $1.87 billion, or 3.5 percent less than a year earlier, according to data from the state Division of Gaming Enforcement.

Governor Chris Christie, a 51-year-old Republican in his second term, has invited casino representatives, elected officials and labor leaders to a Sept. 8 meeting to chart a turnaround based on retail, entertainment, tourism and other non-casino revenue. In 2010, the governor announced a five-year plan to revive the city, including $261 million in tax breaks to Revel and the creation of a state-run tourism district.

"We're going to talk about a plan to help those folks who may lose their job," Christie told an audience in Long Branch on Aug. 19. "We can't look at this as a disaster."

About 20 New Jersey municipalities have state-backed qualified debt, the sort that Atlantic City will issue, which "gives investors added confidence that they will be paid in full," Tom Neff, director of the Division of Local Government Services, said by e-mail.

Debt Payments

They include Harrison, whose involvement in the financing of a stadium for Major League Soccer's Red Bulls led to a Moody's rating of Ba1, the same as Atlantic City; and Salem, rated Ba3, two steps lower, burdened with redevelopment debt.

"Atlantic City's budget has appropriated funds to make their debt-service payments in 2015 and state law requires adequate budget appropriations for debt service in the future," Neff said. "The division will enforce these laws."

Though the New Jersey backing gives towns access to lower-cost lending, the program saw its own credit slip this year after Moody's cut the state's general-obligation debt to A1, its fifth-highest level. The rating, which Moody's said reflected revenue shortfalls and higher benefits costs, is second-lowest among U.S. states, behind Illinois.

On May 15, two days after it acted on New Jersey, Moody's downgraded the qualified financings for 17 towns to A2, with a negative outlook, saying the grades are linked to the state's.

The program should still keep down Atlantic City's borrowing expenses, Cure said.

"There will be a premium that has to be paid, but it will be cheaper than if Atlantic City tried to go out on its own," Cure said.

By Elise Young and Michelle Kaske Sep 2, 2014 5:00 PM PT

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Colorado Joins Campus Arms Race With Stadium Deal: Muni Credit.

The University of Colorado is joining the athletic-facilities arms race with a $155 million football stadium overhaul as it seeks to revive a struggling program and keep pace with conference competitors.

The public university sold a record $304 million of tax-exempt bonds last month, according to data compiled by Bloomberg. It will use $100 million for the stadium on the flagship Boulder campus, and $25 million will go toward a parking garage. The rest will refinance debt and fund projects such as a $49 million student village, bond documents show.

Colorado switched conferences in 2011, joining the Pac-12 when it signed a record $3 billion TV broadcasting contract. The West Coast grouping's 12 members have been pouring money into facilities, leading athletics-related debt to more than triple from 2005 to 2012, according to the Knight Commission on Intercollegiate Athletics.

"Facilities expansion has played such a large role in athletics spending," said Amy Perko, executive director of the commission, which has sought to rein in the cost of college sports and increase graduation rates for athletes. “The consequence has been concern about that spending, especially when there’s a flatline on the academics side.”

Bowl Dreams

Athletics spending per athlete by universities competing in football’s top echelon rose 40 percent from 2005 to 2012, adjusting for inflation, outpacing a 6 percent jump in academic outlays per student, according to the commission, funded by the Miami-based Knight Foundation. More than three-quarters of the 127 schools subsidize sports with student fees and other institutional revenue, Perko said.

While the securities Colorado sold last month are backed by revenue such as tuition and other student fees, the athletics department in Boulder is required to pay back its share of the debt with resources such as ticket sales, said Ken McConnellogue, a spokesman for the university. While the football program generated an $11 million surplus last year, the athletics department had a deficit of about $8 million, according to a state auditor’s report.

‘Arms Race’

“Everyone is aware of the arms race,” said McConnellogue. “Under our position as a new member of the Pac-12, facilities matter and our facilities have not been upgraded in some time.”

Boulder is the largest of the four campuses in the system, which has a combined student body of about 58,000. State funding for higher education in Colorado has been falling — it accounted for 4 percent of Boulder’s operating revenue in 2013, down from 16 percent in 1990, according to the university.

As a result, Boulder has sought to broaden its appeal to out-of-state students, who accounted for almost 37 percent of enrollment last school year and pay almost $46,000 a year in tuition, room and board, more than twice in-state rates, according to the university.

Moody’s Investors Service rates the University of Colorado bonds Aa2, third-highest. The system’s debt load has risen 50 percent since 2009 to $1.9 billion, Moody’s said. McConnellogue said much of that debt is related to construction on the Anschutz Medical Campus, financed in part by gifts from billionaire Philip Anschutz.

‘Top Tier’

“The university is top tier and the credit is terrific,” said Ron Speaker, president of Equus Private Wealth Management LLC, a municipal bond investor in Carbondale, Colorado, with about $103 million in assets.

The university sold 10-year debt to yield 2.32 percent, equivalent to a taxable interest rate of 3.84 percent for investors in the top federal tax bracket, according to Bloomberg data. U.S. Senator Charles Grassley, an Iowa Republican, has criticized the use of federally tax-exempt bonds for college football stadiums, questioning the public value.

Football is a hallowed tradition in Boulder, dating back to 1890 and integral to the school’s out-o--state appeal. While the Buffaloes won a national title in 1990, they have struggled lately, posting the worst record in school history at 1-11 in 2012. Mike MacIntyre, a new coach, went 4-8 last year. His salary of $2.4 million a year is more than twice his predecessor’s compensation, and his contract stipulates that the school move to revamp the stadium.

New Seats

The university last month raised the cost of the project to $155 million from the $142 million approved in December. The tally includes removing aging bleachers and installing loge boxes and club seats. The work also includes building an indoor practice field, weight-training and locker rooms and new athletics offices. Capacity will fall to about 50,500 after the project, from around 53,600 now, according to the school. Fundraising and corporate sponsors will cover some of the costs.

The project will “maximize the competitiveness and academic performance of student athletes,” the school said in a prospectus for the bond sale. “Planned facilities improvements will create a more efficient and productive department, enhance recruitment, assist in retaining top talent, and foster an environment to support ongoing fundraising for intercollegiate athletics.”

The University of Washington, which is also in the Pac-12, sold tax-exempt bonds in 2012 and lent $246.5 million to its athletics department for a $281 million football stadium overhaul. The University of California, another conference member, reopened its stadium in 2012 after spending $321 million replacing bleachers with seats, building a training center and making upgrades to meet earthquake codes.

Nike Founder

The University of Oregon, also in the Pac-12, built a football training center that opened last year. Plans from 2012 put the price tag at about $68 million, paid for through donations from Phil Knight, a founder of Beaverton, Oregon-based Nike Inc. (NKE)

Outside of the conference, Colorado State University in Fort Collins wants to raise $110 million in donations for a $254 million venue to strengthen its football program and raise its profile nationally. Texas A&M University has embarked on a $450 million redevelopment project.

While spending is largely driven by television revenue, the cost side of college sports grew more complicated after a federal judge ruled this year that the National Collegiate Athletic Association must scrap rules designed to prevent student athletes from being paid like professionals.

“Expenses go up and up with these programs,” said Andrew Zimbalist, a sports economist at Smith College in Northampton, Massachusetts. “It’s a tough game to keep up.”

By Michael McDonald Sep 2, 2014 7:07 AM PT

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New Borrowing Drags Down U.S. Municipal Bond Sales in August.

(Reuters) – Issuance of U.S. municipal bonds edged down last month as new borrowing saw the slowest August in 17 years, Thomson Reuters data released on Tuesday shows.

Debt sales totaled $24.1 billion in 834 deals, compared with $24.72 billion in 795 deals in July. A year earlier in August, issuance was only $20.97 billion in 733 deals. Altogether, issuance for the year through Aug. 31 was 12.5 percent behind the same period in 2013.

New borrowing totaled $9.79 billion in 449 deals, the smallest August since 1997 when new debt totaled $9.27 billion in 693 deals. In July, borrowers sold $10.5 billion new bonds in 399 deals.

Refunding, on the other hand, ticked up in August. Refinancing totaled $14.31 billion in 385 deals, compared with $9.75 billion in 245 deals in August 2013. That was also stronger than July, when there were 396 refunding deals totaling $14.22 billion.

Last year, as interest rates began rising from historic lows, cities, states and other public authorities ended their refinancing binge. But recently rates have fallen as demand for municipal bonds picks up.

On Municipal Market Data's benchmark scale, yields on top-rated 10-year municipal bonds fell 20 basis points over the course of August to end the month at 2.07 percent, the lowest level since May 2013.

Yields on highly rated 30-year bonds fell to 3.03 percent on the last trading day of August, also the lowest since May 2013, according to MMD, a unit of Thomson Reuters.

Sep 2, 2014 11:39am EDT

(Reporting by Lisa Lambert; Editing by Leslie Adler)

Florida's I-4 Ultimate Project Reaches Financial Close.

Florida Department of Transportation (FDOT) and the lead members of the I-4 Mobility Partners on Friday signed a concession agreement and reached financial close on the I-4 Ultimate Project outside of Orlando, which will be developed through a P3.

The $2.3 billion project calls for reconstructing 21 miles of I-4 and 15 major interchanges, constructing more than 140 bridges, adding four variable priced toll express lanes in the median and completely rebuilding the general use lanes along the entire corridor. The project sponsors will finance, design, construct, operate and maintain the project under the 40-year concession agreement.

Construction will begin in the first quarter of 2015.

Skanska is a 50 percent stakeholder of I-4 Mobility Partners and plans to invest $73 million in the project. The company is responsible for 40 percent of the design/build phase of the project, expected to net $900 million for its U.S. subsidiary.

"As Florida's largest transportation project ever, and the largest greenfield public-private partnership in the U.S. market to date, the I-4 Ultimate is [a] demonstration of how P3s can solve critical infrastructure needs and how Skanska can be part of the solution," Johan Karlström, CEO and president of Skanska, said in a release.

A joint venture between Jacobs Engineering Group and HDR will be responsible for delivering final project design, including roadway/traffic control, drainage, structures, intelligent traffic systems, signing and signalization, lighting, landscaping and aesthetics, according to a release.

“We are delighted to be on the team selected to deliver this historically significant project for FDOT,” said Randy Pierce, vice president of the Jacobs Group.

I-4 Mobility Partners is comprised of Skanska Infrastructure Development and John Laing (concessionaire); Skanska, Granite, Lane as the construction joint venture; and HDR and Jacobs as the design joint venture.

