
Fitch 2014 Outlook: Water and Sewer Sector.

View the report at:

https://www.fitchratings.com/creditdesk/reports/report_frame.cfm?rpt_id=724357

MSRB to Host Education and Outreach Seminar in Atlanta.

Alexandria, VA – The Municipal Securities Rulemaking Board (MSRB) will host a public education and outreach seminar for municipal market professionals in Atlanta, Georgia on January 28, 2014. The MSRB, which oversees the $3.7 trillion municipal securities market, will discuss development of new regulations for professionals that provide financial advice to state and local governments, among other topics.

The seminar will be held on Tuesday, January 28, 2014 from 2:00 p.m. – 5:00 p.m. at the Westin Hotel, Peachtree Plaza, 210 Peachtree Street, Atlanta, GA 30303-1745. Separate sessions will cover municipal advisor regulation, improving transparency of municipal bond prices and the availability of educational resources for state and local governments that issue bonds.

View the seminar agenda:

The seminar is open to all members of the municipal securities community and anyone interested in learning about the market. There is no cost to attend; however, pre-registration is required. The deadline to register is January 23, 2014.

Municipal market participants may also attend the seminar via the internet. The MSRB will make available a live audio feed of the event with the associated presentations. Register to attend the seminar via the internet. The presentations will also be posted on the MSRB's website at msrb.org after the completion of the event.

Register for the event:

Register for the webcast:

Southern Municipal Finance Finance Society 2014 Public Policy & Municipal Finance Conference.

The SMFS will host its 2014 Public Policy & Municipal Finance Conference, February 19 & 20, 2014 at TIAA-CREF, Charlotte, North Carolina.

View the program at:

SIFMA Compliance & Legal Society 46th Annual Seminar -- March 30-April 2, Orlando.

Register today and join us on March 30-April 2 at this exceptional event to engage with leading industry experts and regulators, including: Mary Jo White, chairman of the Securities and Exchange Commission; Richard Ketchum, chairman and chief executive of FINRA; Preet Bharara, United States Attorney, Southern District of New York; and Andrea Seidt, president of North American Securities Administrators Association. Stay up to date with the latest regulatory developments and earn CLE Credits with more than 65 dynamic and informative panels. New keynote speaker added: Commissioner Drew Breakspear, Florida Office of Financial Regulation.

Register at:

http://www.sifma.org/cl2014/

Analysis: Little Respite Seen for U.S. Municipal Bonds in 2014 – Reuters.

(Reuters) – The withering U.S. municipal bond market will shrink even more well into 2014, with interest rate and credit risks keeping both investors and borrowers away.

Barring an unforeseen turnaround in the final weeks of 2013, municipal bonds will post their first negative annual performance since the financial crisis, with investors fleeing municipal funds at a record pace and the market's overall size, now less than $3.7 trillion, contracting for a third straight year.

Analysts, portfolio managers and traders say concerns about the Federal Reserve scaling back its massive stimulus, and about the financial soundness of state and local governments, will keep hitting the market at least through the first half of next year. They expect debt issuance to fall further and investors to continue exiting bond funds.

"There are two themes that occurred this year and they're going to carry on to next year," said Chris Alwine, head of municipal bonds at The Vanguard Group, which has $100 billion in assets. "The big news in the muni market was the back-up in rates and the underperformance of the long end of the curve."

Municipal bond yields shot up this year on the Federal Reserve's talk about tapering its monthly purchases of Treasuries and mortgage-backed securities, news of Detroit's bankruptcy filing and Puerto Rico's budget woes. Demand plummeted as investors moved into more promising equities. Supply followed, with outstanding municipal debt hitting its lowest level in nearly four years.

As for performance, the Bank of America Merrill Lynch master municipal index has fallen 2.84 percent this year, putting the market on track for its first negative total return since 2008. Its index of bonds with maturities 22 years or more is down nearly 6 percent.

“Altogether, 2014 will likely be another down year for munis,” wrote Thomas Weyl, credit analyst for Barclays Capital in a note. “As we contemplate the taper and rising interest rates, as well as continued municipal mutual fund outflows … it is hard to see the light at the end of the tunnel.”

BOND SALES SEEN DECLINING, FUND OUTFLOWS PERSISTING

Total municipal issuance will likely tumble to $349.5 billion in 2014 from the $366.1 billion it projects for this year, according to the Securities Industry and Financial Markets Association’s (SIFMA) recent survey of 11 underwriters and dealers, one of several forecasts for a drop in bond sales.

“Although the overall systemic credit quality of the municipal market is strong, state and local issuers remain pressured by a moderate recovery, and the refunding wave has waned,” said Michael Decker, head of SIFMA’s Municipal Securities Group.

Rising yields have ended the savings issuers could reap through refinancing existing bonds. Sales of refunding bonds are running 30 percent lower than last year and depressing total issuance, according to Thomson Reuters data.

In fact, sales may not even meet SIFMA’s projections for 2013. As of Friday, total issuance for the year was $303.66 billion and sales are only expected to reach $2.5 billion next week.

“In the growth years, 2000 to 2010, you had debt for new infrastructure growing significantly and you had refunding,” said Chris Mier, managing director of analytical services at Loop Capital, which forecasts 2014 issuance only at $300 billion. “Now you’re seeing … new money volume for these infrastructure projects flat because of the political environment and the aversion for taking out new debt.”

On the demand side, net outflows from muni funds – which have already hit a record $52.76 billion this year – could persist for three to six months, said Vanguard’s Alwine.

Outflows during the third quarter alone, $32 billion, exceeded total net outflows of any entire year going back to 1992, according to Lipper, a Thomson Reuters company.

Many funds hold Puerto Rico bonds because they are exempt from state and federal taxes, and some outflows were driven by the territory’s budget woes. Detroit’s bankruptcy filing – the largest municipal one in U.S. history – also led to outflows.

Still, “maybe 80 percent was driven by fears of interest rates going higher,” said BlackRock Managing Director Peter Hayes, who heads the firm’s municipal bonds group.

There will likely be a modest uptick to start the year, as coupon payments and maturing bonds often give investors cash to put back into funds or individual bonds each January, Hayes said, “but I’m not sure how large or sustained they’ll be.”

CLARITY FROM THE FED

The Fed’s discussion of tapering, which will ultimately lead to rising borrowing costs, is also pushing investors into shorter-term funds, said Michael Rawson, fund analyst for Morningstar Inc. Only two

of the 16 municipal bond fund categories the investment research group tracks had inflows this year, with the larger inflow in the short-term category.

“The reaction to the prospect of tapering among retail investors has been pretty violent,” said David Santschi, CEO of TrimTabs Investment Research, adding $164.5 billion has left the funds since the start of June. “What will happen when the Fed actually takes action?”

Most on Wall Street expect the Fed to hold off reducing its bond purchases until the first quarter, but there is some risk the central bank could move as early as its meeting next week. Either way, the meeting is expected to bring some clarity to the Fed’s timeline.

In the past, municipal bonds outperformed Treasuries when the Fed tightened the money supply, and several analysts look for that scenario to play out again, with some market players eyeing opportunity among the municipal market’s fat yields, especially relative to other corners of the bond market.

Currently, highly rated 30-year bonds are yielding 4.16 percent on the benchmark scale set by Municipal Market Data, a Thomson Reuters company, compared with a 30-year Treasury yield of just 3.87 percent. Add in their tax-exempt qualities, and they look even cheaper by comparison.

“Some of the hysteria from 2013 has and will continue to yield good buying opportunities that will benefit from spread compression, even if rates continue to drift higher,” said Michelle Knight, chief economist and managing director of fixed income for Banyan Partners, LLC.

BY LISA LAMBERT

WASHINGTON Sun Dec 15, 2013 7:03am EST

NYT: $15 Hourly Minimum Wage in Northwest City Faces Court Challenge.

SEATTLE — The highest municipal minimum wage in the nation, approved by voters last month in the small city of SeaTac, Wash., at $15 an hour, survived a narrow election and a recount. Now, just weeks before its scheduled Jan. 1 start date – raising the pay of thousands of SeaTac residents and workers at Seattle-Tacoma International Airport, which is within the city limits — opponents are sending in the lawyers.

At a hearing scheduled for Friday in King County Superior Court in Seattle, Judge Andrea Darvas is expected to rule on whether to affirm the statute, strike it down or perhaps hold it in abeyance. Supporters of the measure said they were braced for a loss, and were preparing an emergency appeal to the state’s highest court.

The statute, which is being closely watched around the nation by labor and business groups as a barometer of the nation’s working wage debate, specifically exempts airlines and small businesses, including restaurants with fewer than 10 employees, but could raise pay for about 6,500 workers on and off airport property and give paid sick days to many of those workers for the first time.

Alaska Airlines and the Washington Restaurant Association are leading the legal challenge, contending that the measure, known as Proposition 1, was too broadly and vaguely written, and that the city has no authority to regulate economic activity at the airport, which is operated by the Port of Seattle.

Although Alaska Airlines employees would not be covered by the law, the company said that higher costs borne by its contractors would be passed on to the airlines and travelers.

The director of government affairs for the Restaurant Association, Bruce Beckett, said he thought that no matter what happens on Friday, the statute could have a long legal road ahead because of the complexity of the issues raised. “I don’t know how this can all be resolved by Jan. 1,” he said.

Labor leaders, in pushing the wage measure before the election, said that higher wages for airport workers would benefit the entire region, since most of those workers live outside the city of SeaTac.

In responding to the legal challenge, Heather Weiner, a spokeswoman for a group that worked for Proposition 1’s passage, derided the lawsuit as containing “everything but the legal kitchen sink.”

Washington already has the highest state minimum in the nation, at $9.19, but stands to be surpassed by California, which recently approved a $10 minimum, phased in over two years. The federal minimum is $7.25. The SeaTac statute passed by just 77 votes out of about 6,000 cast – a number affirmed in the recount results that were announced this week.

Friday’s hearing will not be the first time Proposition 1 has come before Judge Darvas. In August, she threw the measure off the ballot, agreeing with opponents that the signature process had been flawed. Her order was later reversed by an appeals court in time for the election.

But she also stressed in her ruling at the time that she was taking no position on the underlying question about minimum wage levels — only on the technical aspects of the law.

“The court wishes to emphasize that its decision in this matter has nothing whatsoever to do with the substance of the initiative itself,” she wrote.

By KIRK JOHNSON

Published: December 12, 2013

Munis Face Challenges In ‘Choppy’ 2014 – Barclays.

After a lousy 2013 for muni bonds, Barclays sees better times ahead next year – perhaps. From Barclays muni strategists Thomas Weyl, Sarah Xue and Ming Zhang:

While we expect munis to outperform Treasuries, a lot of challenges remain, and the municipal market could be choppy in the next year. A lot will depend on fund flows and the supply/redemptions dynamic. The latter should be supportive, but a strong rally is not likely without a stabilization of fund flows. We think that it will be difficult for fund flows to stabilize until the Fed starts to taper. The muni market could react adversely in the early stages, but we think that outflows will reverse – similar to the 2005 experience – as valuations likely become attractive and the benefit of tax exemptions increases with rising rates.

Similar to 2013, Barclays sees headline risk in 2014 that could come from Puerto Rico and Illinois, as well as from underfunded pension and benefit plans across the muni market. Otherwise Barclays says “overall municipal credit quality is actually improving due to modestly increasing revenues” while “the largest issue regarding municipal credit quality will be the increasing payments required to meet retiree obligations: pensions and health care.”

Among tax-exempt bonds, Barclays sees value in long bonds, given the underperformance of longer-duration municipal bonds and a steep muni curve. From Barclays:

We expect the muni curve to flatten next year, in line with expectations in the Treasuries market. We also think that the A-rated portion of the index looks attractive at current levels given its underperformance this year, as well as improving municipal credit quality. On a sector basis, we believe the following sectors offer relative value: hospital, IDR/PCR, transportation, and water and sewer. Finally, muni HY looks attractive versus US HY, with the ratio of the former to the latter at 119%, an all-time high.

On the taxable side, Barclays says it sees value in intermediate taxable munis and the power sector within long taxables.

Muni-Bond Market Shrinks at Record Pace.

The U.S. municipal bond market shrank at a record pace in the third quarter, and the amount of bonds held by households, the market's biggest investors, fell to the lowest level in nearly seven years, according to Federal Reserve data released on Monday.

According to figures that raise red flags for the strength of the market heading into next year, the amount of outstanding municipal debt fell to $3.69 trillion, the lowest since the end of 2009, from $3.72 trillion in the second quarter. The $35.3 billion quarterly contraction was the largest going back to 1950 when the Fed started tracking the data on a quarterly basis.

Of the total amount, U.S. household ownership of muni bonds fell by $32.7 billion to $1.64 trillion, the least since the fourth quarter of 2006, according to the Fed's quarterly tally of U.S. financial accounts on everything from stocks to corporate bonds. It was the eighth outflow in the past 10 quarters, and marked a resumption of heavy selling of municipal bonds by households after two quarters of small inflows at the start the year.

"The municipal bond market has been sensitive to both shifts in supply and demand," said J.R. Rieger, vice president of fixed-income indexes at S&P Dow Jones Indices. "Since households are a primary driver of demand for municipal bonds, flagging holdings illustrates a possible headwind for the market in 2014."

Individual investors rushed for the municipal market's exits in the middle of the year on fears about the end of the Federal Reserve's stimulus program. The Fed has been buying $85 billion a month in Treasurys and mortgage-backed securities, a program that has stoked demand for other assets, such as municipal bonds, as investors seek higher returns, and the threat of an end to bond purchases has rattled investors for months.

Detroit's filing in July of the largest municipal bankruptcy in U.S. history, a case that threatens to change some of the long-standing presumptions about the safety of muni debt, has also weighed on the market. Adding to the anxious mood, concerns grew about the financial soundness of Puerto Rico, one of the biggest municipal issuers, with some $70 billion outstanding.

"The third quarter was just a very significant quarter," said Natalie Cohen, senior analyst at Wells Fargo Securities.

Mutual funds, which hold a large amount of Puerto Rico debt, began selling off bonds.

“Once retail opened their statements and saw how much they lost in their funds that perpetuated the selloff,” said Cohen. “That makes the issuers more skittish.”

Municipal mutual funds dropped $81.9 billion worth of bonds in the quarter, the largest amount shed on records going back to 1976, the Federal Reserve data shows.

The yield on highly rated 30-year munis was 3.83 percent on July 1, the start of the third quarter, on Municipal Market Data’s benchmark scale. By the end of the quarter on Sept. 30 it was 4.12 percent, according to MMD, a Thomson Reuters company.

Bond yields and prices move in opposite directions.

The rising yields brought a halt to the refinancing surge and curtailed state and local governments’ appetite to take on more debt. In the third quarter, state and local government debt declined at an annual rate of 3.9 percent, after rising about 1 percent in the second quarter, according to the Federal Reserve.

Over the last three years, the level of outstanding debt has fallen in seven of 12 quarters. Before 2013, the largest contraction on record was in the second quarter of 2011, a $29.7 billion drop.

This week municipal bond sales are expected to total $12.6 billion, the largest weekly total this year. The rush comes in the week before the final Federal Reserve policy meeting of the 2013, when top central bank officials are expected to debate when to start winding down bond purchases.

Despite this week’s surge in issuance, few expect the level of outstanding debt to rise quickly in 2014. Higher interest rates will likely keep the refunding low, said Cohen.

“I think volume is going to return to lower levels than before the housing boom, lower than before 2001,” she said. “It will probably be in the high 200s (billion), not in the 300 to 400 range that we were.”