Ballard Spahr: Congress Passes Highway Funding Bill; Includes Pension Funding Relief.

Last week, Congress gave final approval to a $10.8 billion bill that will keep federal highway funds flowing to states through the busy summer construction season. While this short-term “patch” offers some relief, it is now the responsibility of the new Congress that will be sworn in next year to fashion legislation that can offer a long-term solution to pay for mass transit systems and repairs to bridges and highways across the country.

The vote came after weeks of debate regarding appropriate funding mechanisms for the struggling Highway Trust Fund (Fund), and hours before the government was set to begin cutting payments to state construction projects. The Fund was created as a user-supported fund. Simply, the revenues of the Fund were intended to finance infrastructure projects, with the taxes dedicated to the Fund paid by the users of the infrastructure. The Fund pays for highway and mass transit projects across the country, but it is now nearly exhausted because gasoline taxes—which finance the Fund—have not been able to keep up with spending. President Obama has indicated he will sign the bill into law.

A number of factors have contributed to the Fund’s struggles, and for years lawmakers have sparred over how to deal with the annual funding shortfalls. The federal gasoline tax of 18.4 cents a gallon has remained unchanged since 1993, and has not been able to keep pace with the rising costs of construction and rehabilitation of transportation projects. Adjusted for inflation, the tax should now be approximately 29 cents a gallon. Further, with crumbling highways and bridges and greater demand for transportation infrastructure, the needs have grown, but the dramatic advances in fuel efficiency have substantially eroded the amount of gasoline tax funds coming in. The value will erode much further as new fuel efficiency standards take effect over the next decade.

The measure passed by Congress transfers $10.8 billion into the Fund and reauthorizes it through May 2015. More than half of the cost is offset by changes to the pension funding rules for private sector pension plans, which would allow companies to assume higher interest rates in measuring pension liabilities. Higher rates will reduce pension liabilities, which, in turn, will reduce the tax-deductible minimum required contributions that companies must make to fund their pension plans. Reducing the tax-deductible contributions that are expected to be made to pension plans over the next few years will bring new tax revenue to the federal government. Of course, this short-term pension funding relief comes at the possible expense of the long-term financial stability of employer-sponsored defined benefit pension plans.

August 4, 2014

by Brian Walsh, William C. Rhodes, Steve T. Park, Christopher R. Sullivan, and Brian M. Pinheiro

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Ballard Spahr's Employee Benefits and Executive Compensation Group regularly advises clients on the design, implementation, operation, and communication of employee pension and benefit plans. For more information, please contact Employee Benefits and Executive Compensation Practice Leader Brian M. Pinheiro at 215.864.8511 or pinheiro@ballardspahr.com, or the member of the Group with whom you work.

West Virginia Plans for First P3 Highway Project.

West Virginia plans to advertise a request for qualifications for the first P3 project under the state's recently enacted legislation for a 3.3 mile segment of the Coalfields Expressway.

"A solid infrastructure helps provide our communities with additional economic development opportunities, and the public-private partnership concept is a great example of how state government and the private sector can work together to improve the quality of life for our residents," said Gov. Earl Ray Tomblin (D) said in a statement.

The Coalfields Expressway project is multi-lane expressway connecting the I-64/I-77 interchange at Beckley, W.Va. and U.S. 23 near Grundy, Va.

"Our state is breaking new ground with this partnership agreement," said Rep. Nick Rahall (D). "It is most welcome news for the Coalfields Expressway, but it is equally promising news for other highway projects as well. Innovative financing is a true asset in attracting every available federal and other funding dollar to build our highways and the jobs that come with them."

The state legislature passed Senate Bill 190 authorizing P3s in their 2013 session and it took effect on July 1, 2013.

CA Passes Enhanced Infrastructure Financing Districts Legislation.

It looks like Governor Jerry Brown's vision for Enhanced Infrastructure Financing Districts will become law. Meanwhile, a minor revival of redevelopment has also reached the Governor's desk but Brown appears likely to veto it.

In the closing days of the California legislative session, a bill expressing Brown's longstanding goals for Infrastructure Financing Districts (IFDs) came to the floor through a gut-and-amend of SB 628, by State Sen. Jim Beall, D-Campbell. The substitute amendment went on the record Tuesday, August 26. It passed the Legislature without further amendment in the year's closing session early Saturday morning, August 30, and was sent on to the Governor.

If, as expected, the Governor signs it, SB 628 would expand the existing but underused mechanism of IFDs, with the idea that they could take up some former functions of the state's abolished local redevelopment districts. The mechanism would be simpler, more focused on infrastructure, and more dependent on electoral approval, without the flexibility or protections for the existing urban public that were built and bashed into Redevelopment over the years.

The bill's language reportedly came from the Governor's office. It was supported energetically by the California Economic Summit organization. (The Summit's op-ed-style case for the bill, which Beall linked to prominently on his legislative Web site, is at http://bit.ly/1pfneLr.) But the bill alarmed housing advocates, who warned that it could lead to displacement of poorer neighborhoods as in the redevelopment "blight" clearances of the middle 20th century. And while the League of California Cities supported SB 628, the League's legislative director, Dan Carigg, described it as a "helpful" tool that should be one of several, saying it did not by itself replace the usefulness of redevelopment funding mechanisms to serve populated urban areas.

The Governor's press office, in response to a detailed request for comment, wrote: "SB 628 is consistent with the administration's previous proposal regarding infrastructure financing districts."

A very different bill, AB 2280 by Assemblymember Luis Alejo, D-Salinas, made it to the Governor's desk as of August 27 after extended negotiations (partly through its 2013 predecessor, AB 1080) that gathered support from business, local government and housing advocates. But the odds were still running against the Governor's signing it. AB 2280 would revive redevelopment-style tax-increment financing in narrowly chosen urban areas, with 25% affordable housing set-asides. Those provisions are more reassuring to housing and local-government advocates but more likely to trigger the Governor's opposition to former redevelopment mechanisms and his skepticism toward housing affordability restrictions.

Compared with its last formal expression in the May budget proposal revision, the Enhanced IFD's legislative language picked up two major changes in SB 628.

The bill removed a prior 55% popular vote requirement to create an Enhanced IFD, though it still requires a 55% vote for any such district to issue bonds. Carigg characterized this as the major change since May. But he still said the 55% requirement for bond issues made Enhanced IFDs more likely to be created where "it's less populated, or on the edge of town."

Legislative staff veteran Fred Silva, now a senior fiscal policy advisor to California Forward and staff to the California Economic Summit "infrastructure action team", said his group and the League had each advocated for the single 55% vote, to be required only at the stage of issuing bonds, rather than requiring two votes, first to create the district and then to issue the bonds.

Brian Augusta, a legislative advocate with the Western Center on Law and Poverty, noted SB 628 also softened a requirement on post-redevelopment disputes, appearing in the bill's proposed new Sec. 53398.54 of the Government Code. As of the May revise this provision would have blocked local governments and/or special districts from making use of the Enhanced IFD mechanism unless they first had "resolved all litigation" with the state over specified statutes related to the redevelopment dissolution process, involving either themselves or their successor redevelopment agencies. But in the parallel SB 628 provision, as Augusta noted, "it says that they can't use any assets of a former redevelopment agency that are the subject of litigation [involving the state] to 'benefit' the new IFD entity."

The requirement remains in place in SB 628 that each would-be Enhanced IFD creator must first receive a Department of Finance "finding of completion" regarding assets managed by the successor agency for its former redevelopment agency.

Augusta wrote that the requirement to resolve litigation “was a big sticking point, I am told, in discussions between the Governor’s office and legislative leaders. Apparently the revised language was satisfactory to both sides.”

The Governor had been pushing all year to expand the IFD mechanism to perform selected redevelopment functions, rather than re-enact the old Redevelopment laws and processes. (See http://www.cp-dr.com/node/3480 on the post-Redevelopment picture as of mid-spring, http://www.cp-dr.com/node/3492 on the IFDs proposal in the May revise.)

The relevant May Revise language is at http://bit.ly/1qqn4ol. For comparison the SB 628 bill as passed is on the state legislative tracking site at http://bit.ly/Z38wlC.

Silva said the May revise already reflected a policy his group had supported: authorization to include vehicle license fee “backfill” funds as a source of IFD financing.

Carigg said that over the Legislature’s summer break the League sought something more along the lines of Sen. Lois Wolk’s SB 33, which was not successful in the 2013-14 session. He still saw a need to have some financing mechanism available that is patterned after “the proven tool of the past, which is redevelopment.” He said, “If you’re going to be realistic about the challenges of urban California,” addressing them would take more than SB 628.

Housing advocates said the bill did not contain adequate protections against displacement, nor any requirements to fund or build affordable housing. They warned that housing protections of these types were painstakingly added to redevelopment law because of lessons learned from the slum-clearance devastations of the twentieth century, and dropping them risked having to learn those lessons over again.

Augusta’s concern was for the possible loss of affordability and anti-displacement legal protections reflecting 70 years of lessons learned on redevelopment. He said it took creation of Redevelopment’s low- and moderate-income housing fund and the 20-percent housing set-aside obligation to stop the program’s original gentrifying effects, together with replacement housing requirements and housing production requirements assuring that affordable housing would be built in redevelopment areas. Although SB 628 does include some housing replacement and relocation protections, he described it as a redevelopment tool of a type “that often drives gentrification, displacement” without including the old tools that were developed to prevent it. Hence he called it “kind of half a loaf.”

He said those concerns were expressed to the Assembly and the Governor’s office but word came back that SB 628 in its current form was what the Governor was willing to sign.

The bill does provide some anti-displacement and relocation provisions, including that if an IFD removes affordable housing, it must be replaced within two years by “the construction or rehabilitation, for rent or sale to persons or families of low or moderate income” of an equal number of units if the removed units were home to people of “low or moderate income,” or 25% of the units if the residents themselves were not of “low or moderate income.” Affordability restrictions are to apply for 55 years to rentals or for 45 years to “owner-occupied units,” with an alternative option to set up an equity-sharing agreement.

Silva said housing advocates were concerned, though, he argued, unduly so, about the bill’s definition of “low or moderate income” by reference to Health and Safety Code Sec. 50093.

Section 50093 under current law defines “Persons and families of low or moderate income” as “persons and families whose income does not exceed 120 percent of area median income,” adjusted for family size. The current official state income limits under Sec. 50093 appear at http://www.hcd.ca.gov/hpd/hrc/rep/state/inc2k14.pdf. They give San Francisco’s area median income for a four-person household in 2014 as $103,000 per year and Los Angeles County’s as $64,800 per year. As of early 2013 the maximum CalWORKS cash aid payment for a household with four eligible persons was $762 per month. (See http://bit.ly/1pvGGtf.)

While some spoke of fixing the legislation in a later cleanup bill, policy director John Bauters of Housing California sent a furious series of Twitter messages during the SB 628 gut-and-amend’s brief pendency to liberal legislative leaders, once calling it a “horrible bill” and repeatedly saying “#SB628 will displace people of color from their communities. Vote NO!”

Arriving on the floor late and suddenly, the bill was not amended. Housing advocates had hoped to add an anti-displacement amendment but could not. Silva said in addition to housing relocation provisions, he expected cleanup legislation on the process for forming districts and setting up their financing with public participation — especially the question of whether a city that initiated formation of a district should be the only author of its financing plan, if the district included other local governments or districts as partners.

Silva said the bill’s history was an instance of “one of the dilemmas where the Administration is working through the elements of a proposal and is not prepared to have a proposal heard and worked on by a legislative policy committee.”

Augusta said work on a cleanup bill was likely to start in January, with any cleanup amendments likely to take effect in the fall of 2015 — timing that might not be a huge problem because he didn’t expect “a gold rush” to create IFDs after the bill’s signing.

He said, “The administration and the Speaker have committed to working next year to clean up the relocation and replacement housing provisions, and that’s good. We are also looking to have the broader conversation about putting in place requirements and funding for affordable housing, because that is a key anti-displacement tool that is missing from this.”

Silva argued that the objectives of the new Enhanced IFDs would be to create infrastructure, not so much to build housing. He suggested the example of a five-square-mile district, partly within a city limit, for which a city, its surrounding county, and the local water district might choose to layer together their tax increment eligibilities to cooperate on financing a stormwater capture project. Multiple districts would be most likely to agree on infrastructure types of projects, he suggested.

Silva noted that cities have extremely varied policy positions on whether to favor affordable housing, and said “we’re silent on that question because the Economic Summit wanted to [make] tools available as opposed to requirements that said, ‘whatever you’re going to do, you have to set money aside for a particular purpose’,” because “purposes are always going to be different.” He said his own group and the Governor’s office had concluded adequate tools were needed for infrastructure investment, not “the old redevelopment model that had more of a target to reduce blight.”

Responses by the Western Center on Law and Poverty to relevant parts of the May Revise are at http://bit.ly/1lT16rZ and http://bit.ly/1lAtRqo.

The League of California Cities’ response to the May Revise is at http://bit.ly/1lDa76W.

California Planning & Development Report
By Martha Bridegam

31 August 2014 – 2:35pm

Los Angeles Plans P3 to Build New Streetcar Line.

A proposed streetcar line in downtown Los Angles may cost $55 million less than originally projected, lowering the price tag to $270 million, according to the final draft of the URS Corp. report.

Despite the project's lower cost estimate, the city is planning to rely on a P3 to finance at least $100 million of the project.

Two years ago, voters living in downtown approved a special tax district which could raise up to $85 million. In addition, city officials hope to receive a $75 million construction grant from the Federal Transit Administration.

The project faces an uphill battle for federal funding since transit projects costing more than $250 million must compete for federal dollars against most expensive transit proposals, reported the Los Angeles Times.

The city plans to finish the streetcar line's environmental review documents by spring 2015, and officials hope to receive the $75 million grant in the summer of 2016, allowing the project to begin by 2019.

S&P: Certain Detroit Water and Sewer Dept. Revenue Bond Ratings Could Differ From Others, Depending on POA Implementation.

CHICAGO (Standard & Poor's) Aug. 1, 2014—Standard & Poor's Ratings Services said that its ratings on certain CUSIPs of water and sewer revenue bonds issued by the city of Detroit could differ from its ratings on other similar CUSIPs, based on their treatment in the final Plan of Adjustment (POA) or earlier, if we become certain that the list of CUSIPs subject to impairment would not be changed.

Should the POA be executed in its current form, certain currently outstanding CUSIPs would be exchanged for new CUSIPs with different interest rates or call provisions. Because of these potential differences, we would likely view the exchange as distressed, with the rating on the outstanding to be affected CUSIPs being lowered to 'CC' from 'CCC'. Moreover, when the actual exchange is executed, we would likely lower the rating on the affected CUSIPs to 'D' from 'CC'. The POA also designates certain CUSIPs as "non-impaired" with no changes to any payment terms. The non-impaired CUSIPs will likely carry a different rating than those that were impaired through the distressed exchange and we would likely raise our ratings on the non-impaired CUSIPs to a level we think appropriate based on our view of the fundamental credit quality of the water or sewer system. The rating assigned to the non-impaired CUSIPs would reflect our view of the then-current credit conditions of the water or sewer system, rather than the rating of the CUSIPs pre-bankruptcy.

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New York City Tackles Rising Lawsuit Costs with Data and Maps.

New York is a city of 8 million. With that many people, bad things can happen, from falling tree limbs and unfilled potholes to medical malpractice and civil rights violations, all of which lead to lawsuits against the city. This fiscal year, the city has set aside $674 million to pay for settlements and judgments from lawsuits brought against New York. The city's Comptroller's Office projects that to grow to $782 million in fiscal 2018, an amount that exceeds the combined budgets for the Parks Department, Department of Aging and the New York Public Library.

Until recently, little has been done to keep those costs from rising — or to find a way to reduce them. But now, the city's comptroller is applying some data analytics and mapping tools to look for patterns in the claims and find out where they were occurring, why and, hopefully, figure out how to reduce the number and cost of the claims.

Comptroller Scott Stringer calls the system he and his staff developed ClaimStat. "We decided to take a fresh look at the [lawsuit] problem," he said. "With ClaimStat, we can help agencies change policy or create an initiative that would decrease the likelihood that the city would get sued."

The Comptroller's Office, which is the city's watchdog agency and has a staff of 750, oversees settlements and claims for and against the city. Last year, the office devised new metrics to analyze the claims and found that most are filed against a handful of agencies: the Police Department, Health and Hospitals Corp. (HHC), and Department of Transportation. While claims against HHC have been dropping, thanks to some reforms, the number of claims against the police has skyrocketed, according to a report produced by the Comptroller's Office.

Stringer readily admits that ClaimStat borrows heavily from the program known as CompStat, which was developed by the city's police department years ago to closely track crime by precinct and to then hold commanders accountable for getting crime numbers down. For example, with ClaimStat the comptroller developed a metric for comparing precincts by the number of claims per 100 crime complaints. They quickly discovered that one precinct in the south Bronx had a much higher rate than precincts of similar size. Why there's such a difference can't be readily explained, but the local media is already calling on Mayor William De Blasio and the police commissioner to investigate the problem.

Another ClaimStat analysis found that when the Parks Department slashed funding for tree maintenance in 2010, personal injury and property lawsuits shot up. When the department restored additional funding for pruning, the number of tree-related claims fell swiftly. ClaimStat also uncovered a troubling and significant increase in the number of injury claims against the city's Corrections Department. In a five-year period, Stringer's office found a 34 percent rise in the amount of money the city had to pay out in settlements and judgments. "When we looked at the details of the claims, we found they were coming from prisoners who were mentally ill or in solitary confinement," said Stringer.

The Comptroller's Office uses ArcGIS and other software tools to analyze and display the geo-located data so that the city's agency commissioners, as well as the public, can view the mapped results for patterns and trends. The information comes from notice of claims filed by the injured. While claims against the city can be filed digitally, most are still filed on paper, according to the Comptroller's Office.

Several other cities around the country have taken a data-driven approach to claims management. In Portland, Ore., the Police Department auditor discovered a pattern of claims suggesting that officers did not understand the basis of their authority to enter a home without a warrant. In response, the city attorney's office made a training video on the issue and the problem disappeared.

While New York City may be late when it comes to using technology as a risk management tool, Comptroller Stringer is determined to stay at the forefront. "We should always look at ways to make government bureaucracy work better," he said. "We want to put forward new, innovative ideas using technology and thinking when it comes to making government more efficient."

AUGUST 29, 2014

GOVTECH.COM

Tod Newcombe | Senior Editor
With more than 20 years of experience covering state and local government, Tod previously was the editor of Public CIO, e.Republic's award-winning publication for information technology executives in the public sector. He is now a senior editor for Government Technology and a columnist at Governing magazine.

Public Employees' Pension Dilemma.

The story has played out repeatedly in recent years. As unfunded pension liabilities rise, financially stressed local governments seek to move employees toward 401(k)-type retirement systems to get out from under crippling long-term commitments, but public employee unions fight to maintain their defined-benefit plans.

As the municipal landscape becomes more fiscally precarious, public employees might want to rethink the traditional strategy.

A couple of decades ago, it was almost unheard of for a municipality to declare bankruptcy. But fast forward to today and Bridgeport, Conn., Detroit and Stockton, Calif., and are just a few of the cities that have descended into bankruptcy. Pension problems even have Vallejo, Calif., which emerged from bankruptcy in 2011, in danger of declaring for a second time.

In Detroit, U.S. Bankruptcy Court Judge Steven Rhodes ruled that pension promises are not sacred in the city's bankruptcy proceedings, and the city's pensioners voted overwhelmingly to accept cuts. The city plans to pay most pensioners 95.5 percent of their promised monthly benefit and eliminate cost-of-living adjustments (COLAs) entirely. Police and firefighters would fare somewhat better; they would get 100 percent of their monthly benefit, but the annual COLAs would be cut from 2.25 percent to 1 percent. Rhode Island and the city of Providence are among other jurisdictions that have gone after COLAs in pension-overhaul legislation.

Given the spate of municipal bankruptcies and the fact that so many of them are pension-related, there's little doubt that moving toward 401(k)-style or defined-contribution plans, in which employers contribute to an employee's pension fund each pay period rather than promising a set benefit upon retirement, would help steady municipal finances. But it's also becoming clear that defined-benefit promises on which municipalities can't deliver don't help workers, who may well be better served by getting their employers' pension contributions through a defined-contribution plan.

Guaranteeing all previously promised pension payouts in return for substantial concessions from new hires is an approach that a number of cities have used to ease their pension problems. Atlanta saved $25 million annually by raising its retirement age for new hires. Lexington, Ky. extended its retirement age and also increased the period new employees have to work before vesting in the city's pension plan from 20 years to 25. And even if those Detroit retirees see their pensions cut and COLAs eliminated, they'll still make out better than new city workers. After 30 years, those new employees' pensions are projected to be worth about 40 percent less in inflation-adjusted dollars than those of city workers who retired in 2011.