Detroit Puts $1.1 Trillion of G.O.’s Under Scrutiny: Blooberg Muni Credit.

Detroit’s bankruptcy has some investors fretting that the case will set a precedent for $1.1 trillion of U.S. general obligations. That hasn’t kept the debt from beating revenue bonds for the first time since 2010.

A federal judge last week approved the city’s record $18 billion Chapter 9 filing and said its pensions can be cut in bankruptcy. Detroit’s emergency manager has sought concessions from creditors, including retirees and holders of $369 million of general obligations that the city had promised to repay using its unlimited taxing power.

The potential for losses on Detroit G.O.s means investors may now demand extra yield on obligations of localities struggling to balance budgets, said portfolio managers at T. Rowe Price Group Inc. and UBS Global Asset Management. Even with the prospect of added scrutiny, general obligations are outperforming revenue-backed munis in 2013, Bank of America Merrill Lynch data show. The bonds, the safest part of the municipal universe, are benefiting as investors favor their shorter maturities amid mounting bets that a growing economy will drive interest rates higher.

“The market will have to adjust how they price the risk, including how they judge general obligations

versus revenue bonds," said Hugh McGuirk, Baltimore-based head of T. Rowe Price's muni group, which manages $20 billion. At the same time, "G.O. debt is typically shorter" in maturity, shielding it this year, he said.

Tax Backing

The borrowings account for about 30 percent of the $3.7 trillion municipal market, McGuirk said. Cities and states use the debt to finance projects such as bridges and schools, and repay investors with property-tax receipts or other local levies.

Detroit, which lost a quarter of its population in the decade through 2010, is an example of a shrinking tax base that can't support certain levels of debt, said Ebby Gerry, who helps manage $15 billion of munis at UBS Global Asset Management in New York.

General obligations "will need to be looked at with greater scrutiny," Gerry said. "The impression was that they'd just keep raising taxes and I'll always get my money on coupon payments and maturities. That's not necessarily the case if you have a horrible tax base."

Orr's Plan

In bankruptcy, general-obligation bonds are considered unsecured when they are backed only by a government's promise to repay, rather than any identifiable collateral or a revenue stream like water or sewer fees.

Before the city filed for bankruptcy in July, Kevyn Orr, its emergency manager, tried to get holders of unlimited general obligations to take less than 20 cents on the dollar. The proposal treated the securities on par with Detroit's other liabilities, including those to retirees.

Detroit may take "an aggressive posture" toward creditors, Jeffery Yorg, a Moody's Investors Service analyst, said in a Dec. 3 report.

General obligations of stressed municipalities may merit more scrutiny, Robert Kurtter, a managing director at Moody's, said Dec. 5 at a National Association of State Treasurers conference in New York.

A general-obligation pledge "simply may not mean anything," Kurtter said. "It will affect our view of credits that are under stress with high debt and pension burdens, particularly those that are in the speculative-grade space."

Better Year

Even as bondholders may be forced to take losses on Detroit general obligations, such debt has had a better year than revenue bonds.

The extra yield buyers demand to own revenue bonds instead of general obligations averaged about 0.97 percentage point for the past three months, the most since March 2012, Bank of America data show.

The bank's index of general obligations has lost 2.2 percent this year, beating the 3.3 percent drop for revenue bonds. It would be the first time for general obligations to fare better than revenue bonds since 2010.

Investor bets on Federal Reserve policy provide the backdrop for the reversal. As speculation has

grown this year that an expanding economy will lead the central bank to curb its bond-buying program, shorter-maturity bonds have held their value the best, as have higher-rated securities.

The Bank of America general-obligation index has an average maturity of 12 years and a credit grade two steps below benchmark debt. For revenue debt, the average maturity is five years longer, and the rating one level weaker.

Revenue Effect

“As long-term returns have been hurt, then that would have a bigger effect on revenue bonds,” McGuirk said.

General obligations have another appeal to investors: They are less prone to default than revenue debt, signaling that any Detroit precedent may have limited influence.

Of 443 issuers in default on payments as of Dec. 3, two — Detroit and Brighton, Alabama — are general obligations, Matt Fabian, a managing director at Concord, Massachusetts-based Municipal Market Advisors, said in an e-mail. The rest are backed by revenue such as from real estate developments and senior-living facilities.

California Treasurer Bill Lockyer said “big states and issuers” won’t see any backlash from Detroit.

“Some investors will be nervous,” Lockyer said after a panel at the treasurers’ conference. “So OK, they don’t buy Detroit. They don’t buy some tiny hospital district issue that comes out every 12 years.”

Market Week

In the municipal market this week, issuers plan to sell $11 billion of long-term debt with yields at a three-month high.

Top-rated 10-year munis yield 2.99 percent, compared with 2.86 percent on similar-maturity Treasuries.

The ratio of the interest rates, a measure of relative value, is about 105 percent, compared with a five-year average of 102 percent. The higher the figure, the cheaper munis are compared with federal securities.

Following is a pending sale:

New York state’s Utility Debt Securitization Authority plans to sell $2.1 billion of revenue bonds this week, data compiled by Bloomberg show. Proceeds will refund a portion of the Long Island Power Authority’s $7 billion of debt.

By Michelle Kaske and Romy Varghese Dec 8, 2013

To contact the reporters on this story: Michelle Kaske in New York at mkaske@bloomberg.net; Romy Varghese in Philadelphia at rvarghese8@bloomberg.net

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Tips for Mitigating Muni Losses.

Bond investors are not exactly the gunslingers of Wall Street. In general (high yield investors being one exception), they are looking for safe, predictable income. This is especially true of higher-income investors who favor municipal bonds because their interest has the added advantage of not being subject to federal income tax.

Unfortunately, the muni market has been anything but boring this year thanks to the one-two punch of an uptick in interest rates coupled with a series of events that have shaken investors to the core. The recent bankruptcy court ruling allowing Detroit to potentially walk away from billions of dollars in debt is the latest blow as concerns mount that other broke states and municipalities will follow suit. Puerto Rico's financial problems are on everyone's radar screen. Investors are also anxiously awaiting a decision on Stockton's proposed plan to extract itself from bankruptcy; a California judge is expected to rule in March.

In short, there has been a lot more "excitement" in this corner of the bond market than muni investors like. However, while cases like Detroit make the evening news, defaults among municipal bond issuers remain rare. On average, the municipal bond default rate is less than 1%–far lower than the rate for corporate bonds.

Nonetheless, nervous muni bond investors exited the market in droves this year, driving prices down. This, coupled with a small uptick in U.S. Treasury rates (higher interest rates tend to push bond prices lower), has handed municipal bondholders a loss of nearly 4% over the past 12 months, according to Barclays. The fact that this is less than half the size of the loss recorded by 20-year Treasuries or mortgage-back securities, is small comfort to those who consider municipal bonds the sleepy corner of the bond market.

If you happen to be a muni investor, there's a way to turn your muni bond "lemon" into lemonade, according to George Rusnak, director of fixed income for Well Fargo. But you've got to act fast.

The below-average interest rates we've been experiencing ever since 2008 are not going to last forever. For one thing, despite the small uptick in rates this year, we are still significantly below the 50-year average. "The Fed has made it clear they are going to stop artificially keeping rates low," says Rusnak. "Therefore, you have to plan for the inevitable rise in rates. Our view is they will probably continue to creep up."

If this is the case, all bonds- not just munis- would to see a corresponding decline in value.

If you agree with Rusnak, he suggests the following:

1. Consider selling some of your municipal bonds and replacing them with others that have the same credit quality, but lower "duration" (essentially, shorter maturity). A bond with a shorter duration is less sensitive to an increase in interest rates. Translation: it will hold its value better.

2. Look for a bond that pays a higher interest rate than the one you currently own. For instance–even if it means paying a premium–switching from a bond with a 4% coupon to one with a 5¼% coupon "is more desirable if rates rise," according to Rusnak. A higher coupon makes a bond's price less sensitive to an increase in interest rates, with the added bonus of being more liquid in case you need to sell.

3. Your tax-free income will go up because your new, bond pays a higher interest rate.

4. The loss on your old bond offsets the gains you probably had this year on the stocks you own.

Along with numerous other fixed-income experts, Rusnak feels that “the risk in the muni market is not as significant as people are making it out to be.” In Morgan Stanley’s latest Municipal Bond Monthly Report, John Dillon, the firm’s chief municipal bond strategist writes that, “While a few additional muni defaults may surface in the coming year(s), we view these as important, but rather isolated, events in a broadly improving landscape.”

The message from Dillon and Rusnak and others is that while making adjustments within your municipal bond portfolio makes sense, getting out entirely could be a big mistake. According to Dillon, an increase in state tax collections along with a slowly improving economy will result in reduced risk in the muni arena next year. In fact, if you’ve got the patience and the stomach for it, You might want to use today’s lower prices to add to your municipal bond holdings. Rusnak warns that panicked muni investors who have been shifting into other sectors of the bond market- such as corporates and high yield- because they’re perceived to be safer, may be in for a rude awakening. “There’s no free lunch in the bond market. Make sure you understand the risks you are taking.”

In other words, a handful of high-profile cases does not justify abandoning municipal bonds, especially if you are in one of the higher tax brackets. As Morgan Stanley points out, ”the top federal tax rate reverted back to 39.6%, many states have increased tax rates in recent years and municipal bonds are not subject to the 3.8% Medicare Surtax.”

“Tax-exempt income definitely has it benefits, Says Rusnak. “Set yourself up for success going forward….one of the biggest risks is complacency risk. The risk of doing nothing.”

If you are not comfortable adjusting your municipal bond portfolio yourself, find a financial advisor experienced in this arena. Or invest via a mutual fund where you’ve got a team of experts cherry-picking the bonds that go into the portfolio, monitoring the issuers and adjusting duration in the best interest of all shareholders.

Ms. Buckner is a Retirement and Financial Planning Specialist and an instructor in Franklin Templeton Investments’ global Academy. The views expressed in this article are only those of Ms. Buckner or the individual commentator identified therein, and are not necessarily the views of Franklin Templeton Investments, which has not reviewed, and is not responsible for, the content.

By Gail Buckner

Your Money Matters

Published December 09, 2013

FOXBusiness

Public Safety Buffer Zone at Issue in Supreme Court Case.

How local governments can provide for the public’s safety may be decided in a U.S. Supreme Court case limiting how close protesters can get to abortion clinics in Massachusetts.

The Supreme Court will decide in McCullen v. Coakley whether a Massachusetts statute prohibiting speech within 35-feet of a reproductive health care facility violates the First Amendment. The State

and Local Legal Center (SLLC) has filed an amicus brief in the case.

While only two other states regulate speech within a specific distance of reproductive health care facilities — Colorado and Montana — many local governments use buffer zones in numerous contexts. The SLLC's brief points out that how the court rules in this case could affect state and local government's ability to regulate speech to protect public safety in many situations.

For example, a Kansas City, Mo. ordinance prohibits panhandling within 20 feet of an ATM, and a law in Nashua, N.H. provides specific, limited location restrictions on handbill distribution, based on the "unique layout" and heavy public use of City Hall.

Lower courts have upheld buffer zones to prevent congestion at special events (like circuses), places that regularly draw crowds (like the Washington D.C. metro), and in the face of large-scale protests (like the World Trade Organization conference). Lower courts have also upheld restrictions on protests near funerals to protect vulnerable mourners, who are similarly situated to those seeking a variety of medical care at reproductive health care facilities. These buffer zones and many others may be in jeopardy if the court rules against Massachusetts.

Massachusetts had a long history of protesters outside reproductive health care facilities, including, in the 1980s, people chaining themselves to clinic doors and property. In 2000, the Massachusetts Legislature adopted a law allowing protesters to come within six feet of those entering a clinic within an 18-foot buffer zone around the clinic. Massachusetts' law was modeled around a similar law that the Supreme Court approved in Hill v. Colorado.

The 2000 law did not work very well in Massachusetts. Protesters would crowd six feet from a clinic door making entry into the clinic difficult. So in 2007, Massachusetts adopted a 35-foot fixed buffer zone around clinics.

The 1st U.S. Circuit Court held that the Massachusetts statute is a constitutional regulation of speech because numerous communication channels remain available to protesters.

The Supreme Court will decide in this case whether Massachusetts' fixed buffer zone violates the First Amendment. It has also accepted the question of whether it should overturn Hill v. Colorado.

The SLLC's brief was joined by NACo, the National League of Cities, the International City/County Management Association, the U.S. Conference of Mayors and the International Municipal Lawyers Association.

Oral argument has been scheduled for Jan. 15, 2014. The Supreme Court will issue an opinion in this case by June 30, 2014.

By Lisa Soronen

MAC Offers Bond Insurance Over TMC Electronic Trading Platform.

Real-Time Quotes and Execution Available for Over 9,500 Approved Municipal Credits

HAMILTON, Bermuda, Dec 09, 2013 (BUSINESS WIRE) — Municipal Assurance Corp. (MAC), a bond insurer within the Assured Guaranty group of companies (Assured Guaranty), today began providing real-time bond insurance quotes, as well as the ability to request the purchase of MAC

insurance, on secondary market trades placed through the electronic trading platform of TMC Bonds LLC (TMC). In providing this service, MAC joins its affiliate Assured Guaranty Municipal Corp. (AGM), which introduced secondary market municipal bond insurance to TMC in 2011.

“We are pleased to offer TMC users the ability to attach MAC bond insurance to eligible trades with just a mouse-click,” said William B. O’Keefe, Senior Managing Director for Municipal Marketing. “While MAC only began writing direct bond insurance earlier this year, it has the characteristics of a well-established financial guaranty company, with built-in earnings and all the experience and human capital of Assured Guaranty, the leading provider of muni bond insurance.”

MAC was launched in July 2013 to guarantee only U.S. municipal bonds in the most well-understood bond sectors, such as general obligations, tax-backed issues and public electric, water, sewer and transportation revenue bonds. At September 30, 2013, MAC had $1.5 billion in claims-paying resources and a $108 billion direct and assumed insured portfolio, which generates predictable revenue from its $688 million of unearned premiums.

Rated AA+ (stable outlook) by Kroll Bond Rating Agency and AA- (stable outlook) by Standard & Poor’s Ratings Services, MAC may insure primary offerings in 42 states and the District of Columbia under its current licenses. Through TMC, registered TMC users may obtain secondary market MAC insurance on approved municipal bonds issued in all 50 states.

MAC currently has secondary market insurance capacity available for over 9,500 municipal credits. Registered users of TMC’s electronic trading platform can obtain MAC or AGM bond insurance quotes on approved issues by entering the CUSIP number of bonds they want to insure.

“TMC’s broad market reach makes MAC insurance highly accessible,” said Mr. O’Keefe. “It is particularly efficient for executing smaller size trades, with MAC and AGM insuring par amounts of $100,000 or more.”

MAC is owned jointly by its affiliates AGM and Assured Guaranty Corp. (AGC), the only two companies that have continued to write municipal bond insurance before, during and since the global financial crisis of 2008. MAC shares their management, underwriting discipline, experience in surveillance and remediation, and established accounting, legal and information technology infrastructure.

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PRESS RELEASE

Dec. 9, 2013, 12:01 p.m. EST

Are Municipal Bonds Cheap Relative To Taxable Counterparts?