The problem with this approach is that future public employees are the ones who would be most hurt by it, and they're not represented when the agreements are being negotiated.

Unfunded pension liabilities are one of the main reasons why municipal finances have become so precarious in recent years, and moving to defined-contribution plans would ease the fiscal pressure on cities. While the switch might not be the first choice for many employees of the nation's most troubled municipalities, it's a lot better than facing unilateral benefit cuts after they've already retired or as they near retirement.

But for municipalities facing pension woes that are serious but not yet at the crisis stage, it's tempting to solve the problem by shifting the burden to future employees who have no voice in current negotiations. That option isn't fair and would make the already formidable task of attracting and retaining top-flight public workers even harder in the future.

Governing.com

Charles Chieppo | Contributor
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SEPTEMBER 2, 2014

Detroit Ends Week With Witness From Stockton Bankruptcy.

Detroit ended the first week of trial on its $7 billion debt-reduction plan by calling a witness who has previously argued against the kind of cuts the city says it needs to rebuild.

Charles Moore, Detroit's top restructuring adviser, is a favored specialist both of distressed government agencies, who call upon him to justify trimming their obligations, and of bondholders fighting such cuts. In Detroit yesterday, he advocated cuts, saying the city must erase some of its debts to free up money for new investments.

If Detroit's proposal is rejected, "it is unclear to me how the reinvestment initiatives would be funded," Moore told U.S. Bankruptcy Judge Steven Rhodes, who must determine whether the plan is fair and feasible.

Moore, a senior executive with the financial advisory firm Conway MacKenzie Inc., took the opposite position in May in the bankruptcy of Stockton, California. In that case, Moore was hired by affiliates of money manager Franklin Resources Inc.

Back then, he testified that the California city “can afford to pay Franklin a significant percentage, if not all,” of its obligations. Both Detroit and Stockton are trying to win court approval to pay their retired workers much more than investors.

Detroit, a city of about 700,000, filed a record $18 billion municipal bankruptcy last year, saying decades of decline left it unable to provide basic services while still meeting financial obligations.

Unusual Deal

Rhodes is being asked to weigh an unusual deal in which wealthy donors and Michigan lawmakers agreed to shore up the city’s public pension system with more than $800 million. In return, Detroit agreed not to use its art collection, which includes pieces by Pablo Picasso and Vincent van Gogh, to pay creditors.

Moore isn’t the only professional hired by Detroit who is also fighting Stockton’s debt-cuts. Its main law firm, Jones Day, represents Franklin in the Stockton case.

“Reaching opposite conclusions in two different cases is not inconsistent,” said Dale Ginter, a lawyer who represented retirees in Vallejo, California’s bankruptcy. “The facts of each case are always different,” he said in an e-mail. “Stockton, for all its problems, pales in comparison to Detroit.”

Lisa Johnston, a spokeswoman for Birmingham, Michigan-based Conway MacKenzie, didn’t return an e-mail seeking comment on Moore’s testimony.

10 Cents

Detroit has proposed paying 10 cents on the dollar to investors who hold $1.4 billion of pension-related debt. Bond insurers Syncora Guarantee Inc. and Financial Guaranty Insurance Co. oppose the plan, which might force them to cover investor losses.

Stockton, a city of 298,000 about 80 miles (130 kilometers) east of San Francisco, filed for bankruptcy in 2012 after spending too much on downtown improvement projects and seeing its property-tax revenue plunge in the housing crisis. Creditors filed $1.18 billion in claims.

It has proposed paying Franklin affiliates as little as 1 percent of the $36 million they are owed. Municipal debt investors are watching both cases.

Moore has also studied Puerto Rico’s pension system on behalf of public employee unions and helped bond insurer National Public Finance Guarantee Corp. negotiate a deal with Jefferson County, Alabama, which last year ended the second-biggest U.S. municipal bankruptcy.

Remove Blight

In testimony yesterday, Moore went over Detroit’s spending plans for the next 10 years. Using the savings from reducing debt, the city plans to repair its crumbling neighborhoods, beef up police and fire protection, and improve bus service.

Some of the $87 million the city plans to spend on public transportation will go to hiring more drivers and setting up a security service for drivers and passengers. Bus drivers call 911 for police help 30 times a month, Moore said.

Moore also discussed an employee savings plan that sapped the city's pension system. About 91 percent of eligible employees participated in the plan, which guaranteed a minimum interest rate on accounts and drained about $450 million from one of the city's two pension funds over 10 years, he said.

The city wants to claw back some of the payments by reducing pensions as much as 15.5 percent, depending on how much interest an employee was paid.

Finance Chief

Earlier in the week, Detroit's chief financial officer, John Hill, told Rhodes the city wouldn't be able to free up the funds for $1.7 billion in new investment unless it was able to cut some of its current obligations. Hill was the first of about 25 witnesses the city plans to call.

Syncora and other plan opponents have said Detroit is violating the bankruptcy code by failing to put similar claims on equal footing. They said the city could use its art to pay some debts, either by selling it or borrowing against it. Detroit has repeatedly said the collection isn't on the table.

Moore will return to the stand Sept. 8 to face more questions from creditor attorneys. The city is next scheduled to call Beth Niblock, its chief information officer, followed by Caroline Sallee, an adviser with Ernst & Young LLP, and Police Chief James Craig.

Among other witnesses the city may call is Ron Bloom, the Obama administration's former car czar, who helped reorganize Detroit-based General Motors Co.

Bloomberg
By Steven Church
Sep 5, 2014 9:01 PM PT

The case is In re City of Detroit, 13-bk-53846, U.S. Bankruptcy Court, Eastern District of Michigan (Detroit).

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Fitch: TX Supreme Court Decision Could Benefit School Districts.

Fitch Ratings-Austin-03 September 2014: If the state Supreme Court upholds a lower court ruling on the constitutionality of the state's K-12 school funding program, the state legislature will likely be forced to increase state funding for school budgets, revise the funding system to equalize the benefits, and change the local property tax structure and address its limitations, Fitch Ratings says. In general, we believe such changes would benefit districts in the state, though the benefits will vary and a revised equalization approach may produce both winners and losers. If the state Supreme Court overrules the judge's ruling, many districts will continue to operate with less state funding as a result of the 2012-13 biennium cuts. Late last week a state district court found that the current funding technique violates the state constitution.

The districts' cost-cutting efforts began in 2012, and for some time we have cited the lack of local tax-rate flexibility as a programmatic credit concern. These pressures have been exacerbated due to rapid enrollment growth in fast-growth districts, as the state's economy continues its strong post-recession recovery.

School funding has been one of many perennial growth-related challenges faced by the state in recent decades, with past court decisions requiring state legislative action to adjust education funding. Although the timing of a final Supreme Court decision is unknown, the state continues to benefit from significant fiscal flexibility, including from its large reserve balances.

The district court judge found that the finance system prevents the delivery of an adequate education to all students in the state and does not provide enough money for a "general diffusion of knowledge." The judge also found the system essentially creates a statewide property tax over which districts have little discretion, while inefficiently distributing education dollars. The ruling was the product of the consolidation of six lawsuits representing 75% of Texas school children. The judge for the case agreed to re-open testimony in January 2014 after the Texas Legislature restored $4.5 billion in school funding in its 2013 session. The increased funding levels apply to school district budgets in fiscal 2014 and 2015.

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Driving Muni Bond Rally: Communities Reluctant to Borrow.

Rob Rapheal, president of the school board in Forest Lake, Minn., wants to tap the bond market to fix the community's aging public schools.

Earlier this year, he helped a team of parents, teachers and administrators put forward a proposal that aimed to raise $188 million to repair crumbling roofs, replace aging boilers and reduce debt-service costs.

"It was a real deal for the public," Mr. Rapheal said.

But the proposal was shot down in a special election, with 60% of voters rejecting the plan.

The vote reflects a force behind this year's rally in the $3.7 trillion municipal-bond market: states, cities and communities are unwilling or unable to borrow in the wake of the recession. That means the supply of securities available for investors is dwindling, driving prices higher.

"The market would welcome that paper, but if they can't issue it, we can't buy it," said Tom Metzold, vice president and senior portfolio adviser at Boston-based Eaton Vance Corp., which manages about $26 billion in municipal assets.

It isn't just voters constricting the market; state and city budgets in many regions remain austere since the recession ended in 2009 and officials may be reluctant to propose new taxes ahead of November elections. Others are concentrating on paying down unfunded pension obligations or other critical needs. Meanwhile, municipal-bond issuers already have refinanced large portions of their debt over the past several years, capturing low interest rates, and summer is typically a slow season for new bond sales.

As a result, there are many communities making the same choice as Forest Lake despite borrowing costs that are near generational lows. With or without input from voters, cities and states issued about $29.7 billion less debt during the first eight months of this year than in the same portion of 2013, according to data from the Securities Industry and Financial Markets Association, with about $203.5 billion issued through last month.

Many cities and states were burned in the financial crisis by bad deals on municipal bonds sold to pay for everything from highways in Massachusetts to renovations on Louisiana's Mercedes-Benz Superdome. Taxpayers refinanced billions in securities after auctions for variable-rate bonds collapsed, for example, and spent billions more to get out of derivatives that are often bought to hedge the same deals.

In 2006, politicians sought voter approval on a record $109 billion in bonds, according to Bond Buyer data. By 2009, that was down to $19.4 billion, with voters approving just $12.7 billion, the lowest amount since 1995. Presidential elections typically include many bond measures as public officials take advantage of high voter turnout, but 2012 resulted in the lowest value of new bonds of any presidential cycle since 2000. Last year, voters approved about $22.9 billion, around half the average of the previous 10 years.

“There’s a genuine demonstrated need for infrastructure, and yet states and municipalities are just extremely cautious about borrowing,” said Scott Pattison, executive director of the National Association of State Budget Officers. “From their perspective, revenue is coming in below expectations, growth is slow compared to before the recession, the feds are creating uncertainty, so we’re going to continue to be cautious.”

Water damage at the high school Jenn Ackerman for The Wall Street Journal
The caution is likely to persist, say some analysts. Municipal-bond issuance will decrease to as low as $175 billion in 2017, Tom Kozlik and Alan Schankel said in a Janney Montgomery Scott LLC research report. They attributed the stagnation to interest rates that will eventually rise, austerity measures, high fixed costs for local governments and the lack of broad public policy supporting public works.