Municipals bonds have underperformed in 2013

Municipal bonds have underperformed this year after outperformance last year left absolute market yields at record lows on the Municipal Market Data (MMD) yield curve. The generic “AAA” General Obligation bond with a 30 year term was yielding 2.47% as of 11/30/12 and a year later is yielding 4.10%. Given that bond prices decline when yields increase, the municipal market is down 2.87% year to date as of November 30, 2013 after growing 6.4% in 2012 as measured by the S&P National AMT Free Municipal Bond Index. Persistent redemptions from municipal bond funds may work against municipals’ future positive performance. According to Lipper FMI, as of November 27, there were 27 consecutive weeks of net outflows from U.S. municipal bond funds, totaling $34.8 billion or about $1.3 billion per week.

Municipals present relative value compared to taxable bonds

According to Dorian Jamison, municipal analyst at Wells Fargo Advisors, municipal market yields continue to be historically cheap compared with taxable alternatives. Yield ratios between municipal bonds and their taxable counterparts continue to exceed historical averages, which indicates that municipals are still attractively priced, historically speaking.

The current MMD 10 year triple A muni to Treasury yield ratio of 96.7% remains higher than its 10 year average of 91.7%, which indicates attractive value in the municipal market. Such value tends to attract demand from non-traditional municipal bond buyers and can support municipal bond prices. When yield ratios between municipals and Treasuries fall below historical averages, they indicate that the municipal market is expensive relative to the taxable market.

Municipal to corporate bond yield ratios are even more attractive, particularly at higher tax brackets that have increased this year. For example, for an individual in the 39.6% marginal federal tax bracket, the taxable equivalent yield of a 30 year A+ rated general obligation bond is 8.9% (Source: Bloomberg), which results in a muni to corporate yield ratio of 182%. Investors that expect higher tax brackets next year should consider swapping taxable bonds with municipal bonds to get to keep more of the interest paid.

Intermediate maturities and healthcare municipal bonds

According to both Dorian Jamison from Wells Fargo & Co (NYSE:WFC) and George Friedlander from Citi, the intermediate area of the yield curve provides both value and potential for price stability in the next 12 months. Friedlander and his team highlight that the 5-7 year sector remains the most attractive. Jamison notes that interest rates could continue to rise given potential for the Federal Reserve to scale back bond purchases next year and increasing uncertainty over tax reform impact on municipals’ tax exemption.

Within the high quality municipal market, Friedlander thinks that not for profit hospitals face significant headwinds due to the ongoing implementation of the Affordable Care Act (ACA). There is still uncertainty over how the costs of care for the uninsured will be covered, particularly if states choose not to expand Medicaid. Also, not-for-profit hospitals are facing uncertainty over their tax exempt status as their community benefit, which consists of devoting at least 3% of operating revenue to care for patients unable to pay, may decline as more people get insured with the ACA.

In turn, some hospitals’ tax exempt status may be threatened if not-for-profit hospitals’ community

benefit is not high enough. Despite these circumstances, Friedlander notes that prices of hospital municipal bonds rated A and above are attractive relative to similarly rated General Obligation and Essential Service Revenue bonds. Citi Research analysts recommend considering high quality multi state healthcare system bonds for portfolio diversification and higher risk adjusted yields. Multi state healthcare bonds are better positioned to weather challenges as their revenue base is larger and more diverse.

by Ann Marie

December 9, 2013

NLC: How Salt Lake City Solved Chronic Veteran Homelessness.

The National League of Cities (NLC) has partnered with Mayor Ralph Becker and local stakeholders in Salt Lake City on the campaign to end chronic veteran homelessness, and has promoted the city's efforts in order to enable other cities to learn from their success. Previous posts on NLC's blog CitiesSpeak.org have discussed Salt Lake City's remarkable progress towards the historic milestone of ending chronic veteran homelessness. For more information about how NLC can support efforts in your city to end chronic veteran homelessness, contact Elisha Harig-Blaine at harig-blaine@nlc.org.

Some time in the next few weeks Elizabeth Buehler expects to say these words: Salt Lake City has ended chronic veteran homelessness.

Buehler, the homeless services coordinator for the city, estimated that only 37 chronically homeless veterans — as identified by local shelters and other nonprofits — remained unhoused. That's down from 100, the number at the start of November. "We're going through this like gangbusters right now," Buehler says.

Overall homelessness among veterans in the United States declined by about 24 percent between 2010 and 2013, according to a November report released by the U.S. Department of Housing and Urban Development. Counts conducted in communities across the country last January found that 57,849 American veterans were homeless in 2013. About 291 of those homeless veterans resided in Utah, which marked a 13 percent decrease from the year before. (About three quarters of the state's veteran homeless population lives in Salt Lake City and the surrounding county.) "We're a part of a nationwide trend," Buehler says. "Other cities are going to follow quickly behind us."

Salt Lake City is specifically focusing on chronically homeless veterans — those who are most in need of shelter. The U.S. Department of Housing and Urban Development (HUD) defines people as chronically homeless if they meet two criteria:

- They have a disabling condition.
- They have been continuously homeless for at least a year or experienced four episodes of homelessness within the past three years.

The fact that public officials have zeroed in a sub-population of the homeless is part of the reason for Salt Lake City's success, says Michelle Flynn, associate executive director of The Road Home, a Utah nonprofit that serves the homeless. "It feels doable," Flynn says. "You can get your arms around it."

In an effort to raise awareness about veteran homelessness and to solicit help from landlords, Salt Lake City Mayor Ralph Becker proclaimed November "Housing Veterans Month." In response,

roughly 40 landlords contacted the city to say they had units available for veterans. Becker has also engaged Phoenix Mayor Greg Stanton in a friendly competition to see whose city can end chronic veteran homelessness first.

“That’s where your mayors make a big difference,” says Tamara Kohler, director of Utah’s community services office. As the city leader, Becker could highlight veteran homelessness and convene important stakeholders, such as the city’s public housing authority and landlords.

Salt Lake City also benefits from an especially proactive VA staff, Flynn says. In a 2012 boot camp, where public and private organizations met to discuss ways to reduce homelessness, shelter providers noted that some homeless veterans would always be reluctant to show up at the local VA hospital. In response, some VA staff decided to move their operations to a homeless shelter a couple days a week where they stood a better chance of interacting with the people who needed their help.

At least part of the explanation behind the success in ending homelessness — both in Utah and across the country — appears to be federal policy. As Governing reported earlier this year, President Barack Obama and Eric Shinseki, the VA secretary, pledged in 2009 to end veteran homelessness by 2015. That resulted in a major expansion of a joint HUD-VA program that provides rental-assistance vouchers for permanent housing, linked with counseling, case management and medical services through VA hospitals and community centers. Since 2008, the program has awarded 58,140 of these joint HUD-VA vouchers. Other grant programs, such as the VA’s Supportive Services for Veteran Families, target veterans who are at risk of becoming homeless or who recently became homeless, providing short-term financial assistance for temporary needs, such as paying a security deposit or covering moving costs.

DECEMBER 9, 2013

Byb J.B. Wogan

- Judge Blocks Auction-Rate Arbitration against Goldman.
- WSJ: Borrowing Maneuver Catches Flak.
- State Treasurer Cites Potential Adverse Effects of Proposed Regs on Arbitrage Restrictions.
- Bank of America Settles Municipal Bond Rigging Lawsuit.
- NYT: Pension Ruling in Detroit Echoes West to California.
- Fitch & Moody’s U.S. Public Finance Teleconferences.
- NYT: Playing Pension Games.
- WSJ: Volcker Rule Could Raise Municipal Borrowing Costs, California Treasurer Says.
- *Gulf Coast Housing Partnership, Inc. v. Bureau of Treasury of City of New Orleans*, in which the court concluded that property owned by Louisiana LLC that is a wholly-owned affiliate of a Delaware nonprofit corporation exempt from paying federal tax is not exempt from paying local ad valorem taxes on that property.
- We reccomend that you schedule your next riot and/or affray in Arkansas, whose Supreme Court this week reached the obvious conclusion that $25/month is thoroughly adequate compensation for constables tasked with “suppressing all riots, affrays, fights, and unlawful assemblies; keeping the peace; and arresting offenders.”
- And finally, BCB’s euphemism of the month is brought to you by *Duffy v. Town of Berwick* in which we learn that the toxic waste product generated by automobile recycling plants is called “fluff.” Adorable.

MUNICIPAL ORDINANCE - ARKANSAS

Graves v. Greene County

Supreme Court of Arkansas - December 5, 2013 - S.W.3d - 2013 Ark. 493

Township constable filed complaint against county, county quorum court, and county judge seeking reimbursement of expenses and for writ of mandamus to compel defendants to set salary for constables. The Circuit Court issued order requiring county defendants to set salary and denied constable's claim for expenses, which had to be presented to County Court. The County Court denied constable's claims. Constable then filed complaint for judicial review of denial and sought declaratory relief based on challenge to constitutionality of county ordinance that set salary at $25 per month. The Circuit Court conducted de novo review, denied constable's claim for reimbursement of expenses and found that ordinance setting salary for constables was not unconstitutional. Constable appealed.

The Supreme Court of Arkansas held that:

- Amended version of statute governing reimbursement of expenses of county and district officials in effect at time of request governed request;
- Constable was not "district official" entitled to reimbursement of expenses; and
- Ordinance setting salary for township constables at $25 per month was not so arbitrary and unreasonable as to violate equal protection.

County ordinance setting salary for township constables at $25 per month was not so arbitrary and unreasonable as to violate equal protection based on constable's claim that statutory responsibilities of constables called for reasonable salary of $30,000 per year. Rather, quorum court had rational basis for setting salary based on duties performed by constables at county's request, and constable testified that he never had to suppress riots, fights, or unlawful assemblies within his township, and that he did not issue any traffic or misdemeanor citations, or present any summons to jury.

Graves cites Arkansas Code Annotated section 16–19–301 (Repl.1999), which outlines the responsibilities of constables. Duties of constables include suppressing all riots, affrays, fights, and unlawful assemblies; keeping the peace; and arresting offenders.

PUBLIC UTILITIES - CALIFORNIA

Amedee Geothermal Venture I v. Lassen Municipal Utility Dist.

United States District Court, E.D. California - November 27, 2013 - Slip Copy - 2013 WL 6198967

Plaintiff Amedee Geothermal is a private entity that runs a geothermal power plant in Lassen County. Defendant Lassen Municipal Utility District (LMUD) is a local government agency that procures and distributes electrical power within its service area.

The controversy in this case centers on the terms of two agreement between LMUD and Amedee Geothermal executed in 1987 and 1988. Under the terms of these agreements LMUD agreed to supply Amedee Geothermal the electricity it needed, and to transmit the electricity the geothermal power plant produced to PG&E, in exchange for a fee.

The parties dispute, however, whether the agreements required LMUD to continuously supply

Amedee Geothermal 34.5 kv electricity, and a controversy arose in 2009 when LMUD converted the electricity supply line from 34.5 kv to 12.47 kv. Naturally, Plaintiff asserts that by changing the voltage, the Utility District breached its contractual obligations under the agreement; whereas, Defendant counters the agreement did not obligate the Utility District to continuously provide electricity at the particular 34.5 kv level.

Amedee Geothermal sued in federal court, alleging that the reduction of the electricity voltage amounted to an unconstitutional deprivation and taking of property without due process in violation of the Fourteenth Amendment of the U.S. Constitution and an unconstitutional seizure of property in violation of the Fourth Amendment of the U.S. Constitution. Plaintiff also asserted several state law claims for, in essence, breach of contract, tortious interference, and negligence.

Defendant moved for summary judgment on Plaintiff's federal claims and asked that the Court decline to continue to exercise supplemental jurisdiction over this case—which, Defendant argued, is essentially a state law contract case.

The court granted Defendant's Motion for Summary Judgment as to Plaintiff's federal claims and declined to exercise supplemental jurisdiction over the remaining state law claims.

MUNICIPAL ORDINANCE - CALIFORNIA

Maral v. City of Live Oak

Court of Appeal, Third District, California - November 26, 2013 - Cal.Rptr.3d - 13 Cal. Daily Op. Serv. 12, 857

In December 2011, the City of Live Oak passed an ordinance prohibiting the cultivation of marijuana for any purpose within the City. Plaintiffs sued, contending the ordinance violated the Compassionate Use Act (CUA) (Health & Saf. Code,1 § 11362.5), the Medical Marijuana Program (MMP) (§ 11362.7 et seq.), equal protection, and due process.

The Court of Appeal held that Compassionate Use Act and Medical Marijuana Program Act do not preempt a city's police power to prohibit all marijuana cultivation.

EMPLOYMENT - DELAWARE

Murphy v. City of Lewes

United States District Court, D. Delaware - November 26, 2013 - Not Reported in F.Supp.2d - 2013 WL 6185437

Plaintiff was employed as secretary by the City from June 12, 1988 until August 15, 2012. On June 21, 2009, the City Manaher issued the City's updated Personnel Policy, which became applicable to all city employees on June 23, 2009. The Personnel Policy contained a "substance abuse policy," which provides that persons with a "verified first time positive result" of random drug testing would be placed on unpaid leave, and after 30 days, if they completed counseling and treatment could return to work.

On August 3, 2012, plaintiff was involuntarily taken to a laboratory for a monitored drug test. As a result of the test results, plaintiff was placed on administrative leave at the direction of Eckrich. Plaintiff allegedly was not afforded an opportunity to present facts while disciplinary measures were

being considered. Plaintiff was suspended, which lead to her termination. No other City employee had been similarly treated by failing to follow the procedures outlined in the Personnel Policy.

Plaintiff sued, claiming a constitutionally protected property right in an employment policy. She also claimed that she was forced, without just cause, to undergo a drug test, in violation of her Fourth, Fifth, and Fourteenth Amendment rights under the Constitution.

Defendants countered that plaintiff's complaint failed to plead the existence of a constitutionally protected property right in her employment. More specifically, defendants argued plaintiff did not plead the existence of a contract, implied or otherwise, that provides for anything more than at-will employment. Defendants further asserted the procedures provided under the Personnel Policy did not create a property interest in plaintiff's job because procedural protection alone, without substantive protection under state law, does not create a property interest in employment.

The court disagreed, finding that the complaint set forth sufficient facts to indicate plaintiff had a property interest in her employment with the City. The City modified plaintiff's employment by establishing the substance abuse policies. The City's policies created an implied contract requiring due process for termination, and therefore, created a constitutionally protected property interest in her employment.

ADR - DISTRICT OF COLUMBIA

Bank of America, N.A. v. District of Columbia

District of Columbia Court of Appeals - November 27, 2013 - A.3d - 2013 WL 6228165

District of Columbia brought action against bank, bank employees, and district employees, alleging conspiracy to process fraudulent tax refund checks. The Superior Court denied bank's motions to compel arbitration under the Federal Arbitration Act (FAA) and for stay. Bank appealed.

The Court of Appeals, Wagner held that:

- Trial court's denial of motion to compel arbitration was immediately appealable;
- Threshold question of whether District, through authorized agents, ever agreed to be bound by arbitration provision of contract with bank was for court rather than for arbitrator;
- Under the Procurement Practices Act of 1985 (PPA), District employees in the Office of the Chief Financial Officer (OCFO) lacked authority to agree to arbitrate contract and fraud claims; and
- Evidence was sufficient to support finding that contract between bank and District was completely integrated and thus rendered ineffective any prior authorizations or agreements for arbitration.

ANNEXATION - ILLINOIS

People ex rel. R and D Olson Ltd. Partnership v. Village of Glendale Heights

Appellate Court of Illinois, Second District - November 27, 2013 - Not Reported in N.E.2d - 2013 IL App (2d) 13-0472-U

In this quo warranto case, owners of property in unincorporated Du Page County, challenged the authority of the Village of Glendale Heights, to annex the subject territory.