“There is nothing politically sexy about infrastructure spending,” they said in the report.

Many municipalities are cautious to take on new debt because economic growth in their regions is still slow, said John Bonow, chief executive of Philadelphia-based PFM Group, which advises cities and states on bond deals.

Texas, which includes seven of the nation’s 15 most rapidly growing cities, has sold the most debt in the U.S.—some $20.7 billion worth of bonds through mid-July. By comparison, the state issued $30.9 billion in all of 2013. California, meanwhile, has sold only $19.8 billion in bonds in the same time, trailing the pace that gave it a nationwide-high $47 billion last year, according to Ipreo data.

Officials are postponing anything that isn’t critical or important to public safety for a year or two until economic conditions improve, said Jamison Feheley, head of banking for public finance at J.P. Morgan Chase & Co.

Even when public officials push ahead, voters are rejecting more debt, with the value of approved bonds falling to about two-thirds of those proposed in the three years immediately after the crisis, from an average of more than three-quarters in the three years prior. And while that total rose to 72.7% in 2013, school districts were still below that level and less likely to get voter approval than utilities, transportation or general-purpose debt, according to Bond Buyer data.

Voters in Neosho, Mo., have twice this year rejected a plan to raise property taxes to pay for a new junior high school. In central Ohio last month, two plans to improve facilities at local school districts went down in defeat.

In Forest Lake, the school board hasn’t had a bond referendum pass since Bill Clinton was president. The area is part of Minnesota’s Sixth congressional district, and represented in Washington by former presidential hopeful Michele Bachmann, known for taking a stance against raising taxes. Many Forest Lake schools are now about a half-century old, with antiquated fire and security systems and leaky roofs. A high-school running track hasn’t been usable in a decade. After a $24 million bond proposal failed in 2010, the district built a community task force that toured the schools and spent about eight months developing a plan for how to approach repairs and renovations.

Those included redesigning entrances for better security, closing outdated buildings, repairing roofs, replacing ancient boilers, merging two junior high schools and expanding the high school.

If voters had approved the debt, the district would have made all necessary repairs by 2018, adding arts facilities, a new pool, a track and a football field. The plan would have increased taxes on the average area household by about $200 a year, according to the district. The current levy generates about $850 per student, the lowest in the district's athletic conference.

The school district's superintendent Linda Madsen said the area's residents didn't oppose the plan in an organized way, and state legislators wrote letters of support to the local papers. But, as the results began to roll in on the evening of Election Day, she said it was clear the plan wouldn't pass.

The district's schools are making do by not using the track and planning to use fans instead of new air conditioning.

"Nothing's changed," Mr. Rapheal said. "The type of repairs we need to do are still there. Unless we address them, we're going to end up having catastrophic failures. Really, bonds are a very good way to finance building."

THE WALL STREET JOURNAL
By AARON KURILOFF
Sept. 4, 2014 6:17 p.m. ET

Fed Will Consider Adding Municipal Debt as Quality Asset.

WASHINGTON—States and localities that raise cash in the $3.7 trillion municipal bond market moved closer to winning a reprieve Wednesday after regulators agreed to consider allowing banks to use certain types of municipal debt to satisfy a new post-crisis financing rule.

Banking regulators on Wednesday finalized safeguards to require that banks hold enough liquid assets such as cash or Treasury notes to fund their operations for 30 days if other sources of funding aren't available. Under the final rules, municipal securities issued by states and localities won't count as "high-quality liquid assets," meaning such securities wouldn't qualify for use under the new funding requirements.

Still, the Federal Reserve, which helped craft the rules with two other agencies, opened the door to eventually including at least some municipal securities. Federal Reserve Gov. Daniel Tarullo said he expects the central bank to reconsider the issue in response to evidence that some state and local debt is frequently traded and may be "comparable to that of the very liquid corporate bonds" that qualify as high-quality liquid assets.

The market for municipal debt is vast, with roughly 60,000 borrowers and 1.2 million individual bonds. Only a relatively small number of the bonds—from large states and cities such as California and New York—see their securities frequently traded, according to industry experts. That is partly because the features of the market, including the tax-exempt status of most securities, encourage most investors to hold their bonds until maturity.

The Fed's decision to reconsider whether to fully exclude municipal securities was first reported last week by The Wall Street Journal.

States and localities have warned excluding their securities could cause banks to retreat from the municipal market in which they have increasingly become an important player, with four of the largest U.S. banks alone holding some $100 billion of such debt, according to consulting firm Municipal Market Advisors. State Treasurers and other officials say their costs to finance roads, schools and bridges could jump if banks retreat from the market—costs that will ultimately be borne by taxpayers.

"The exclusion of municipal bonds is wholly unjustified, so the commitment to adopt a subsequent rule that brings at least some of them under the tent is welcome," said Tom Dresslar, a spokesman for California Treasurer Bill Lockyer. "But any future rule should not be stingy in welcoming munis. It should be generous."

Mr. Dresslar added municipal bonds meet every criterion the agencies established to define high quality liquid assets. "Continued statements from staff and regulators that there's only a small slice of munis that might qualify as HQLA do not comport with the facts," he said.

The Fed stressed any change in treatment for municipal bonds would only apply to a limited number of the securities, given that few are frequently traded. While many securities issued by states and municipalities have low likelihoods of default, "the liquidity characteristics of these securities range significantly, with most securities issued by public sector entities exhibiting low average daily trading volumes and limited liquidity, particularly under stressed economic scenarios," the Fed staff wrote in a memo released Wednesday.

THE WALL STREET JOURNAL
By ANDREW ACKERMAN

NYT: Infrastructure Cracks as Los Angeles Defers Repairs.

LOS ANGELES — The scene was apocalyptic: a torrent of water from a ruptured pipe valve bursting through Sunset Boulevard, hurling chunks of asphalt 40 feet into the air as it closed down the celebrated thoroughfare and inundated the campus of the University of California, Los Angeles. By the time emergency crews patched the pipe, 20 million gallons of water had cascaded across the college grounds.

The failure of this 90-year-old water main, which happened in July in the midst of a historic drought, no less, was hardly an isolated episode for Los Angeles. Instead, it was the latest sign of what officials here described as a continuing breakdown of the public works skeleton of the second-largest city in the nation: its roads, sidewalks and water system.

With each day, it seems, another accident illustrates the cost of deferred maintenance on public works, while offering a frustrating reminder to this cash-strained municipality of the daunting task it faces in dealing with the estimated $8.1 billion it would take to do the necessary repairs. The city's total annual budget is about $8.1 billion.

Los Angeles's problems reflect the challenges many American cities face after years of recession-era belt-tightening prompted them to delay basic maintenance. But the sheer size of Los Angeles, its reliance on the automobile and, perhaps most important, the stringent voter-imposed restrictions on the government's ability to raise taxes have turned the region into a symbol of the nation's infrastructure woes.

"It's part of a pattern of failing to provide for the future," said Donald Shoup, a professor of urban planning at U.C.L.A. "Our roads used to be better than the East Coast; now they are worse. I grew up here. Things are dramatically different now than they used to be."

There are constant reminders of the day-to-day burdens that the dilapidating infrastructure poses here.

The city is battling a class-action lawsuit from advocates for disabled people because of broken sidewalks that are almost impossible to navigate in a wheelchair, and challenging for all pedestrians trying simply to make it home. The average car owner here spends $832 a year for repairs related to the bad roads, the highest in the nation, according to a study by TRIP, a nonprofit transportation research group based in Washington. Families here routinely spring for expensive strollers to handle treacherous sidewalks.

City officials estimate that it would cost at least $3.6 billion to fix the worst roads, $1.5 billion to repair the sidewalks and $3 billion to replace aging water pipes.

“From a ratepayer’s point of view, it can appear overwhelming,” said H. David Nahai, an environmental lawyer and the former head of the Los Angeles Department of Water and Power. “We need increases for the streets and the sidewalks. We need increases for the water structure. Pretty much right now we are in a time of transition. That can be frightening.”

The problem is exacerbated by cutbacks in federal spending on public works. “The sense is that more and more, we are going to be doing things alone,” said the mayor, Eric Garcetti.

Close to 40 percent of the region’s 6,500 miles of roads and highways are graded D or F, meaning they are in such bad shape that for now city officials are concentrating maintenance efforts on roads that are in better shape, and thus less costly to fix. More than 4,000 of the 10,750 miles of sidewalks are in severe disrepair, according to Los Angeles city officials.

More than 10 percent of the 7,200 miles of water pipes were built 90 years ago. The average age of a city pipe is 58, compared with an optimal life span of 100 years. While that may not sound so bad, at the current level of funding it would take the Department of Water and Power 315 years to replace them.

Marcie L. Edwards, the general manager of the department, said that the pipes were not in as dire shape as those in some other cities, and that the department had spent more on replacing pipes. Even with more money, she said, there are limits on how fast her department can move.

“Our system is by no means falling apart,” Ms. Edwards said. “We live in a very densely populated environment. These are big jobs that are incredibly impactful on neighborhoods and congested streets.”

Still, the water main break was unsettling because, unlike the war-zone-like patches of streets and sidewalks that have been cast asunder by tree roots in some neighborhoods here, this was a hidden problem until it was revealed in a geyser to motorists waiting at a traffic light. As such, it has become a symbol of the larger problem.

“People don’t think about the fact that there are pipes under the ground that are 100 years old until one blows,” said Mike Eveloff, a leader of Fix the City, a civic group pushing for repairs. “You don’t hear a politician say, ‘I’m going to make your pipes work.’ ”

And here, as in other cities, the demand for public works comes as the costs of municipal pension plans are shooting up — a confluence that has alarmed business leaders.

“Once those payments are made, there’s not much money left, if any, to invest in infrastructure,” said Gary L. Toebben, president of the Los Angeles Area Chamber of Commerce.

The challenge also coincides with a push by city leaders to move Los Angeles away from its historic reliance on cars, with heavy investment in its expanding mass-transit system and bicycle lanes. In an interview, Mayor Garcetti said that any public works campaign would have to factor in that change.

“We have to build a city that people can be happy to walk in and drive in, but we also have to account for the transit revolution that’s coming,” he said. “If we spend billions and billions on car-only infrastructure — ignoring pedestrian, bicycle and transit users — we may look back 10 years from now and say, ‘Whoops, maybe we should have tied all those things together.’ ”

California is also known for being averse to taxes. Earlier this year, city officials debated asking voters to approve a plan to add half a cent to the 9-cent city sales tax. That would raise enough for the $3.6 billion in road reconstruction but just $640 million of the $1.5 billion needed for sidewalk repairs.