The trial court granted summary judgment in favor of plaintiffs but the appeals court reversed,

finding that the Village had met its burden of demonstrating that it properly exercised valid authority to annex the subject territory.

After the Village gave notice on August 22, 2012, but before it passed its annexation ordinance on September 6, 2012, plaintiffs filed section 7–1–8 petitions in Bloomingdale, a neighboring jurisdiction. The Village passed its annexation ordinance after plaintiffs filed their petitions in Bloomingdale, but within the 60–day period during which section 7–1–13(c) prohibited Bloomingdale from annexing the subject territory.

Notwithstanding the Village's statutory compliance, plaintiffs contend that the Village lost authority to proceed with its annexation when plaintiffs filed their section 7–1–8 petitions in Bloomingdale. According to plaintiffs, their filing of the petitions gave Bloomingdale priority over the Village's proceeding.

"We disagree with the parties' characterization of the issue as one of priority. Even assuming arguendo that plaintiffs are correct that Bloomingdale obtained priority when plaintiffs initiated that proceeding by filing their petitions, it would have had no legal effect in the factual scenario presented here. Priority becomes relevant only when two entities have annexed the same territory; here, there was only one completed annexation—the Village's. Plaintiffs' petitions constituted a request that Bloomingdale annex the territory. Plaintiffs themselves cannot annex their property to Bloomingdale; they have no right to be annexed; and they enjoy no right of priority in themselves. Plaintiffs' quo warranto action was simply a challenge to the Village's authority to annex the subject territory, calling for an adjudication of whether the Village acted within its statutory authority. Bloomingdale was not a party; therefore, any rights that Bloomingdale might have had simply were not at issue."

INVERSE CONDEMNATION - KENTUCKY

Stewart v. City of Franklin

United States District Court, W.D. Kentucky, Bowling Green Division - December 2, 2013 - Slip Copy - 2013 WL 6230497

This case arises out of the fire at Plaintiff's residence on August 1, 2012 and the subsequent demolition of the property on August 3, 2012. Following the fire, the City of Franklin condemned the property and razed the building.

The Plaintiff alleged that Defendants violated constitutional rights and federal laws by not compensating him and not providing him an opportunity to contest the actions of the government prior to the demolition of his property. Defendants contended that Plaintiff must exhaust state remedies, specifically an inverse condemnation action, before asserting these claims in federal court. As such, Defendants argued that Plaintiff's claims are not ripe, and thus, the Court does not have subject matter jurisdiction.

Plaintiff contended that he does not need to file an action for an inverse condemnation because this taking solely related to private use, not public use. The Court rejected Plaintiff's argument concerning the condemnation of his property falling into the category of a private taking. Plaintiff correctly states that a taking for a purely private use constitutes a constitutional violation. Montgomery v. Carter Cnty., 226 F.3d 758, 765 (6th Cir.2000). However, to succeed on such a claim, Plaintiff must show that the "taking had no rational connection to a minimally plausible conception of the public interest." Id. at 768. Here, the facts alleged by Plaintiff demonstrate that his

property was demolished in connection with obtaining a local development grant. This fact alone is enough to meet the extremely low threshold of showing a connection to a public use.

TAX - LOUISIANA

Gulf Coast Housing Partnership, Inc. v. Bureau of Treasury of City of New Orleans

Court of Appeal of Louisiana, Fourth Circuit - November 27, 2013 - So.3d - 2013-0556 (La.App. 4 Cir. 11/27/13)

Gulf Coast Housing Partnership, Inc. (GCHP), is a Delaware nonprofit corporation licensed to business in Louisiana. It owns and is the sole member and manager of the three Louisiana limited liability companies (LLCs). Each of these three limited liability companies owns immovable property in Orleans Parish that they assert will be used for housing of the poor.

The Orleans Parish assessor assessed the LLCs' immovable property for ad valorem property taxes for calendar year 2010. GCHP paid the 2010 property taxes for the LLCs as assessed under protest and commenced this suit against the assessor, the City of New Orleans, and the Louisiana Tax Commission for a refund of the taxes paid.

The core issue was whether La. Const. art. VII, § 21(B)(1)(a)(i) allows Louisiana immovable property to be exempt from ad valorem property tax when the property is titled and/or owned directly by a limited liability company that is not directly a 26 U.S.C.A. § 501(c)(3) tax-exempt entity and thus income tax-exempt by United States and Louisiana law when the sole member (owner) of the limited liability company is a 26 U.S.C.A. § 501(c)(3) tax-exempt nonprofit corporation, and because the activities of the tax-exempt corporation are not commercial in nature but compliant with law for income tax-exempt purposes.

The court concluded that only if the immovable property was undeveloped and held by the tax-exempt corporation in its own name as an investment would the immovable be exempt from ad valorem tax. Here, the LLCs acquired the immovable properties for commercial purposes, albeit charitable in nature, to-wit: for "affordable and supportive rental housing for low-income individuals with disabilities and for low-income workers."

In addition, the court found no evidence that GCHP or the LLCs had entered into any agreement with any municipal or parish industrial development board to bring them within the purview of La. R.S. 51:1151, et seq., and thus potentially exempt from ad valorem taxation of their immovable property.

ZONING - MAINE

Duffy v. Town of Berwick

Supreme Judicial Court of Maine - December 5, 2013 - A.3d - 2013 ME 105

Landowners whose property abutted that of an automobile recycler sought review of planning board decision approving conditional use permit to install and operate a metal shredder for vehicles. The Superior Court vacated. Recycler appealed and landowners cross-appealed.

The Supreme Judicial Court of Maine held that:

- Planning coordinator's e-mail to attorney for applicant did not taint decision by planning board to approve the permit;
- Board's finding that application met the ordinance standards was supported by the record; and
- Record supported board's determination that metal shredder would meet the 60-decibel standard as measured at the neighboring property.

ZONING - MINNESOTA

White v. City of Elk River

Supreme Court of Minnesota - December 4, 2013 - N.W.2d - 2013 WL 6252431

Property owner brought declaratory judgment action against city seeking declaration that campground operated on property was a legal nonconforming use and that city had wrongfully revoked conditional use permits to operate campground, and seeking damages for alleged intentional interference with business relations.

The Supreme Court of Minnesota held that:

- On an issue of first impression, application for and receipt of conditional-use permit did not automatically waive nonconforming use status;
- Property owner did not waive nonconforming use status;
- Municipality lacked authority to terminate nonconforming use by revocation of conditional-use permit; and
- City properly required interim-use permit for replacement of destroyed accessory building.

Property's owner's application for and receipt of conditional-use permit for property did not constitute a surrender of the right to continue nonconforming use of the property as a campground unless the property owner validly waived that right. Nonconforming uses were constitutionally protected property rights, and a property owner's voluntary compliance with a later-enacted zoning ordinance did not automatically waive the right to operate under nonconforming use status in the future.

Property owner who had applied for and received a conditional-use permit did not "waive" its right to continue nonconforming use of property as a campground, where, although property owner knew of its nonconforming-use rights as a campground when it applied for the conditional-use permit, there was nothing in the record to evince an intent that, by applying for and accepting the conditional-use permit, property owner subordinated its rights to the city's zoning regime.

EMINENT DOMAIN - MINNESOTA

County of Dakota v. Cameron

Supreme Court of Minnesota - November 27, 2013 - N.W.2d - 2013 WL 6189021

County commenced condemnation action to acquire various properties to provide a right-of-way for road construction. The District Court awarded compensation to commercial property owner and awarded attorney fees and other costs. Property owner appealed.

The legal questions presented by this case relate to the operation of Minnesota's minimum-compensation statute, Minn.Stat. § 117.187 (2012), which provides a mechanism for compensating

property owners who “must relocate” following the condemnation of their real property. Appellant, who had his commercial property taken by respondent County of Dakota, argued that the district court erred when it failed to award him sufficient damages under the minimum-compensation statute to purchase a “comparable property in the community.”

The Supreme Court of Minnesota held that:

- Condemned property’s city was the relevant community for purposes of determining award under minimum-compensation statute;
- Another liquor store in city was a “comparable property” under minimum-compensation statute, even though such other property was not available for sale;
- The lodestar approach governs the determination of the reasonableness of an award of attorney fees in an eminent-domain proceeding; and
- Trial court acted within its discretion in reducing award of attorney fees to account for property owner’s limited success.

EMPLOYMENT - MISSISSIPPI

Strickland v. South Panola School Dist.

Court of Appeals of Mississippi - December 3, 2013 - So.3d - 2013 WL 6233912

Strickland, a teacher employed with the school district, was arrested for enticing a child pursuant to Mississippi Code Annotated section 97–5–33(7) (Supp.2013). On October 26, 2012, while Strickland was in jail, the superintendent of the school district, hand-delivered a letter to Strickland which informed him that the board had decided to terminate his employment as a result of his arrest. The letter further stated that Strickland had five days from the date of the delivery of the letter to request a hearing. Strickland did not request a hearing until November 4, 2012. Shaffer notified Strickland’s attorney on November 5, 2012, that the board would not grant Strickland’s request for a hearing because the request was not made within five days of Strickland receiving notice.

Strickland argued that he was “practically unable” to request a hearing within five days because he was incarcerated. He insists that as soon as he was able to meet with his attorney, he had a written request for a hearing delivered to the board. “It is clear here that Strickland failed to comply with section 37–9–59, as he requested a hearing outside of the five-day period mandated by the statute. Therefore, he waived his right to request a hearing, and his termination became effective on November 1, 2012.”

Despite his failure to comply with section 37–9–59, Strickland argued that the doctrine of equitable tolling applied, suspending the five days mandated by section 37–9–59. He contends that extraordinary circumstances forced him to make his request outside of the time period. The court concluded that the doctrine of equitable tolling does not apply here because the five-day requirement in section 37–9–59 has never been interpreted as a statute of limitations, and because Strickland was requesting a hearing with the school district, not filing a complaint in court. Additionally, Stickland cited no specific, extraordinary circumstances that kept him from contacting his attorney or the board while incarcerated and cites no authority to support his argument that the timeline set forth in section 37–9–59 may be extended pursuant to the doctrine of equitable tolling.

ETHICS - NEVADA

Carrigan v. Commission on Ethics of State

Supreme Court of Nevada - November 27, 2013 - P.3d - 129 Nev. Adv. Op. 95

After Nevada Commission on Ethics censured city council member based on his failure to recuse himself, pursuant to the Nevada Ethics in Government Law, from voting on a matter due to potential conflict of interest, council member petitioned for judicial review. The District Court denied the petition, and council member appealed. The Nevada Supreme Court reversed. Certiorari was granted, and the United States Supreme Court reversed and remanded.

On remand, the Nevada Supreme Court held that:

- Ethics in Government Law's recusal provision was not void for vagueness;
- Application of Law's recusal provision for conflicts of interest to city council member did not violate member's due process rights; and
- Conflict of interest recusal provisions did not violate city council member's right of association.

CBA - NEW YORK

In re Bd. of Educ. of Valhalla Union Free School Dist. v. Valhalla Teachers Ass'n

Supreme Court, Appellate Division, Second Department, New York - December 4, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 08076

The Board of Education of the Valhalla Union Free School District entered into a collective bargaining agreement with the Valhalla Teachers Association (VTA). The CBA required, inter alia, that, where a teacher's position has been "excessed" and another position becomes available, the Board must appoint the teacher whose position was excessed to the available position, if the teacher is certified in the teaching area in the available position. At some point at the end of the 2010/2011 school year, a Spanish language teacher retired, and her position became available. On June 28, 2011, the position was filled. In a July 12, 2011, meeting, the Board "excessed" the position of Lisa Petek, a teacher of English as a second language.

The VTA filed a grievance on behalf of Petek, claiming that Petek, who was certified to teach Spanish and had experience teaching the subject in another school district, should have been appointed to the vacant position. The Superintendent of Schools denied the grievance, which was appealed to the Board. The VTA waived its right to a hearing and demanded arbitration pursuant to the CBA's grievance procedures. The Board then filed a petition to permanently stay arbitration, asserting that the CBA provision at issue conflicted with public policy and the mandates of the Education Law. The Supreme Court denied the petition.

The Appellate Division found that the Supreme Court erred in concluding that this dispute was subject to arbitration. The CBA provision at issue mandates that the Board appoint a "certified" teacher, whose position has been "excessed," to a vacant position in the teacher's area of certification. While certification may be a central qualification, the Board has the discretion, under the Education Law, to prescribe additional qualifications (see Education Law § 2573[9]). The CBA, in effect, divests the Board of its discretion by mandating automatic appointment of certified teachers without inquiry into any additional qualifications the Board may have prescribed. This discretion may not be bargained away. Accordingly, the Board's petition for a permanent stay of arbitration should have been granted.

LIABILITY - NEW YORK

Antonetti v. City of New York

Supreme Court, Appellate Division, First Department, New York - November 26, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07836

Plaintiff brought action against city and city board of education, seeking to recover damages for injuries she allegedly sustained on board's premises. The Supreme Court dismissed complaint with respect to board, granted summary judgment in favor of defendants, and denied plaintiff's motion to renew and reargue. Plaintiff appealed.

The Supreme Court, Appellate Division, held that:

- City could not be held liable for torts committed by board;
- Trial court's order denying defendants' motion for leave to amend their answer to deny that board operated premises on which plaintiff's injury occurred became law of the case; and
- Defendants were equitably estopped from seeking dismissal on ground that board did not owe plaintiff special duty.

CBA - NEW YORK

Town of Babylon v. Carson

Supreme Court, Appellate Division, Second Department, New York - November 27, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07980

Town commenced proceeding to vacate arbitration award which reduced penalty it had imposed upon an employee Union and employee cross-petitioned to confirm the award.

The Supreme Court, Appellate Division, held that arbitrator lacked authority to reduce penalty.

Collective bargaining agreement (CBA) only empowered arbitrator to provide employee with remedy upon finding that imposition of discipline was not founded on just cause, and thus, arbitrator lacked authority to reduce penalty after finding just cause. Moreover, stipulation that arbitrator would determine whether hearing officer had considered progressive discipline in course of imposing initial penalty did not confer upon arbitrator independent power to reduce penalty imposed.

ZONING - PENNSYLVANIA

McConville v. City of Philadelphia

Commonwealth Court of Pennsylvania - November 27, 2013 - A.3d - 2013 WL 6190143

City residents brought action against city challenging legality of consent agreement between city and billboard companies and seeking declaratory and injunctive relief. The Court of Common Pleas sustained city's preliminary objections and dismissed residents' complaint. Residents appealed.

The Commonwealth Court held that:

- Resident who actively pursued billboard owner's alleged ordinance violations before Zoning Board of Adjustment (ZBA) had standing to challenge agreement, and

- Another resident who failed to pursue available administrative remedy for alleged violations lacked standing to challenge agreement.

City resident who complained to city about reconstruction of purportedly non-conforming billboard and actively pursued billboard owner's alleged ordinance violations before ZBA had standing to challenge legality of consent agreement between city and billboard companies, where billboard owner withdrew from further participation in ZBA proceedings and used consent agreement to move billboard dispute to alternative, non-public venue in which resident could not participate.