City Council leaders and Mr. Garcetti decided against putting anything before voters, probably until November 2016, to give the city more time to come up with a plan that has a chance of winning.

“I think people quite frankly are paying enough taxes right now,” said Mitchell Englander, a Republican councilman and leader of the repair effort. “We’ve got to do things differently. They don’t trust politicians.”

Kevin James, a conservative talk-show host who ran for mayor last year and was appointed by Mr. Garcetti to lead the Board of Public Works, said a sales-tax increase was needed to deal with a serious threat to the city’s well-being.

“A lot of people are going to say they feel overtaxed,” Mr. James said. “I’m not saying we’re not. But it means going to the voters, as I am prepared to do on behalf of Mayor Garcetti, to make the economic argument that $26 a year, which is what you would spend on a half-cent sales tax increase, is a lot better than $830 a year to fix your car.”

Funds to replace water pipes would come, presumably, if the Department of Water and Power gained approval from the City Council to increase water rates. Because of the drought, the typical city resident’s monthly bill for water has risen to $60, from $34.85 in the fall of 2011, reflecting the higher cost the department had to pay to purchase water.

“The longer we wait, the more expensive it’s all going to be.” said Mr. Nahai, the former head of the Department of Water and Power.

THE NEW YORK TIMES
By ADAM NAGOURNEY
SEPT. 1, 2014

GFOA Award for Best Practices in School Budgeting.

GFOA is a leader in developing, communicating, and encouraging best practice implementation in budgeting and financial planning. GFOA’s most recent project is to enhance the existing Distinguished Budget Presentation Award for school districts and community colleges. Through this project and with the help of some of the best minds in the field, GFOA will develop best practices for resource alignment, as well as criteria by which districts and colleges can demonstrate budget process excellence.

Over two years, GFOA’s Research and Consulting Center will be working with practitioners, researchers, and other education finance experts to identify the best ways for PK-12 and community college institutions to leverage the budget process to align their resources to student outcomes. In addition, GFOA will also develop award criteria that allow districts and colleges to demonstrate process excellence and receive the recognition they deserve. GFOA will then observe the outputs in practice through a number of pilot projects in order to test the best practices and award criteria. Based on the lessons learned during the pilots, GFOA will finalize the criteria and incorporate them into the Distinguished Budget Presentation Award program criteria for the 2016-2017 budget year.

Read more.

- Bank Liquidity Rules Seen Cooling Demand for Bonds: Muni Credit.
- WSJ: Fed to Consider Including Municipal Bonds in New Bank Safeguards.
- SEC Rating Agency Reforms Positive for Munis.
- Bond Buyer Webinar: The Changing Landscape of Municipal Bankruptcy.
- Post-Implementation Review Completed on GASB Standard Addressing Capital Asset Impairment, Insurance Recoveries.
- BDA Submits Comment Letter to MSRB: Draft Rule G-42, on Duties of Non-Solicitor Municipal Advisors.
- And finally, The Horror, The Horror is brought to you this week by *Lee ex rel. Office of Grant County Prosecuting Attorney v. Jasman.* Oh, you thought we were referring to being locked in the coroner's van against your will? Understandable mistake. We were actually referring to the unholy terror of being locked in a room with the judge who, referring to this incident, wrote. "[The victim] was unable to escape the hegemony of her boss." I'll be in back with the cadaver, thanks.

ZONING - DISTRICT OF COLUMBIA

Howell v. District of Columbia Zoning Com'n

District of Columbia Court of Appeals - August 14, 2014 - A.3d - 2014 WL 4085785

Neighbors sought review of Zoning Commission's approval of zoning map amendment and application for a planned unit development (PUD).

The Court of Appeals held that:

- Evidence was sufficient to support finding that additional height sought in zoning map amendment was essential to successful functioning of project;
- Fact that Commission improperly failed to make explicit finding about gross floor area, in determining whether PUD satisfied requirement that new residential building projects of a certain size reserve units for affordable housing, did not require reversal; and
- Commission's failure to include in record a land disposition and development agreement did not violate neighbors' due process rights.

TAX - INDIANA

Indianapolis Racquet Club, Inc. v. Marion County Assessor

Tax Court of Indiana - August 21, 2014 - N.E.3d - 2014 WL 4116487

Owner contended that Indiana Board of Tax Review erred when it found that the Indianapolis Racquet Club, Inc. failed to establish a prima facie case that its land assessments were excessive or that they were not uniform and equal.

The Tax Court held that:

- Club's presentation of land assessments of other three clubs did not establish a prima facie case that tennis club's land was over-valued;
- Club was required to show how inconsistent use of surrounding parcels negatively impacted its land's value; and
- Showing that three other tennis clubs were valued differently was insufficient to establish that property tax assessment was not uniform and equal.

LIABILITY - LOUISIANA

[Odom v. Fair]

Court of Appeal of Louisiana, Second Circuit - August 20, 2014 - So.3d - 49, 274 (La.App. 2 Cir. 8/20/14)

Tenant brought action against her landlord, a city housing authority, after a dog owned by another tenant bit her, alleging that housing authority failed to monitor its premises for risks and hazards, failed to require tenant to keep dog in a secured area, and allowed tenant to maintain a dog known to attack without provocation. The District Court entered judgment in favor of tenant after a bench trial. Housing authority appealed.

The Court of Appeal held that housing authority did not have actual knowledge of vicious propensities of dog as required to impose liability on it for tenant's injuries.

Dog had never bit or attacked anyone prior to incident, tenant did not report that dog was a vicious animal, and housing authority's maintenance crew that visited dog owner's property was not tasked with enforcing pet policy or inspecting for technical violations of lease.

LIABILITY - MINNESOTA

[Shariss v. City of Bloomington]

Court of Appeals of Minnesota - August 18, 2014 - N.W.2d - 2014 WL 4056083

Motorist brought negligence action against city and snowplow driver after snowplow backed into motorist while making room for school bus. The District Court denied city's and snowplow driver's motion for summary judgment on immunity grounds, and city and snowplow driver appealed.

The Court of Appeals held that snowplow driver's decision to back up was ministerial rather than discretionary.

City snowplow driver's decision to place snowplow in reverse to allow school bus to proceed was ministerial rather than discretionary such that driver did not have discretionary function immunity from motorist's negligence action arising out of collision between snowplow and motorist's vehicle. Snowplow driver was stopped and was waiting in a queue behind another snowplow, and based on standard operating procedure, which imposed a duty to maintain traffic flow, driver decided to reverse his snowplow and began to back up.

HOUSING - MINNESOTA

Housing and Redevelopment Authority of Duluth v. Lee

Supreme Court of Minnesota - August 27, 2014 - N.W.2d - 2014 WL 4212688

Public housing authority (PHA) brought eviction action against tenant in Section 8 federally-subsidized housing after tenant failed to timely pay rent and late fees imposed by PHA for three consecutive months. The District Court granted summary judgment in favor of PHA, holding that monthly late fee assessed by PHA was reasonable, and that federal regulations preempted state law governing fees for late payment of rent. Tenant appealed.

The Supreme Court of Minnesota held that:

- State law capping late fee at eight percent of overdue rent was not preempted by federal law, and
- PHA was subject to eight percent limitation.

BENEFITS - NEW YORK

Pastalove v. Kelly

Supreme Court, Appellate Division, First Department, New York - August 21, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 05922

Police officer brought article 78 petition seeking to annul determination of board of police pension fund rejecting his application for accidental disability retirement benefits. The Supreme Court, New York County, denied the petition. Police officer appealed.

The Supreme Court, Appellate Division, held that officer's injury was not a sudden or unexpected event.

Police officer's accident, in which he sustained injuries from falling when two water hoses he stepped on were charged with water by firefighters to combat residential fire, was not the result of a sudden, fortuitous, or unexpected event, and thus officer was not entitled to accidental disability retirement benefits.

LIABILITY - NEW YORK

Kellman v. Hauppauge Union Free School Dist.

Supreme Court, Appellate Division, Second Department, New York - August 20, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 05844

Student injured during baseball practice brought personal injury action against school district. School district moved to dismiss, and student moved for leave to serve late notice of claim. The Supreme Court granted plaintiff's motion. School district appealed.

The Supreme Court, Appellate Division, held that School district employees had actual knowledge of essential facts underlying legal theories on which liability was predicated well within 90–day statutory period, as required for leave to serve late notice of claim in student's personal injury action against school district.

Two weeks before injury during baseball practice, student sustained ankle injury at school, in connection with first injury, student wore visible air cast on his leg, school made accommodations for his injury, and student did not participate in gym or sports activities, and school had in possession a note from student's doctor advising that he should not participate in sports until reevaluation, before scheduled reevaluation had occurred, baseball coach directed student to act as goalie in "handball" game during baseball practice, coach was present when student fell and injured shoulder, and coach filled out accident report which was signed by school nurse and principal and retained in school records.

TAX - OREGON

Habitat for Humanity of the Mid-Willamette Valley v. Marion County Assessor

Oregon Tax Court, Magistrate Division - August 8, 2014 - 2014 WL 3890325

Habitat for Humanity appealed County Assessor's property tax exemption application denial for the 2103–14 tax year on vacant land it had purchased for the purpose of constructing a home.

ORS 307.130(2) exempts from taxation property owned by charitable institutions provided the property "is actually and exclusively occupied or used in the * * * charitable * * * work carried on by [the] institutions [ ]."

At issue here was whether or not land merely being held for future use is "actually occupied or used."

Habitat argued that the subject property was actually and exclusively occupied or used in its charitable work because its tax exempt activities include purchasing property and purchasing property is its charitable use.

The Tax Court concluded that Habitat's failure to make any actual use of the property by commencing construction of a residence prior to the tax year did not meet the statutory requirement that the property be "actually and exclusively occupied or used."

EMINENT DOMAIN - PENNSYLVANIA

In re Tax Parcel 27-309-216

Commonwealth Court of Pennsylvania - August 27, 2014 - A.3d - 2014 WL 4214922

In 1992, the Department of Transportation condemned a portion of a tract of land as part of a project to relocate part of Route 15 in Lycoming County. As a result of the condemnation, part of the tract became landlocked.