City resident who repeatedly complained to city about reconstruction of purportedly non-conforming billboard but failed to pursue available administrative remedy for billboard owner's alleged ordinance violations lacked standing to challenge legality of consent agreement between city and billboard companies. Although resident claimed that she "lost faith in the system" when city referred to consent agreement in response to resident's final complaint, it was resident's failure to pursue administrative remedy, and not consent agreement itself, that prevented resident from effectively challenging owner's reconstruction of billboard.

GOVERNMENT RECORDS - TEXAS

Fox v. State

Court of Appeals of Texas, Texarkana - December 4, 2013 - S.W.3d - 2013 WL 6244662

After repeated arrests, Robert James Fox resolved to sue the City of Jacksonville under the Texas Tort Claims Act. To this end, Fox created a document captioned, "CLAIM: NOTICE TO CURE/NOTICE OF INTENT TO SUE AS PRESENTED BY AFFIDAVIT OF Robert James Fox." The claim asserted, among other things, that the Jacksonville Police Department commenced a "series of attacks by force of arms" on three separate occasions. Fox further claimed his December 3 arrest and the events leading up to it were the result of retaliation, discrimination, religious persecution, and included torture.

Fox filed his notice among the miscellaneous documents in the County Clerk's Office of Smith County on January 6, 2009. Once filed, a copy of the document became a part of the records of the County Clerk of Smith County. After filing the notice in Smith County, Fox delivered the notice to Betty Thompson, the City Secretary for Jacksonville. After stamping the notice as "received" by the City of Jacksonville, Thompson delivered the notice to the city manager, the city attorney, and the human resources director for the City of Jacksonville. The city manager delivered the notice to Daniel.

On January 23, 2009, Fox was arrested for tampering with a governmental document. The indictment alleged that Fox presented or used a governmental record, i.e., the notice filed with the County Clerk of Smith County, by presenting the notice to the City of Jacksonville, with the intent to harm or defraud the City, with knowledge of its falsity as the document purported "to be a complaint, summons, or other Court Process and/or claiming retaliation and/or discrimination and/or religious persecution and/or torture."

After a jury trial at which Fox represented himself with standby counsel available, Fox was found guilty of tampering with a governmental record and was sentenced to one year of incarceration and fine of $10,000. Fox appealed, claiming, among other things, that the evidence was insufficient to support his conviction. The court of appeals agreed.

The Court of Appeals held that:

- Defendant's delivery of notice of claim to city secretary transformed such notice into governmental record;
- Evidence countering claims in notice of claim did not establish that defendant knew such claims were false when they were made;
- Evidence that defendant knew that allegations of discrimination, religious persecution, retaliation, and torture were false when made was insufficient to support conviction; and
- Evidence that defendant presented notice of claim to city with intent that it be taken as genuine governmental record by presenting or using document filed with county clerk was insufficient to support conviction.

"At most, the foregoing testimony supports the proposition that these witnesses disagree with Fox's allegations. This testimony does not, however, get at the root of the issue—Fox's knowledge that the claims were false. Stated differently, the State was required to prove not only that the specific allegations of discrimination, retaliation, religious persecution, and torture were false, but that Fox was aware that they were false. In this task, the State failed."

"The foregoing evidence is insufficient to prove Fox knew the allegations of discrimination, religious persecution, retaliation, and torture were false. Fox's allegations are merely that—allegations—to be accepted or rejected in a civil proceeding."

Judge Blocks Auction-Rate Arbitration against Goldman.

NEW YORK (Reuters) – Goldman Sachs Group Inc has won a court order blocking a North Carolina utility from moving forward with an arbitration before the Financial Industry Regulatory Authority over the extent the bank misled it about auction-rate securities.

U.S. District Judge Paul Engelmayer in Manhattan entered a preliminary injunction Monday preventing North Carolina Municipal Power Agency Number One from proceeding with the arbitration.

In making his ruling, Engelmayer pointed to decisions earlier in 2013 by two different judges in New York presiding over similar cases over auction-rate securities, in which the arbitrations were blocked because of forum selection clauses in broker-dealer agreements.

"The court agrees with their analysis and reasoning; and applies them here," Engelmayer wrote.

Lawyers for Goldman and the North Carolina utility did not respond to requests for comment.

The case was one of a number filed in the wake of the global financial crisis of 2007 and 2008 by large institutions and investors seeking to bring cases before FINRA.

While arbitration has historically been seen by critics as defense-friendly, some plaintiffs viewed FINRA as attractive because of the speed it hears cases and the difficulty defendants face in overturning an arbitration award on appeal.

Of the 10 largest U.S. securities arbitration awards, seven were issued since 2008, according to Securities Arbitration Commentator Inc.

The case against Goldman stemmed from the North Carolina utility's issuance of $149.7 million in auction-rate securities underwritten by the bank.

Auction-rate securities were a type of bond in which interest rates were set through bidding by investors. The market for the securities froze in February 2008 when banks ceased propping it up with support bids.

The agency, which provides wholesale power to 19 cities in North Carolina, filed the arbitration in December 2012 accusing Goldman of misrepresenting its role in supporting the market.

The bank, through lawyers at Sullivan & Cromwell, subsequently filed a federal lawsuit seeking to block the arbitration.

Among other arguments, the bank contended that the North Carolina utility waived its right to arbitrate by signing a broker-dealer agreement containing a forum selection clause requiring disputes to be litigated in federal court in New York.

'PRECLUDE ARBITRATION'

In a 17-page decision, Engelmayer said the agreement "provides 'positive assurance' that the parties intended to preclude arbitration."

Engelmayer also found the auction-rate securities issuance "constitutes a 'transaction contemplated' by the broker-dealer agreement and, as such, falls within the scope of the forum selection clause."

He said the claims were also tied to the broker-dealer agreement. Goldman acted not just as underwriter but also broker-dealer, he said.

"NCMPAI cannot wish away the terms of the broker-dealer agreement when its claims are based on Goldman's actions as a broker-dealer," Engelmayer said.

The ruling follows a similar case in which Goldman blocked an auction-rate securities arbitration brought by Golden Empire Schools Financing Authority and Kern High School District in California.

Engelmayer relied in large part on that case, decided by U.S. District Judge Richard Sullivan in February, as well as a decision in May blocking an arbitration by a related North Carolina utility against Citigroup Inc.

The claimants in both Goldman cases and the Citigroup dispute are all represented by James Swanson, a lawyer at Fishman Haygood Phelps Walmsley Willis & Swanson.

The firm has brought several other big cases before FINRA against banks related to auction-rate securities. And while judges in New York have tended toward blocking the arbitrations, other courts have been receptive to the arguments of Fishman Haygoods' clients.

In January, the 4th U.S. Circuit Court of Appeals allowed Carilion Clinic of Roanoke, Virginia, to proceed with an arbitration against UBS AG and Citigroup over $234 million in auction-rate securities.

A month later, a judge in Minneapolis refused UBS AG's request to enjoin an arbitration by Allina Health System arising out of $125 million in auction-rate securities it issued in 2007.

The case is Goldman Sachs & Co v. North Carolina Municipal Power Agency Number One, U.S.

District Court for the Southern District of New York, No. 13-01319.

For Goldman Sachs: David Braff and Matthew Schwartz of Sullivan & Cromwell.

For North Carolina Municipal Power Agency Number One: James Swanson of Fishman Haygood Phelps Walmsley Willis & Swanson; and Peter Mougey and James Kauffman of Levin Papantonio Thomas Mitchell Rafferty & Proctor.

By Nate Raymond

Moody's: Muni Distressed and Spec-Grade Issuers Growing, but Remain Small Share of Market.

A small but growing number of municipal issuers have riskier credit profiles with ratings below investment-grade. This group of Moody's-rated municipal issuers reflects the range and severity of credit challenges present in the municipal sector. This special comment updates last year's report on local governments and expands the analysis to include housing, healthcare, higher education, transportation, utilities and project financings. Our key observations are: + A small number of municipal issuers–217 entities, or less than 2%–of nearly 15,000 rated local governments, hospitals, colleges and other tax-exempt bond issuers have debt rated below investment-grade (ranging from Ba1 to C). + This group has grown by 27% since 2008, reflecting the pressures related to the prolonged and lingering effects of the recession. We expect the number of speculative-grade issuers will continue to rise, although likely at a slower pace, and we also expect it to remain a very small share of the rated municipal… – See more at: http://moodys.alacra.com/research/moodys-global-credit-research—PBM_PBM160853#sthash.rkw0A6TS.dpuf

Purchase the full report at:

http://moodys.alacra.com/research/moodys-global-credit-research—PBM_PBM160853

Moody's Revises 2014 Outlook for US Local Governments to Stable from Negative.

New York, December 04, 2013 — Moody's Investors Service has revised its outlook for the US local governments to stable from negative as housing markets continue to stabilize, municipalities' fund balances remain stable, and cities and school districts modify their expenses. Conditions, however, will remain more difficult for local governments than they were before the 2008 recession, and pockets of serious credit pressure remain.

"The 'new stable' will be an era of constrained resources, but the worst is over for local governments in most of the country," says Naomi Richman, a Moody's Managing Director, in the report "2014 Outlook — US Local Governments."

The outlook expresses Moody's expectations for the fundamental credit conditions in the sector over the next 12 to 18 months. A stable sector outlook indicates that Moody's does not expect conditions to change significantly.

Helping credit quality, local government revenues should increase over the next two years as housing markets stabilize, although not all areas are recovering at the same pace.

Most states have also begun to restore funding cuts to local governments as state finances improve. State assistance, however, remains below levels they reached before the recession.

Also supporting the stable outlook is that most local governments have recognized the more difficult fiscal landscapes they face and worked to control costs. They have become more discriminating in labor negotiations, trimmed salaries, and moved to decrease their leverage, says Moody's.

Although costs will continue to escalate because of pension and healthcare obligations, Moody's says the measures local governments have taken to slow increases will be enough for the sector to generally retain its financial stability.

A good part of this stability is based on the durability of property taxes, which have held up well since the economic downturn.

Pockets of credit weakness remain among the local governments, however, and the Moody's report lists the 12 states where downward credit stress lingers for cities, counties, or school districts.

These are areas where local governments have been slow to modify cost structures, the housing recovery lags, or where secular population and economic shifts have led to sustained declines in the tax base. Downgrades are likely to remain concentrated in these regions."Overall, however, the vast majority of local governments retain strong ratings, while a smaller number continue along a downward path," says Moody's Richman.

For more information, Moody's research subscribers can access this report at:

https://www.moodys.com/research/2014-Outlook-US-Local-Governments–PBM_PBM160299.

SIFMA Litigation Advisory Committee Amicus Briefs.

SIFMA's Litigation Advisory Committee files amicus curiae legal briefs on behalf of SIFMA in cases that raise significant policy issues affecting financial markets or common practices within the financial services industry. The Committee also prepares and files comment letters, legal analyses, and other work product, and otherwise advocates industry positions on litigation-related issues. On occasion, the Committee provides guidance to SIFMA in filing lawsuits in SIFMA's name to seek injunctive, declaratory and other relief on behalf of SIFMA member firms.

http://www.sifma.org/committees/office-of-the-general-counsel/litigation-advisory-committee/overview/

Bank of America Settles Municipal Bond Rigging Lawsuit.

NEW YORK (Reuters) – Bank of America Corp has agreed to pay $20 million to settle a lawsuit in which investors accused it of rigging bids for municipal securities, court papers filed on Wednesday show.

The settlement is part of litigation that began in March 2008, and that alleged Bank of America and other banks conspired to artificially fix prices and manipulate markets for so-called municipal derivatives.

Plaintiffs including the City of Baltimore, and the Central Bucks School District and Bucks County Water & Sewer Authority in Pennsylvania said this activity violated antitrust law, and caused them to receive lower interest rates than they would have in a competitive marketplace.

In a filing in the U.S. district court in Manhattan, lawyers for the municipal entities called the settlement "significant and of substantial benefit to the class."

They added that Bank of America faced less liability than other defendants because it cooperated sooner, including by reporting misconduct to the U.S. Department of Justice.

More than one dozen people have pleaded guilty in the Justice Department probe.

Wednesday's unopposed settlement requires court approval. It follows earlier settlements of $44.6 million by JPMorgan Chase & Co, $37 million by Wells Fargo & Co and $6.5 million by Morgan Stanley, court papers show.

Bank of America, JPMorgan, Wells Fargo, General Electric Co and UBS AG have settled related claims brought by various state attorneys general, the papers show.

The total payout for Bank of America is $82.5 million, including the earlier settlement, court papers show.

Bank of America, the second-largest U.S. bank, is based in Charlotte, North Carolina. A spokesman declined to comment.

The case is In re: Municipal Derivatives Antitrust Litigation, U.S. District Court, Southern District of New York, No. 08-02516.

(Reporting by Jonathan Stempel in New York; Editing by Steve Orlofsky)

FINRA Fines Oppenheimer $675,000 and Orders Restitution of More Than $246,000 for Charging Unfair Prices in Municipal Securities Transactions and for Supervisory Violations.

WASHINGTON — The Financial Industry Regulatory Authority (FINRA) announced today that it has fined Oppenheimer & Co., Inc. $675,000 for charging unfair prices in municipal securities transactions and for failing to have an adequate supervisory system. FINRA also ordered Oppenheimer to pay more than $246,000 in restitution, plus interest, to customers who were charged unfair prices. In addition, FINRA fined Oppenheimer's head municipal securities trader, David Sirianni, $100,000, and suspended him for 60 days.

Thomas Gira, FINRA Executive Vice President and Head of Market Regulation, said, "FINRA has no tolerance for firms or individuals who charge customers excessive markups. Oppenheimer charged customers unfair prices in numerous municipal securities transactions and failed to properly supervise municipal securities transactions with its customers."

FINRA found that from July 1, 2008, through June 30, 2009, Oppenheimer, through Sirianni, priced 89 customer transactions from 5.01 percent to 15.57 percent above the firm's contemporaneous cost. In 54 of those transactions, the markups exceeded 9.4 percent. Sirianni purchased municipal securities from a broker-dealer on Oppenheimer's behalf, held the bonds in inventory for at least overnight, and then made the bonds available for resale at an unfair price to the firm's customers. Sirianni was responsible for determining the prices paid by customers in the 89 transactions.

Oppenheimer failed to detect the unfair prices charged. Oppenheimer's supervisory system was deficient because supervisory personnel relied solely on a surveillance report that only captured intra-day transactions to review the fairness of markups/markdowns in municipal securities transactions. From at least 2005 through June 30, 2009, if an Oppenheimer trader purchased municipal securities and held those securities in inventory for a day or longer, the subsequent sales to customers would not populate the firm's surveillance report or be subjected to a fair pricing review.

In concluding this settlement, Oppenheimer and Sirianni neither admitted nor denied the charges, but consented to the entry of FINRA's findings.

Ex-GE Bankers Win Reversal of Convictions for Bid-Rigging.

Three former General Electric Co. (GE) bankers won an appeal of their convictions for defrauding cities and the federal government in a bid-rigging scheme involving municipal bonds.

The federal appeals court in Manhattan reversed the 2012 convictions of Steven Goldberg, Peter Grimm and Dominick Carollo on Nov. 26, without immediately providing a reason. The men were ordered released from prison the next day.

The three were found guilty in May 2012 of conspiracy to commit fraud by manipulating auctions for municipal bond investment contracts. U.S. District Judge Harold Baer sentenced Goldberg to four years and Grimm and Carollo to three years in federal prison.

The defendants appealed, claiming the government waited too long to charge them and that Baer should have declared a mistrial after a key prosecution witness disappeared and tried to kill himself before defense lawyers were able to complete their cross-examination. The witness, Adrian Scott-Jones a former broker for Tradition NA, was later sentenced to 18 months in prison for his role in the case.