Owners filed a civil action under the Private Road Act requesting the appointment of a board of viewers to open a private road across adjacent private property to connect their parcel to the nearest public road.

Owners admitted that the access they sought across the adjacent land was for their use – as opposed to a particular public use as required by the Act – but contended that because the public benefitted from the Commonwealth's exercise of eminent domain that caused their property to become landlocked in the first place, the public was also the primary and paramount beneficiary of the private road that would unlock their property.

The Commonwealth Court disagreed, noting that the Act was constitutionally limited to situations in which the public was the primary and paramount beneficiary of its use and, in this case, Owners failed to meet this burden. The Court agreed that the public was the undeniable beneficiary of the condemnation for the Route 15 relocation, but that the evidence of connection between the condemnation and use of the Act was less than compelling, citing the availability of other options for connecting the land to a public road and Owner's significant delay in seeking to utilize the Act.

MUNICIPAL ORDINANCE - TEXAS

Hosseini v. State

Court of Appeals of Texas, Houston (14th Dist.) - August 26, 2014 - S.W.3d - 2014 WL 4199138

Defendant was convicted of violating a city ordinance requiring managers of sexually-oriented businesses to possess a permit. Defendant appealed.

The Court of Appeals held that:

- Evidence was sufficient to support conviction, and
- Ordinance was not unconstitutionally vague.

Ordinance requiring managers of sexually-oriented businesses to possess a permit was not unconstitutionally vague. Ordinance described with specificity that managers were required to hold a permit and described conduct that was required to demonstrate that a person was acting as a manager, ordinance set forth punishment for its violation, and ordinance provisions related clearly and directly to regulation of a sexually-oriented business enterprise and provided guidance to law enforcement and the general public concerning what type of conduct was prohibited and how ordinance would be enforced.

ZONING - WASHINGTON

Potala Village Kirkland, LLC v. City of Kirkland

Court of Appeals of Washington, Division 1 - August 25, 2014 - P.3d - 2014 WL 4187807

Property developers filed action against city seeking writ of mandamus directing city to accept and process building permit application for proposed project. The Superior Court granted summary judgment in favor of developers and issued writ. City appealed.

The Court of Appeals held that developers' filing of application for shoreline substantial development permit did not vest rights to zoning ordinances for entire project that existed on date of application.

Developers' filing of completed application for shoreline substantial development permit for portion of project prior to city's moratorium on certain building permits did not vest rights to zoning or other land use control ordinances for entire project that existed on date of filing, absent filing of completed building permit application. Statute governing vested rights doctrine only referred to building permits and did not include shoreline substantial development permits, and no law prevented developer from filing building permit application prior to moratorium.

EMPLOYMENT - WASHINGTON

Lee ex rel. Office of Grant County Prosecuting Attorney v. Jasman

Court of Appeals of Washington, Division 3 - August 19, 2014 - P.3d - 2014 WL 4086304

County prosecuting attorney filed quo warranto action against deputy coroner seeking judgment of ouster and alleging that coroner's conviction for disorderly conduct precluded him from serving as county coroner or deputy coroner. The Superior Court granted attorney summary judgment. Coroner appealed.

The Court of Appeals held that:

- Coroner was disqualified from serving as a deputy county coroner and from signing death certificates due to his conviction for disorderly conduct;
- County coroner and deputy coroner were not entitled to appointment of a special prosecuting attorney to represent them in quo warranto action;
- In a matter of first impression, judicial estoppel could not be raised in the first lawsuit; and
- County prosecutor was not entitled to attorney fee award.

Coroner was disqualified from serving as a deputy county coroner and from signing death certificates due to his conviction for disorderly conduct stemming from an incident that occurred when he served as the elected county coroner in which he repeatedly refused to let a colleague out of coroner's truck after an argument. Individual who held the position of deputy county coroner and performed the task of signing death certificates was a "public officer" subject to disqualification under statute disqualifying a public officer from holding future public office following a criminal conviction.

CA Lawmakers Could Make it Easier to Pay for Local Infrastructure Before Session Ends.

It's hard to remember a summer with more urgent reminders of the need to invest in the state's aging infrastructure—from ninety-year-old water mains spectacularly bursting in Los Angeles and dams cracking in the Sierra foothills to difficult daily commutes in cities like San Jose, where even in the heart of Silicon Valley, nearly 60 percent of local streets are now in "poor" condition. All this, of course, was before the biggest earthquake to hit the Bay Area in 25 years rattled buildings and buckled roads from Napa to Vallejo.

With less than a week remaining in this year's legislative session, the California Economic Summit is urging lawmakers to give local governments more power to do something about all of this—distributing a letter that encourages the Legislature to act on a bill, SB 628 (Beall), that would provide local agencies with a more robust infrastructure development tool known as "Enhanced Infrastructure Financing Districts" (EIFDs).

Accompanying the letter is a How-to Guide for Using SB 628's Enhanced Infrastructure Financing

Districts that details how local and regional agencies could use this new authority to invest in everything from sidewalk repair and water infrastructure to the implementation of sustainable communities plans.

Senator Beall's bill combines language that has been circulating in the Legislature—and that was also pushed this week by Assembly Member Roger Dickinson—with a range of proposals recommended by the governor in his budget earlier this year. This updated legislation, which was moved out of the Assembly Committee on Local Government this morning, gives local leaders a far more robust infrastructure investment tool than they currently have at their disposal. "The elimination of redevelopment agencies doesn't leave us with the flexibility to address a lot of local needs," Senator Beall told the Assembly committee this morning. "This bill is a consolidation of ideas to expand the financing tools [used by redevelopment] to utilize IFDs for a broad array of uses…It also expands the opportunities for city governments to accomplish their economic development goals."

Summit Leaders on What EIFDs Can Do

"These proposed EIFDs would give communities more authority to build the infrastructure California needs and a set of funding mechanisms they can use to pay for it," says Mark Pisano, a senior fellow at USC's Price School of Public Policy who coauthored the Summit report and who is one of more than a dozen economic development experts signing onto the Summit letter.

"These financing districts would not only be able to build all public infrastructure, they could also serve as a platform for multiple funding streams—and provide a foundation for the types of public-private partnerships that we know can be successful in developing infrastructure," says Sean Randolph, president and CEO of the Bay Area Council Economic Institute, who serves as co-lead of the Infrastructure action team. "The new districts can also do a lot to encourage the types of policy integration we'll have to see to successfully implement regional sustainable communities strategies."

There's no question local governments need this type of authority—especially in the absence of redevelopment. The Legislature has spent the last two years discussing a variety of proposals for increasing local infrastructure investment—and wrestling with the difficulty of financing needed projects. By some estimates, the state will need to invest $765 billion in the next 10 years on everything from transportation and energy to water and school facilities, but the state and local governments only have the resources to pay for about half of this amount.

While state government is unable to fill this gap, the Summit's Infrastructure action team has concluded that existing public resources must be complemented by a new working relationship among the public, private, and non-profit sectors.

"The new Enhanced Infrastructure Financing Districts," says Pisano, "present a unique opportunity to begin this work."

How to "Enhance" Local Financing Tools

In its step-by-step guide, the Summit explains why, showing how local and regional agencies can access the wide variety of new funding streams that will be available to EIFDs. The guide notes four areas, in particular, where EIFDs can improve local infrastructure development:

- **Reduce vote requirements:** While current law requires a two-thirds vote to form an Infrastructure Financing District, the new EIFDs could be formed—and could use a range of existing financial tools—without going to voters. Only issuing tax increment bonds would require a

vote, with a vote threshold of 55 percent.
- **Expand financing authority:** The new EIFDs would allow local leaders to support infrastructure projects through multiple funding streams, including a full complement of existing public mechanisms (tax increment authority, benefit assessments, and fees), as well as private investment and procurement.
- **Increase investment in different types of infrastructure:** The enhanced districts would be able to build every type of infrastructure: transportation, water, flood control and storm water quality management, transportation, energy, public facilities, energy, and environmental mitigation—so long as a direct connection can be established between the needed infrastructure and its users. The paper also provides a case study of how this type of modeling has been conducted successfully by regional planners in Southern California.
- **Allow more flexible institutional collaborations:** SB 628 also would give communities more flexibility to accommodate regional growth by making infrastructure investments across jurisdictions through Joint Power Authorities.

Whether a public agency is interested in upgrading sidewalks and streets for stormwater collection or expanding transit stations and building affordable housing, the new EIFDs could help—in a way no other financing mechanism currently does. "While existing, single-purpose funding makes it difficult to achieve all of these outcomes, they could be accomplished using the full range of tools provided by an EIFD," says Pisano.

If structured correctly, in other words, these new districts could play an important role in driving sustainable growth by connecting a vast number of infrastructure projects with an array of new funding streams.

This will not only empower local leaders to address local infrastructure issues—it could also begin to provide California with a way to take on one of its preeminent fiscal challenges.

But only if the Legislature acts. And soon.

AUGUST 27, 2014
BY JUSTIN EWERS

More Detail Needed in GSA 'Swap-Construct' Exchanges, GAO Concludes.

The General Services Administration (GSA) needs to do a better job of outlining what the government hopes to gain when it offers "swap-construct" exchanges for federal properties, according to a new report from the Government Accountability Office (GAO).

Since 2012, the GSA has offered six swap-construct exchanges, which would allow the GSA to swap the titles of federal properties for construction services or assets. However, the agency has only completed two of the deals since 2000.

The companies told the GAO the exchanges, which took three years in one case and five years in the other, took longer than expected.

Other companies told the GAO they were concerned about the lack of detail from the GSA's construction needs.

The report recommends that the GSA include more detail on what it is seeking in exchange for a federal property when it proposes a swap-construct exchange. Further, it should develop criteria for when to pursue such exchanges rather than simply disposing of unneeded of federal property.

The GSA is currently considering a swap-construct exchange for the FBI headquarters in Washington, D.C., and has narrowed its choice to three options, Greenbelt Metro and Landover in Maryland, and the other at the GSA Franconia Warehouse Complex in Springfield, Va.

WSJ: Mow-Down in Motown.

Bond insurers have a good case against Detroit for unfair treatment in bankruptcy.

Federal Judge Steven Rhodes will begin hearings Tuesday to determine whether Detroit's readjustment plan fulfills the legal and fiscal requirements to exit Chapter 9 bankruptcy. The trial may provide investors a lesson, instructive but painful, in how politics can override law in municipal bankruptcies.