A three-judge panel of the appeals court reversed the convictions, saying an opinion will be issued "in due course."

The government claimed that from August 1999 to November 2006 the men gave kickbacks to brokers hired by local governments to solicit bids, win auctions and increase their profits. The charges grew out of a five-year investigation by antitrust prosecutors into the $3.7 trillion municipal bond market.

Bond Money

The case focused on guaranteed investment contracts, which cities buy with the money raised from selling bonds. The arrangement lets the cities earn money on the funds until they're used for projects such as waste treatment plants, hospitals and roads.

The appeals case is U.S. v. Grimm, 12-04310, U.S. Court of Appeals for the Second Circuit (Manhattan). The lower-court case is U.S. v. Carollo, 1:10-cr-00654, U.S. District Court, Southern District of New York (Manhattan).

By Bob Van Voris – Dec 2, 2013 1:19 PM PT

NYT: Playing Pension Games.

Pity the municipal bondholder. Between Detroit's bankruptcy and the rising concerns over unfunded pensions in Illinois and elsewhere, it has been a rough year for many muni bond investors. While the Standard & Poor's municipal bond index has recovered from its September lows, it is still off 2.7 percent for the year.

A big problem for investors in this $3.7 trillion municipal market — mostly individuals — is that financial disclosures by states, cities and other issuers of tax-exempt debt can be decidedly inadequate.

Securities laws require issuers of municipal debt to provide the information investors need to make informed decisions when buying or selling these instruments. But lax disclosure practices remain, making it hard to spot signs of problems like those hobbling some states and cities. Disclosures about the soundness of public pensions, for example, can be essential to weighing the health of municipal bond issuers that are responsible for funding them.

Investors aren't the only ones who need more information. This was on full display last week, when a judge in Detroit suggested in a groundbreaking ruling that the city's pensioners would not get priority in the city's bankruptcy, and their retirement pay could be considered an unsecured obligation.

John R. Mousseau, executive vice president and director of fixed income at Cumberland Advisers, a money management firm in Sarasota, Fla., said: "Detroit's pensioners may be as eligible to take a haircut as the city's bondholders or vendors. This development should demand more disclosure."

But better disclosure practices among tax-exempt issuers are slow in coming, investors say.

If issuers make material misstatements or omit information, they can face civil or criminal penalties. The Securities and Exchange Commission has brought eight cases contending disclosure failings by municipal issuers this year.

A large case last March involved accusations that the state of Illinois misled investors about its unfunded pension. From 2005 to 2009, a period when the state issued $2.2 billion in bonds, the S.E.C. said Illinois failed to warn investors about the pension system's woes and "the resulting risks to the state's financial condition."

Among the details missing from the state's offering statements and filings, the commission said, were those relating to the contributions made by the state to its various pension funds. The commission said investors were not told that the state was contributing far less to the pensions than was required each year. Last week, the Illinois Legislature voted to shore up the pensions by raising the retirement age for some workers and lowering cost-of-living adjustments. The state is facing a pension shortfall of $97 billion.

Illinois settled with the S.E.C., but the agency did not impose fines or penalties. The S.E.C. doesn't typically exact penalties in such cases, its officials said, because the money would come out of a state or city budget, making matters worse.

Disclosures about pensions in the muni arena rank high as an S.E.C. concern, according to John J. Cross III, director of its Office of Municipal Securities. "Our office expects to take a good hard look at pension disclosure issues," he said. "It is a major concern because of the magnitude of unfunded municipal pension liabilities and the size and opaqueness of the investment portfolios."

But the S.E.C. can't dictate disclosure rules related to accounting, Mr. Cross explained. "We can't mandate line-item things, but we could highlight more of what we think is appropriate to address material disclosure issues in the pension area as simply and clearly as possible."

If issuers took the initiative on greater transparency, they'd most likely benefit from reduced borrowing costs, Mr. Mousseau said. Investors who feel confident that they understand the risks in a muni bond will accept a lower interest rate on that security, he explained. "Fewer unknowns in a world fraught with headline risk are a good thing," he said.

Many people who put money in municipal securities are individual investors looking for a small but safe return, not a big gain on a risky investment. So investors not only need more information from tax-exempt issuers, they also need that information to be relatively simple. That's the view of Chris Tobe, a public pension consultant and a former trustee of the Kentucky Retirement System. He is also author of "Kentucky Fried Pensions — Worse than Detroit." He added: "Bad financial practices are a signal of stress down the road and should be disclosed. Investors need to be able to discern between good actors and bad actors."

A crucial metric that should be found in issuers' offering statements and filings is one cited by the S.E.C. in the Illinois case: the shortfall in annual contributions that are needed to keep a pension fully funded. Known as annual required contributions, or ARC, many states fail to meet them.

This has the effect of masking an issuer's financial troubles, Mr. Tobe said. "There almost needs to be a bold statement saying the state is not paying 100 percent of its ARC payments," he said.

He cites a December 2011 offering statement for $72 million of bonds issued by the University of Illinois. Nowhere does it detail the shortfalls in state contributions to the university system's pension fund in recent years. Investors seeking this information must go to the Illinois State Universities Retirement System website.

On that website are annual reports and other revealing filings. The fiscal 2012 report shows that for the last five years, Illinois has contributed only 60 percent of the university system's annual required contributions, on average. With each year the state pays less than the required contributions, the pension fund goes deeper into the hole.

The system has 200,000 members in the defined-benefit plan, 45,548 of whom are retired. The pension's assets available to pay out benefits fell from 44.3 percent to 42.1 percent in 2012, the report said. The system's actuarial liability is $19.2 billion.

I asked officials at the Illinois State Universities Retirement System if they planned to offer investors more clarity in future bond offering statements, given the S.E.C.'s recent case against the state.

Thomas Hardy, executive director for the office of university relations, said the pension's unfunded liability is not the obligation of the university under current state law. But, he said, the Illinois university system's filings would start including figures on unfunded pension liabilities in its 2015

fiscal year, which begins next July. It will do so to comply with new accounting rules issued by the Governmental Accounting Standards Board, he said.

That's a good thing. But many pension problems remain hidden from view. Bondholders lose because "they don't get the interest rate they deserve for the risks they are taking," Mr. Tobe said. "While issuers play these games, it's investors who feel the losses."

By GRETCHEN MORGENSON

Published: December 7, 2013

Obama Threatens to Veto Bill Exempting Private Equity Advisors From Registration.

H.R. 1105 is a step backward from the Dodd-Frank progress made to date, administration says

The Obama administration told members of Congress Tuesday that it would veto H.R. 1105, the Small Business Capital Access and Job Preservation Act, which would amend the Investment Advisers Act of 1940 to exempt nearly all private equity fund advisors from registration.

The bill is up for a vote Wednesday afternoon on the House floor.

There is much more to compliance examination survival than knowing all of the rules. It helps to understand why the rules were put in place—and to recognize that examiners are not the enemy.

Differences Between State and SEC Regulation of Investment Advisors

States may impose licensing or registration requirements on IARs doing business in their jurisdiction, even if the IAR works for an SEC-registered firm. States may investigate and prosecute fraud by any IAR in their jurisdiction, even if the individual works for an SEC-registered firm.

"The legislation effectively provides a blanket registration and reporting exemption for private equity funds, undermining advances in investor protection and regulatory oversight implemented by the Securities and Exchange Commission under Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act," the administration told Rep. Robert Hurt, R-Va., the bill's sponsor, and its 12 co-sponsors.

The administration said that it was "committed to building a safer, more stable financial system," and that H.R. 1105 represented "a step backwards from the progress made to date, given that private equity fund advisors have been filing reports with the SEC for over a year."

Moreover, the administration said that the bill's passage "would deny investors access to important information intended to increase transparency and accountability and to minimize conflicts of interest." H.R. 1105 "would exempt private equity funds from the disclosure requirements that the Congress laid out in Wall Street Reform to allow regulators to assess potential systemic risks."

Private equity funds are already subject to less stringent reporting requirements than other types of private funds and to an annual, rather than quarterly, filing requirement.

In addition, private fund advisors with less than $150 million in assets under management are

exempted from registration and subject only to recordkeeping and reporting requirements.

By Melanie Waddell, ThinkAdvisor

Washington Bureau Chief

Investment Advisor Magazine

SIFMA Submits Comments to SEC on Issues Regarding Securities Industry Processors, Provides Industry Views on Critical Market Structure Reviews.

New York, NY, December 5, 2013 – SIFMA today submitted a letter to Mary Jo White, chair of the Securities and Exchange Commission (SEC), in response to her recent statement on the SEC's review of Securities Industry Processors (SIPs) following the August 22nd SIP outage that led to a halt in trading of NASDAQ-listed securities.

SIFMA commends the SEC's leadership in examining this vital market structure issue and its call for the self-regulatory organizations (SROs) to work with broker-dealers as they craft proposals for enhancing SIPs. In addition, SIFMA appreciates the SROs' initial engagement with our members as they formulated their preliminary proposals. SIFMA's letter provides the Association's viewpoint on the five workstreams for enhancing SIPs.

SIFMA's letter also notes more broadly that the August 22nd SIP outage is a symptom of the outdated system by which critical market data is controlled and distributed. SIFMA urges the SEC to work with the SROs and industry members to examine SIPs more broadly and develop action plans that (1) revamp governance, (2) increase transparency in operations, and (3) provide for increased efficiencies.

"The events of August 22nd highlight the critical nature of the SIPs in maintaining fair and orderly markets and the need for regulators and market participants to collaborate to make sure the markets are operationally resilient," said Randy Snook, executive vice president, business policies and practices. "Further, we believe the time is time is right for a broader review of SIPs to address concerns with transparency and governance. The current system for distributing market data was developed over 30 years ago. It's time to reevaluate what's best for the markets."

SIFMA believes it is imperative that the broker-dealer and investment communities play an active and substantive role with the SROs as the SIP enhancement process moves forward from identifying preliminary concepts to developing concrete proposals. Collaboration between SROs and the broker-dealer community is essential to crafting comprehensive proposals that strengthen the resiliency of equity market structure in the United States.

SIFMA's letter, which includes detailed comments on the five SIP workstreams identified by the SEC, is available here:

http://www.sifma.org/issues/item.aspx?id=8589946502

MSRB: Advancing Municipal Advisor Regulation.

The MSRB is advancing a regulatory framework for municipal advisors that includes rules for professional conduct, professional qualification examination requirements as well as education and outreach to municipal advisors. In light of the September 18, 2013 final registration rule from the Securities and Exchange Commission (SEC) defining who is a municipal advisor, which takes effect January 13, 2014, the MSRB has prioritized the development of municipal advisor rules in five key areas. They are: fiduciary duty and fair dealing standards of conduct of municipal advisors to municipal entities and obligated persons; supervision requirements for municipal advisory firms and their employees; rules to address the potential for pay-to-play activities by municipal advisors; limitations on gifts and gratuities to employees of municipal securities issuers and other market participants; and duties of solicitors.

The MSRB will seek public comment before proposing rules to the SEC for approval. The MSRB also is continuing to work with the municipal advisory industry to develop a professional qualification exam to establish standards of competency for municipal advisors.

IRS Tells Arizona City Its BABs Don't Qualify for Subsidy Payments.

WASHINGTON — The Internal Revenue Service has told Avondale, Ariz. that it believes $29.8 million of Build America Bonds it issued in 2009 do not qualify for subsidy payments because of tax law violations.

Avondale, which disclosed the IRS' Nov. 12 proposed adverse determination letter in an event notice posted on the Municipal Securities Rulemaking Board's EMMA system this week, said the subsidy payments for the BABs are estimated to be between $675,000 and $54,000 per year for 25 years. It said the loss of the subsidy payments, if retroactive, could total about $10.83 million from issuance through maturity.

The IRS claims the bonds don't qualify for the subsidy payment because the BABs are private-activity bonds and because of alleged issue price problems, according to the event notice.

But Avondale is disputing the IRS' proposed determination. "The city does not agree with the positions taken by the service in the notice and plans to exercise appeal rights," the city said in its event notice.

The BAB program was created under the American Recovery and Reinvestment Act and allowed state and local governments to issue taxable bonds in 2009 and 2010 and receive subsidy payments from the Treasury Department equal to 35% of the interest costs.

The BABs were issued to finance street improvements, sewer improvements and a multi-purpose recreation center, according to their official statement. Kevin Artz, Avondale's finance and budget director, said that under a lease agreement, a private company operates the recreational center and shares some of the profits with the city.

Under federal tax law, BABs cannot be private activity bonds. Bonds are private activity bonds if more than 10% of a project is used by private parties and more than 10% of the debt service is paid for or secured by private parties.

Artz also said the IRS thinks the BABs were issued with more than a de minimis amount of premium,

generally defined as 0.25% of the stated redemption price at maturity multiplied by the number of complete years from the bond's issue date to its maturity date.

The IRS' letter does not affect the ad valorem tax levy required on taxable property in Avondale to pay debt service on the bonds, the city said in its event notice.

Greenberg Traurig LLP served as bond counsel for the deal and Robert W. Baird & Co. served as underwriter, according to the official statement. Stone & Youngberg, now a division of Stifel Nicolaus & Co., served as financial advisor.

At least two other issuers have settled tax disputes over BABs with the IRS.

In 2012, Half Moon Bay, Calif. agreed to reduce its subsidy payments to 29% for $10.2 million of BABs it issued in 2009 after the IRS claimed the bonds violated the tax law because they were not used for capital expenditures.

A few months ago, the Nebraska Public Power District agreed to pay $350,000 to settle IRS charges that some of the bonds were sold at a price greater than the de minimis amount of premium.

BY NAOMI JAGODA

DEC 4, 2013 4:11pm ET

State Treasurer Cites Potential Adverse Effects of Proposed Regs on Arbitrage Restrictions.

Washington State Treasurer James McIntire has expressed concern with proposed regs (REG-148659-07) modifying the rules for determining the issue price of tax-exempt bonds for arbitrage purposes, warning that the regs would impose burdensome and potentially unworkable market monitoring obligations on municipal issuers.

November 27, 2013

Internal Revenue Service

P.O. Box 7604

Ben Franklin Station

Washington DC 20044

November 26, 2013

Re: Comments on REG-148659-07

To whom it may concern:

I am writing on behalf of the State of Washington to comment on the Internal Revenue Service's proposed regulations released on September 13, 2013, (REG-148659-07) specifically the proposed provisions modifying the long-standing rules for determining issue price (the "Proposed Issue Price Rules").

Based on our experience as a large and frequent issuer of municipal bonds, we strongly believe the Proposed Issue Price Rules, if enacted as drafted, would increase the cost of capital for the State of Washington, result in higher arbitrage yields, increase the amount of interest income exempt from Federal tax and increase the potential for profitable "flipping" of tax-exempt bonds in the secondary market. Further, the Proposed Issue Price Rules would impose burdensome and potentially unworkable market monitoring obligations on municipal issuers. It is critical to the continued effective functioning of the municipal bond market that any revised issue price rules retain a "reasonable expectations" provision and maintain the definition of "substantial amount" or "safe harbor amount" at or close to 10%.