Since declaring bankruptcy in July 2013, Detroit has cut deals with nearly all of its major creditors. Workers, retirees and most bondholders this summer voted to accept the plan. Yet Judge Rhodes must still validate that the plan is "fair and equitable" and was proposed in good faith, among other standards of Chapter 9.

The reality is that some creditors are making out far better than others with similar legal standing. The city has offered general-obligation bondholders 34 to 74 cents on the dollar. Voluntary Employee Beneficiary Associations will administer reduced health benefits, and pensions will be modestly trimmed under a deal negotiated by the court's mediator.

The state, the Detroit Institute of Art and some philanthropies have pledged $816 million to shield the city's artwork from monetization. These proceeds will exclusively fund pensions and minimize benefit cuts. Accruals for non-public safety workers will be pared by 4.5% in lieu of the 26% emergency manager Kevyn Orr proposed earlier this year. The city has even agreed to restore cost-of-living adjustments and accruals in nine years if the pension funds are flush.

In other words, the plan patently favors workers and retirees over bond insurers Syncora and Financial Guaranty Insurance Company that have similar legal standing. To their current regret, the two companies insured $1.4 billion in certificates of participation (COPs), a common form of government financing, that the city issued last decade to shore up its pension funds. According to the city's calculations, insurers stand to recover at most 10 cents on the dollar, which is 30 to 50 cents less than the pension funds. Does the city really consider this distribution equitable and fair?

Under Chapter 9, a city isn't required to monetize its assets. However, it can't requisition assets to goose the recovery of a single creditor as Detroit has done with its art. As a counter-example, imagine the political blowback if the city had decided to sell its Belle Island to make bond insurers whole and no one else.

Detroit has tried to browbeat Syncora and Financial Guaranty into settling for the mere 10% by suing to void the COPs. In 2005 Detroit politicians circumvented their state-imposed debt limit by creating "service corporations" and intermediary pension-fund trusts to issue the COPs. They provided third-party legal opinions to investors validating the framework.

But earlier this year the city sued its service corporations to undo the COPs transaction, even as it wants to keep the $1.4 billion it borrowed. If the transaction was invalid, then the city can't retain the proceeds. This would be as if Argentina sued itself in international court for issuing bonds in alleged violation of its sovereign laws and then refused to repay its lenders. The legal terms for this are fraud and theft.

Detroit is supposedly seeking to rehabilitate its political culture, so it's not a good sign that it's trying to pull a fast one on creditors. The cynicism is reinforced by the city's agreement to pay banks 30 cents on the dollar for interest-rate swaps tied to the COPs. If the COPs are invalid, why aren't the swaps too?

Retirees and unsecured GO-bond holders have also been promised a higher recovery if courts undo the COPs transaction. By dangling this fillip, the city induced the unsecured bondholders to support the plan.

Trouble is, if courts void the COPs, the pension funds may be required to disgorge the $1.4 billion and interest. That could render the pension funds insolvent. Since the COPs litigation could extend past bankruptcy, Detroit might face another fiasco down the road.

Bankruptcy allows municipalities to break contracts and restructure obligations, but in return they are required to treat creditors fairly. Institutions and individuals lend on the presumption that courts will enforce the law. If municipalities can mow over creditors and the rule of law in bankruptcy, they deserve to pay a political-risk premium to borrow, assuming anyone is still foolish enough to lend.

THE WALL STREET JOURNAL
Updated Sept. 1, 2014 5:55 p.m. ET

SEC Rating Agency Reforms Positive for Munis.

WASHINGTON – The Securities and Exchange Commission's new credit rating agency reforms seem to make some positive strides for the muni market by creating parity between municipal and corporate bond ratings and increasing rating methodology transparency, sources said.

The rule, adopted on Wednesday by a 3-2 vote, codifies requirements of the Dodd-Frank Act of 2010 that were put in place because of mistrust stemming from credit rating agencies giving high ratings to securities that ended up defaulting and contributing to the financial crisis.

The rules for rating agencies, designated by the SEC as nationally recognized statistical rating organizations, or NRSROs, require them to put in place policies and procedures designed to ensure quality control of the ratings, publish a certificate with every rating that discloses the methodology used and limitations or uncertainties of the score, and apply rating symbols universally for all obligations.

The reforms of most concern to the muni market are effective nine months days after publication in the Federal Register.

Under the new rules, the rating agencies will have to have policies and procedures in place designed to assess the probability than an issuer will default, a positive for munis, which have lower default rates than corporate bonds.

Dustin McDonald, director of the Federal Liaison Center at the Government Finance Officers

Association, said issuers had been eager to see munis rated the same way as corporate bonds.

Because muni defaults are extremely rarely relative to corporates, market participants and lawmakers including retired Rep. Barney Frank, D-Mass., pushed for a universal scale. A BNY Mellon analysis published last year showed that three years after being rated A, muni bonds had a default rate of about one in 10,000, versus about 41 out 10,000 A-rated corporate bonds. The NRSROs also will have to publish material changes to their procedures or methodologies, the reason for the change, and the likelihood that the change will cause current ratings to change.

"I would definitely view that as a positive," McDonald said.

Other aspects of the rule are designed to curtail potential conflicts of interest, and forbid rating analysts from participating in sales and marketing activities. The agencies must also perform "look backs" and revise ratings that were improperly influenced by business considerations, such as the prospect of future work for the issuer.

SEC chairman Mary Jo White, who joined with commissioners Kara Stein and Luis Aguilar in approving the rule, said it was necessary to crack down on compensation arrangements or performance review procedures that incentivize analysts to award inflated ratings.

"We must address these channels of influence if we are to prevent the full range of potential conflicts of interest that can lead to deficient credit ratings," she said.

Aguilar said the SEC could go even further by evaluating the "issuer pays" system, which is common in the muni market. Issuers pay the rating agencies a fee in return for getting a rating, which they need in order to effectively market their bonds.

"The commission should consider proposing rules that would more directly address the conflicts that arise when rating agencies are paid by the very issuers of the products they rate," Aguilar said. "This conflict of interest continues to jeopardize the quality of credit ratings today. If we are to restore integrity to the ratings process, the commission must address this conflict of interest in a meaningful and effective way."

Commissioners Daniel Gallagher and Michael Piwowar voted against the rule, saying it created a compliance nightmare, particularly the prohibition on marketing activities influencing analysts.

"This new prohibition is solely based on state of mind – there is no requirement that any action be taken," Gallagher said. "Even if the rating process is effectuated without any abuse, we could theoretically still pursue the analyst unfortunate enough to display evidence that a stray thought related to sales and marketing considerations crossed his or her mind."

Piwowar sounded similar concerns, and also voiced disagreement with the idea of a universal rating standard for all securities.

"I agree with the concern that credit ratings may be confusing and even downright misleading if they are not applied consistently," Piwowar said of the rating symbols. "But academic research indicates that trying to achieve perfectly comparable rating scales is not only impractical – it is impossible. Despite any efforts by the credit rating agencies to maintain ratings comparability, the risk profiles of distinct asset classes are significantly different and thus result in varied performance of the instruments."

Rating agencies, which have waited for the rules for more than four years, expressed a readiness to comply.

“The markets must have clear and consistent rules for credit-rating agencies, and the SEC’s regulatory framework will help ensure investors have confidence in the rating process,” said Daniel Noonan, managing director at Fitch Ratings.

David Wargin, a spokesman for Standard & Poor’s, said his agency is determining what impact the new rule would have.

“We are evaluating the new regulations to determine what changes to our operations may be required,” he said. “We are committed to the highest standards in our ratings activities and complying with the new requirements.”

Moody’s Investors Service declined to respond to a request for comments.

THE BOND BUYER
BY KYLE GLAZIER
AUG 27, 2014 5:12pm ET

[Muni Groups Urge SEC To Require MA Supervision Rule Changes.]

WASHINGTON – The Municipal Securities Rulemaking Board failed to address concerns that its proposed municipal advisor supervision rule will be too costly and burdensome, non-dealer MAs told the Securities and Exchange Commission this week.

National Association of Independent Public Finance Advisors counsel Nathan Howard told the SEC in a comment letter that proposed Rule G-44 on supervisory and compliance obligations of municipal advisors, as well as proposed amendments to Rules G-8 on books and G-9 on preservation of records, remain substantively unchanged after it asked MSRB to reduce the burdens.

Rule G-44 would require MAs to establish, implement, maintain and enforce written supervisory procedures designed to ensure compliance with the federal securities laws and rules. It would mark the first time non-dealer MAs have been subject to supervisory requirements under MSRB rules., NAIPFA remains concerned that the burdens of those requirements would drive up costs for issuers and force smaller MAs out of the business altogether.

Meanwhile, Dave Sanchez, a former SEC muni office lawyer who most recently served as general counsel at a dealer firm, suggested some changes he told the commission would help avoid confusion and reduce regulatory burdens. For example, Sanchez wrote, the portion of the proposal requiring “prompt” amendment of written procedures after rule changes should be altered to “within a reasonable time after changes occur in the applicable rules.” That language matches the requirement of the existing G-27 rule governing dealer supervision requirements, and would help reduce confusion for dealer-affiliated MAs who will have to comply with the new rule as well as existing supervision requirements.

The proposal’s revisions to Rules G-8 and G-9 on preservation of records would require MAs to keep and maintain records of their compliance policies for at least five years and records of those responsible for compliance for at least six years after they are no longer in charge of compliance. If the SEC approves the set of proposals, it will be the first of the new MA rules to get the final go-ahead.

Dealer groups largely support the MSRB proposal, but Bond Dealers of America chief executive officer Mike Nicholas told the SEC that the rule still offers too much wiggle room for smaller MAs. The proposal allows small MA firms to take their size into account when designing their compliance programs.

“As the BDA mentioned in our April letter to the MSRB, we believe draft Rule G-44 provides too much flexibility to small firms by allowing [them] to determine and make accommodations for themselves simply because of their size,” Nicholas wrote. “As a result, we requested that the MSRB set forth certain minimum standards that all municipal advisor firms must meet when establishing supervisory and compliance procedures but still allow these firms appropriate flexibility to decide how to implement such procedures.”

“We continue to believe that the draft Rule G-44 is biased toward larger firms and that the accommodations smaller firms are allowed to make should be more circumscribed,” he continued. Nicholas told the SEC that all implementation of the MSRB’s MA rules should be delayed until they are all complete.

The Securities Industry and Financial Markets Association asked for at least six months between approval and implementation.

THE BOND BUYER
BY KYLE GLAZIER
AUG 28, 2014 12:25pm ET