Eliminating the "reasonable expectations" provision and changing the 10% "substantial amount" definition to a 25% "safe harbor" provision creates strong incentives for underwriters and issuers to price bonds at interest rates that ensure that 25% of each maturity of a bond issue will be sold to end investors at the list price immediately on the date of sale. Qualifying for the 25% safe harbor in this way eliminates (a) the costs and time commitment required for issuers, underwriters and/or legal counsel to monitor and interpret secondary market trading information over multi-week time periods; (b) the need to perform onerous and potentially complex yield adjustment calculations; (c) the risk of being required to make "yield reduction payments;" and (d) an underwriter's risk that it could be accused of abusive "flipping" of bonds post sale. But pricing bonds to be able to qualify for the 25% safe harbor will undoubtedly result in higher interest rates.

In negotiated sales, the State of Washington negotiates with underwriters to achieve the lowest possible all-in cost for a bond issue, given market conditions at the time of sale. Frequently, this process results in certain maturities being fully or partially underwritten by the underwriting group rather than being sold immediately to end investors on the day of sale. The practical requirement to immediately sell 25% of each maturity to end investors will greatly diminish our ability to negotiate for higher prices or interest rates that are lower than the rates required to sell 25% of each maturity. This will generally lead to higher all-in interest costs on negotiated bond sales and higher arbitrage yields. It also generates more interest-income exempt from Federal tax. Moreover, this will create more opportunities for end investors or underwriters to "flip" bonds at lower interest rates and higher prices in the days and weeks after a bond sale.

The Proposed Issue Price Rules could even more severely disrupt the functioning of the competitive new issue market by introducing significant uncertainty and administrative burden. This will have a material negative impact on our state's cost of capital as Washington issues nearly all of its debt through competitive sales. In competitive bond sales, there are very limited opportunities for dealers to "pre-market" upcoming issues to investors. Underwriters bid for entire bond issues at prices they expect but have no assurance will enable them to sell most of the bonds to the public and other dealers. The practical requirement to ensure that 25% of each maturity will be sold quickly to the public at list price will motivate underwriters to bid lower prices and higher yields.

In addition to the significant adverse impact the Proposed Issue Price Rules would have on borrowing costs of issuers like ourselves, there are significant impediments to their accurate application in any case. Market information dissemination platforms provided by the MSRB (EMMA), Bloomberg and Thompson-Reuters (TM3) provide reasonably good information on secondary market trading, but the information is not 100% accurate. Further, the information provided can be difficult to interpret given that no dealer or investor names are disclosed, trade amounts greater than $5 million par amount are not disclosed until one week following the trade date and trade details can be revised long after the trade information is originally submitted. Further, trade tracking can be complicated by intra-entity trades and distribution affiliation agreements that exist among some dealer firms.

In conclusion, we are strongly in agreement with the wide range of market participants who believe that the Proposed Issue Price Rules will penalize issuers who negotiate the best deals with underwriters, result in higher arbitrage yields for tax purposes and increased amounts of interest income exempt from Federal tax. We firmly believe that the current rules, coupled with prudent IRS enforcement, are and will continue to be highly effective in achieving the interrelated goals of minimizing borrowing costs for issuers, minimizing arbitrage yields and minimizing the amount of interest income exempt from Federal tax.

Sincerely,

James L. McIntire

State Treasurer

State of Washington

Olympia, WA

IRS Releases Federal and State Reference Guide Publication.

The IRS has released Publication 963 (rev. Nov. 2013), Federal-State Reference Guide, which provides state and local government employers a complete reference source for Social Security and Medicare coverage guidance and FICA tax withholding issues.

http://www.irs.gov/pub/irs-pdf/p963.pdf

Insurance Industry Unhappy About New Identified Mixed Straddle Regs.

The insurance industry does not support new proposed (REG-112815-12) and temporary (reg. section 1.1092(b)-6T; T.D. 9627) regulations on identified mixed straddles (IMSs) because they limit insurers' ability to use capital loss carryforwards, speakers said at a December 4 IRS hearing on the regs.

The insurance industry does not support new proposed (REG-112815-12) and temporary (reg. section 1.1092(b)-6T; T.D. 9627) regulations on identified mixed straddles (IMSs) because they limit insurers' ability to use capital loss carryforwards, speakers said at a December 4 IRS hearing on the regs.

Peter J. Bautz of the American Council of Life Insurers and Jeffrey Maddrey of PricewaterhouseCoopers LLP commented on the new regulations' adverse effect on the insurance industry, particularly the asymmetrical tax treatment for bond holders.

Maddrey said he believes the existing regulations, which have been in place since 1985, allow insurance companies to use expiring loss carryforwards. "We continue to believe these transactions are entirely appropriate under current law, especially considering the context of the way insurance companies operate their business," he said.

A mixed straddle exists when one leg of the straddle is marked to market while the other leg is not.

Insurers use an IMS when they have expiring loss carryforwards; the IMS preserves an insurer's ownership in the bond but allows it to recognize gain to offset the expiring losses. The proposed and temporary regulations eliminate a taxpayer's ability to recognize gain on an IMS, freezing the gains when the taxpayer enters the mixed straddle and recognizing the gains only when the position is ultimately disposed.

Bautz conceded that there are other ways for insurers to recognize gains, such as by selling appreciated bonds and buying similar ones from the market. However, he said, those alternatives significantly increase transaction costs.

The commentators noted that asymmetrical bond treatment affects the insurance industry in particular because the industry's investment portfolios are generally all bonds. Asymmetry exists in bond taxation because gain is generally ordinary while losses are capital. The industry uses the identified straddle rules to trigger gain that offsets expiring bad debt capital losses. According to Maddrey, taxpayers trigger gain when interest rates are declining, thus increasing the value of the bonds. He argued that "buy and hold" investors need a way to trigger gain when they have expiring capital losses and that the existing regulations provide just that.

Maddrey also said that while other types of investors have the luxury of a diversified portfolio with various liquid assets, insurance companies generally purchase bonds with the intention of holding them to maturity. That means that other investors are able to trigger gain more easily to offset expiring losses.

Treasury initially released the proposed and temporary regs on August 2 and made them immediately effective. However, commentators raised concerns regarding an immediate effective date, and Treasury later delayed the applicability until final regulations are released. The final regs are expected to be released by the end of June 2014.

by William R. Davis

IRS: 2014 Standard Mileage Rates.

Notice 2013-80 provides the optional 2014 standard mileage rates for taxpayers to use in computing the deductible costs of operating an automobile for business, charitable, medical, or moving expense purposes. This notice also provides the amount taxpayers must use in calculating reductions to basis for depreciation taken under the business standard mileage rate, and the maximum standard automobile cost that may be used in computing the allowance under a fixed and variable rate (FAVR) plan.

Notice 2013-80 is available at:

http://www.irs.gov/pub/irs-drop/n-13-80.pdf

IRS Releases Publication on Charitable Contributions.

The IRS has released Publication 526 (rev. 2013), Charitable Contributions, which explains how to claim a deduction for charitable contributions and discusses organizations that are eligible to

receive deductible charitable contributions.

http://www.irs.gov/pub/irs-pdf/p526.pdf

Contracts and Grants between Nonprofits and Government.

This brief summarizes the results of the 2013 National Survey of Nonprofit-Government Contracts and Grants. Expanding on the 2010 study of human service nonprofits, we examine most types of nonprofits with expenses of $100,000 or more. This report documents the size and scope of government financing, administration of contracts and grants, and nonprofit perceptions of problems and improvements in these processes and reports on the financial status of nonprofits at the end of the Great Recession. Nearly 56,000 nonprofits have government contracts and grant, and we estimate that governments paid $137 billion to nonprofits in 2012.

Read the full report at:

http://www.urban.org/UploadedPDF/412968-Contracts-and-Grants-between-Nonprofits-and-Government.pdf

Sarah L. Pettijohn, Elizabeth T. Boris

Capping Charitable Deduction Will Reduce Giving, AEI Predicts.

Although recent tax increases may stimulate charitable giving in the short term, enacting a proposed limit on the charitable deduction would significantly reduce donations and result in “serious — maybe catastrophic” harm to many nonprofits, the American Enterprise Institute predicted in a December report.

http://www.aei.org/papers/economics/fiscal-policy/taxes/the-great-recession-tax-policy-and-the-future-of-charity-in-america/

EOs Should Pay Attention to Tax Reform, Panel Says.

Although prospects of passing a tax reform package anytime soon are slim, tax-exempt organizations should be alert to what tax reform could mean to them, panelists at a program on legislation and exempt organizations said December 4.

Although prospects of passing a tax reform package anytime soon are slim, tax-exempt organizations should be alert to what tax reform could mean to them, panelists at a program on legislation and exempt organizations said December 4.

Alexander L. Reid of Morgan, Lewis & Bockius LLP, moderating a program sponsored by the District of Columbia Bar Taxation Section’s Exempt Organizations Committee, said that based on his recent conversation with a House Ways and Means Committee tax counsel, the exempt organizations portion of the tax reform bill being drafted by committee Chair Dave Camp, R-Mich., is significant

and far-reaching. Topics that have been the subject of committee hearings in recent years — colleges and universities, political and lobbying activities, and commercial activities, among others — are areas that members have found interesting, Reid said, adding, “Anything that there has been a hearing on is on the table.”

Reid also said that although committee members want to preserve the deduction for charitable contributions, “they also want to envision the [charitable] sector as it is today and maybe as it will be in the next five to 10 years.”

Alan Lee, Ways and Means Democratic tax counsel, who spoke on his own behalf, said there are rumors that Camp is not committed to maintaining the charitable deduction in its current form, although that does not mean he wants to repeal it or cap it at 28 percent, as has been proposed before.

Camp, who had originally intended to introduce and have his committee mark up a tax reform bill by the end of 2013, told reporters December 4 that that won’t be possible. (Related coverage .)

Lee said that while a bill next year is possible, it would be difficult to act on tax reform when there are so many budget issues to deal with. “Getting tax reform through the House, I think, is a very difficult prospect,” Lee said. “Once members start realizing this is not just a rate reduction exercise and that this actually has real impacts because these are real policies, you’re going to have a lot of members in the Republican caucus taking a step back and wanting to really take a closer look at the bill.”

Alexander Brosseau, Democratic tax policy analyst for the Senate Budget Committee, said that for a tax reform bill to succeed, it would have to have bipartisan support. “Certainly, coming out of the House, it has to, so long as the Senate is controlled by Democrats and the White House [is] the same,” he said.

by Fred Stokeld

TE/GE Memo Revises Procedures for Verifying Membership Requirements of Veterans' Organizations.

The IRS has issued a memorandum (TEGE-04-1113-21) revising examination guidelines for section 501(c)(19) tax-exempt veterans’ organizations to eliminate an agent’s discretion to request military service discharge certificates at the start of exams for purposes of determining whether the organization meets statutory membership requirements.

November 26, 2013

Affected IRM: IRM 4.76.26

Expiration Date: Nov 26, 2014

MEMORANDUM FOR

ALL EO EXAMINATIONS MANAGERS,

ALL EO EXAMINATIONS REVENUE AGENTS

FROM:

Nanette M. Downing

Director, EO Examinations

SUBJECT:

Verification of Statutory Membership Requirements

of Veterans' Organizations

This memorandum revises examination guidelines for tax-exempt veterans' organizations described in section 501(c)(19) of the Internal Revenue Code (IRC) by eliminating an agent's discretion to request DD Forms 214 at the outset of examinations for the purpose of determining whether the organization meets statutory membership requirements.

IRC sections 501(c)(19) and 170(c)(3) provide statutory membership requirements for certain tax-exempt veterans' organizations. Compliance with these requirements has a direct effect on the qualification for tax-exempt status and the deductibility of contributions.

In order to confirm whether a veterans' organization meets statutory membership requirements, IRM 4.76.26.12(1) provides that examining agents may request, among other documents, DD Forms 214, Certificate of Release or Discharge from Active Duty, of veterans' organizations. DD Form 214 is a military service discharge certificate issued to veterans, providing proof of military service. However, DD Form 214 also contains private information, such as medical information.

Effective immediately, if an agent needs to determine the composition of membership of a veterans' organization, the agent shall initially request and collect from the organization four sets of documents, as follows:

1. Membership list(s) that contain the names of the members, the military service dates, and the status of each individual member. This status information is to indicate whether the member is active duty, veteran, cadet, or spouse. The organization may provide list(s) from its affiliated parent organization.

2. A document that shows the dues structure and classes of memberships.

3. The documentary information used by the organization to create the membership list(s) noted above. Organizations should be informed that to satisfy this request they may provide membership applications, membership cards, or other similar documents, other than DD Form 214.

4. Documents showing the organization's policies and procedures on how it decides an individual is eligible for membership, including documents which show the means by which it enforces its membership requirements.

If an agent possesses information that contradicts documentary information provided or if the organization fails to satisfy a reasonable request, agents may then request DD Forms 214 or other discharge documents from the organization in order to ascertain compliance with the federal tax laws cited herein. DD Forms 214 must include the name, department, component and branch of service, and record of service dates. All other personal information may be redacted.

The contents of this memorandum will be incorporated in IRM 4.76.26.

Please submit your questions to Mandatory Review via *TEGE EO Review Staff.

NYT: Detroit Ruling on Bankruptcy Lifts Pension Protections.

DETROIT — In a ruling that could reverberate far beyond Detroit, a federal judge held on Tuesday that this battered city could formally enter bankruptcy and asserted that Detroit's obligation to pay pensions in full was not untouchable.

The judge, Steven W. Rhodes, dealt a major blow to the widely held belief that state laws preserve public pensions, and his ruling is likely to resonate in Chicago, Los Angeles, Philadelphia and many other American cities where the rising cost of pensions has been crowding out spending for public schools, police departments and other services.

The judge made it clear that public employee pensions were not protected in a federal Chapter 9 bankruptcy, even though the Michigan Constitution expressly protects them. "Pension benefits are a contractual right and are not entitled to any heightened protection in a municipal bankruptcy," he said.

James E. Spiotto, a lawyer with the firm Chapman & Cutler in Chicago who specializes in municipal bankruptcy and was not involved in the case, said: "No bankruptcy court had ruled that before. It will be instructive."

For people in Detroit, the birthplace of the Motown sound and of the American auto industry, Judge Rhodes's decision that the city qualified for bankruptcy amounted to one more miserable, if expected, assessment of its woeful circumstances. The city has lost hundreds of thousands of residents, the judge said, only a third of its ambulances function, and its Police Department closes less than 9 percent of cases.

"This once proud and prosperous city can't pay its debts," said the judge, who sits in United States Bankruptcy Court for the Eastern District of Michigan. "It's insolvent. It's eligible for bankruptcy. But it also has an opportunity for a fresh start."

Appeals were expected to be filed quickly. At least one union filed a notice of appeal on Tuesday, and other unions and pension fund representatives said they were considering contesting the outcome as well. But the ruling also allows Kevyn D. Orr, an emergency manager assigned in March by the state to oversee Detroit's finances, to proceed swiftly with a formal plan for starting over — a proposal to pay off only a portion of its $18 billion in debts and to restore essential services, like streetlights, to tolerable levels.

Mr. Orr said he intended to file the formal blueprint, known as a "plan of adjustment," by the first week of 2014. That plan could include efforts to spin off city departments to outside entities, to sell city assets and to reinvest in failing city services. Mr. Orr has said his goal is to bring Detroit, the nation's largest city ever to find itself in bankruptcy, out of the court process by next fall.

"We have some heavy work ahead of us," Mr. Orr said Tuesday.

Around Detroit, leaders sounded somber but mildly hopeful tones. Mayor-elect Mike Duggan said that Tuesday was a day no one wanted to see, but that the city now needed to move forward. And Dave Bing, the departing mayor, whose tenure in office has been consumed by the financial distress, said it was inevitable that Detroit would ultimately be found insolvent. "We are now starting from

Square 1," he said.

Municipal workers and retirees said they were shaken by the developments, and unsure what to expect. Any cut to pensions, many said, would be crushing.

"The impact of this is going to be catastrophic on families like mine on fixed income," said Brendan Milewski, 34, a Detroit firefighter who was seriously injured in an arson in 2010 and said he received a pension of $2,800 a month from the city. "Retirees are going to be put out of house and home. They're not going to be able to afford a car, food or medicine."

Bruce Babiarz, a spokesman for the Detroit Police and Fire Retirement System, was blunt in his assessment. "This is one of the strongest protected pension obligations in the country here in Michigan," he said. "If this ruling is upheld, this is the canary in a coal mine for protected pension benefits across the country. They're gone."

Since July, Mr. Orr, with approval from Gov. Rick Snyder, a Republican, has sought bankruptcy protection, and most here agree that the city's situation is dire: Annual operating deficits since 2008, a pattern of new borrowing to pay for old borrowing, miserably diminished city services, and the earmarking of about 38 percent of tax revenues for debt service. A city that was once the nation's fourth largest has dropped to 18th, losing more than half of its population since 1950. The city was once home to 1.8 million people but now has closer to 700,000.

Judge Rhodes rejected arguments by unions and other opponents that the bankruptcy filing was the result of secret and unconstitutional decisions made by Mr. Snyder and others. He agreed with opponents of the bankruptcy that the city had failed to make "good faith" attempts to negotiate with creditors, but said that such negotiations had been "impracticable."

In perhaps the most contested portion of the case, the judge made it clear that federal bankruptcy law trumps the state law when it comes to protections for public employees' pensions, making the pensions of 23,000 retirees fair game for the city to include in its plan of adjustment. But while the judge said pensions could not be treated differently from other unsecured debt, he said the court would be careful before approving any cuts in monthly payments to retirees.

That seemed to be of little comfort to union leaders, who denounced the ruling as illegal and immoral.

Lee Saunders, the president of the American Federation of State, County and Municipal Employees, said the ruling, in essence, put a "bull's eye" on the backs of municipal workers and retirees by saying pensions are vulnerable. "It sets a bad precedent for cities that are under economic distress to look at doing the easy thing: to attack the workers and attack the retirees," Mr. Saunders said.

Experts said the decision seemed unlikely to prompt a rush of bankruptcy filings by cities, but was likely to give cities more leverage over pensions in negotiations before bankruptcies. Detroit has included $3.5 billion in unfunded pension liabilities in its larger mound of debt, and city lawyers say it can simply no longer afford its pension plan.

For his part, Mr. Orr said he had a difficult reality to present to retirees. "There's not enough money to address the situation no matter what we do," he said. "That is clear." At another point, he said of the pension question, "We're trying to be very thoughtful, measured and humane about what we have to do.

By MONICA DAVEY, BILL VLASIC and MARY WILLIAMS WALSH

Published: December 3, 2013

NYT: California City's Return to Solvency, With Pension Problem Unsolved.

Stockton's Struggle: Before Detroit, Stockton, Calif. was the largest city to file for bankruptcy. Now, Stockton is working its way back, and city leaders see lessons in its ordeal for other struggling municipalities.

Battered by a collapse in real estate prices, a spike in pension and retiree health care costs, and unmanageable debt, this struggling city in the Central Valley has labored for months to find a way out of Chapter 9. Now having renegotiated its debt with most creditors, cobbled together layoffs and service cuts and raised the sales tax to 9 percent from 8.25 percent, Stockton is nearly ready to leave court protection.

But what Stockton, along with pretty much every other city in California that has gone into bankruptcy in recent years, has not done is address the skyrocketing public pensions that are at the heart of many of these cases.

"No city wants to take on the state pension system by itself," said Stockton's new mayor, Anthony Silva, referring to the California Public Employees' Retirement System, or Calpers. "Every city thinks some other city will take care of it."

While a federal bankruptcy judge ruled this week that Detroit could reduce public pensions to help shed its debts, Stockton has become an experiment of whether a municipality can successfully come out of bankruptcy and stabilize its finances without touching pensions. It is an effort that has come at great cost to city services and one that some critics say will simply not work once the city starts trying to restore services and hire 120 police officers it promised to get the sales-tax increase passed.

"They wanted to get out of bankruptcy in the worst possible way, and that's just what they did," said Dean Andal of the San Joaquin County Taxpayers Association, which fought the sales-tax increase. "If they go ahead and hire those new police officers, the city will be back in insolvency in four years."

Stockton declared fiscal emergencies in 2010 and 2011, giving it the power to renege on annual pay increases for city workers. City services were slashed. Hundreds of municipal workers were laid off. And many retirees who had been promised health coverage for life learned that they would have to begin paying for it.

"That was the hardest part," Councilman Elbert Holman said, "looking people in the eye and telling them sorry, you are losing your health care, but it's absolutely necessary."

By the time the judge found Stockton eligible for Chapter 9 bankruptcy on April 1, the city had about $147 million in unfunded pension obligations and about $250 million in debt from various bond issues.

The years of fiscal emergency and bankruptcy have left their mark, including a skyrocketing crime rate, which city officials and many residents attribute to staffing and service cuts in the Police Department.

“I suddenly realized a few years ago that, just in my tiny, two-block neighborhood, there had been 11 residential burglaries in the previous nine months,” said Marci Walker, an emergency room nurse.

Cities go bankrupt for many reasons: a collapse in real estate prices, a spike in pension and retiree health care costs, a burden of debt from expensive city projects. Stockton has experienced all three.

When real estate prices shot up in Silicon Valley in the last decade, many commuters decided that Stockton’s cheaper housing was worth the long commute to the Bay Area. That drove up local housing prices, so when the bubble burst it had a bigger impact, giving Stockton one of the nation’s highest foreclosure rates.

City leaders had also gone on a construction spree during the flush years, building a new sports arena, a minor-league baseball stadium and a marina. Citizens still bitterly mention the 2006 concert that opened the arena, where Neil Diamond was paid $1 million to perform.

And through it all, the pension costs for city workers — particularly for police officers and firefighters, who can retire early and draw on those pensions for decades — kept going up.

No part of the city has been left unscathed. Ms. Walker’s comfortable neighborhood near the University of the Pacific campus was hit with rising crime almost immediately after the police layoffs. “When the economy got bad and we lost police officers, it all started,” she said.

So she started the Regent Street Neighborhood Watch, the first of more than 100 such organizations to sprout up in the city in the last few years.

“We don’t confront anybody, we just let them know that we know they’re there,” Ms. Walker said. She added, “Criminals do not like eyeballs on them.”

While the rising crime rate had the biggest effect on the city, other service cuts were also felt, including deteriorating streets and closed libraries and community centers. The other consequences of the downturn — shuttered storefronts, crumbling infrastructure, empty downtown sidewalks — only added to the sense of decline.

“There was just this perception that the city was not safe,” Police Chief Eric Jones said. “Downtown was impacted. Many people were reluctant to go down there.”

The crime problem is a big reason Stockton chose to keep paying into the Calpers system even as it pared other costs, including its payments to bondholders. Officials say that if the city cuts the rate at which its workers build up their pensions, workers will leave — especially police officers who were recruited with the promise of large, early pensions.

Last year, Stockton asked Calpers for a “hardship exemption,” allowing it to slow its contributions. The huge state pension system said no, fearing that if Stockton fell behind, it might never catch up.

Now, even before the ink is dry on Stockton’s proposed blueprint for getting out of bankruptcy, skeptics are worried that the plan is not comprehensive enough to solve its problems and that city leaders will not fulfill their promise to use some of that money to hire police officers.

City officials insist their plan will work. “We got the tax, and thank God it passed,” Councilman Holman said. “I have confidence that the numbers line up.”

Nor does the Detroit ruling this week make Stockton want to revisit pension reductions. Connie Cochran, a city spokeswoman, said that city workers had already seen their pay and retiree health

benefits cut. In addition, she said, Calpers told the city that its only option was to pay a $970 million termination fee to leave the system, and Stockton could not afford it.

Mayor Silva said the city's plan would help it out of bankruptcy sometime late next spring, if all goes well, after the judge hearing the case has time to rule on its fairness and viability and negotiations can be completed with one final bondholding creditor.

"We will lose the stigma of bankruptcy, and it will buy us time," he said.

One of three new members elected to the City Council in November, Michael Tubbs, said he was convinced that the bankruptcy plan would work, providing $28 million to $30 million in revenue each year for the next decade and allowing the city to pay down its debt while still hiring police officers.

"I am incredibly optimistic," said Mr. Tubbs, 23, who grew up in Stockton.

Chief Jones said he was counting on the 120 new officers and planned to hire 40 a year for the next three years. In 2008, Stockton had 441 police officers. By this year, the force had fallen to 350, the second-lowest per capita staffing level in the country. The result, he said, is that all violent crimes rose in the city, which had 58 homicides in 2011 and 71 in 2012, both records.

Even before the sales-tax increase passed, Chief Jones said he had decided to reinstate some of the community outreach programs that were curtailed during the budget crunch, even if that meant slower response times for nonviolent crimes.

"We had to tell the community to be patient, we're going to focus on violent crime," he said.

The impact was immediate. As of mid-November, there had been only 28 homicides this year.

Still, bondholders complain that Calpers will get 100 cents on the dollar for its city debt, while they must make do with much less. Following months of negotiations, most of Stockton's bondholders said they would not try to block the city's plan, but Franklin Templeton Investments was girding for a fight, possibly strengthened by the Detroit ruling that federal bankruptcy law trumps state pension guarantees.

Two Franklin funds hold about $35 million of bonds that Stockton issued in 2009 and are now in default. Stockton is proposing to pay the two Franklin funds just $95,000 to discharge all the remaining debt on those bonds, amounting to less than a penny on the dollar.

Douglass Wilhoit Jr., chief executive of the Stockton Chamber of Commerce, agreed that "the elephant in the room is the pension stuff." But he said that he was confident this plan would ease the city out of bankruptcy and start a process that would inevitably come to include some sort of pension changes. "Over all, honestly, I think the bankruptcy process has been a positive experience for Stockton," he said. "We are going to come out of it stronger and better."

By RICK LYMAN and MARY WILLIAMS WALSH

Published: December 5, 2013

Supreme Court Opens Door Wider for Collecting Internet Sales Taxes.

By declining to hear a challenge to New York State's "Amazon law," the U.S. Supreme Court has now helped pave the way for states and localities to collect more of the roughly $13 billion that they're owed each year in uncollected sales taxes on Internet purchases. That should encourage other states to pass similar laws, though only federal policymakers can solve the problem comprehensively.

First, some background. Previous Court decisions held that a merchant must have a "physical presence" — generally, employees or facilities — in a state before that state could require the company to charge sales taxes to its customers there. Although buyers are legally obligated to pay directly to their states any applicable taxes that the merchants don't charge, very few do.

But the Court has also said that people who aren't employed by the merchant but help market its goods constitute a "physical presence." So, New York enacted a law requiring Internet merchants with in-state "affiliates" to charge sales taxes on all taxable sales to New York customers. "Affiliates" are companies and individuals that link to an Internet retailer from their own site and receive a commission when someone clicks on the link and buys something on the merchant's site.

Amazon and Overstock, two of the many large retailers that operate affiliate programs, challenged New York's law. But New York's high court upheld the law, and yesterday the U.S. Supreme Court let that decision stand.

More than a dozen states (including New York) have enacted laws requiring Internet retailers with in-state affiliates to charge tax on all taxable sales in the state (see map). Now that New York's law has withstood all legal challenges, other states may follow its lead. Amazon laws can chip away at the problem even if they don't represent a full solution, I've explained.

A federal law that empowered states to require all sellers to collect sales tax would:

- Help states and localities maintain public services and possibly reinvest in services they cut during the recession — rehiring teachers, freezing college tuition increases, and boosting road and bridge maintenance, for example.
- Create a more level playing field for local store-based retailers, which do collect sales taxes.
- End the unfair sales tax treatment of consumers who don't shop online, including low-income people who lack computers, Internet access, or credit cards.

The federal Marketplace Fairness Act, which represents a fair and comprehensive solution to the problem of uncollected tax on Internet and other interstate sales, passed the Senate in April but is stalled in the House. Until it moves, states need to do what they can to address the problem themselves. The Supreme Court has now cleared a big obstacle in their paths.

WSJ: Borrowing Maneuver Catches Flak.

'Scoop and Toss' Involves Selling New Debt to Pay Off Existing Bonds

A budget-stretching tactic employed by strapped local governments from California to Puerto Rico is coming under market scrutiny, amid fears that Detroit's record bankruptcy filing could presage further pain for municipal-bond investors.

The maneuver, called “scoop and toss,” involves selling new long-term debt to raise funds to pay off maturing bonds, effectively extending the timetable for retiring municipal borrowings. Refinancings that aim to reduce interest rates typically keep the same maturity schedule.

The practice, which has been around for decades, helps cities, states and other local entities to stay current on their obligations as they try to claw out of one of the deepest economic downturns since the Great Depression.

The debt sales often offer above-market interest rates that appeal to many bond buyers at a time of slow economic growth, easy Federal Reserve policy and low rates on relatively safe investments such as U.S. Treasury securities and bank accounts.

But some observers warn that scoop-and-toss refinancings add to interest costs while allowing civic managers to overlook structural economic difficulties. Investors purchasing the debt take on the risk that the securities will lose value, as they did in Detroit’s $18 billion Chapter 9 bankruptcy case.

“It’s never a good sign to see this,” said John Loffredo, portfolio manager of the MainStay Tax Free Bond Fund. Mr. Loffredo said his firm recently started buying Puerto Rico bonds that carried third-party insurance guaranteeing repayment, citing the high yields.

Among the chief practitioners of scoop and toss is Puerto Rico, which since 2006 has relied on new bond sales and loans to help balance its budget and pay off old bonds coming due. The island commonwealth has restructured about $4 billion in debt from its main operating budget since then. About $70 billion of Puerto Rico debt is outstanding.

Yields on Puerto Rico’s bonds have risen sharply this year, making it much more expensive to sell debt to investors, following rating-company downgrades. Puerto Rico bond prices are down about 16% in 2013.

In 2011, Puerto Rico sold $356 million of bonds that begin maturing in 2024. Some of the proceeds were used to pay off a bond from 1989 that was maturing in 2011—in effect turning a 22-year bond into a 35-year one.

Lyle Fitterer, head of tax-exempt investments at Wells Capital Management, which oversees about $33 billion in municipal-debt investments, said he would like to see cheaper bond prices or a sustainable economic recovery plan before he boosts his firm’s small Puerto Rico holdings.

“The scoop-and-toss strategy might be a good strategy for a short-term solution, if you have a temporary economic recession,” he said. “But obviously, the longer it goes on, the more difficult it is to argue that it’s a good long-term solution.”

Officials in the U.S. territory are seeking to put the island on stronger fiscal footing through tax increases and entitlement reform, and seek to end scoop and toss by 2015. “In the past, it had been restructuring after restructuring,” Puerto Rico Treasury Secretary Melba Acosta said recently in an interview. “We are moving away from that.”

Puerto Rico officials have said they can make it through this fiscal year without borrowing, and have been drawing down a line of credit from the Government Development Bank, according to Fitch Ratings.

U.S. companies frequently issue new bonds to pay off old debt. But investors typically worry less about corporate-debt issuers because the money can be used to expand the business, which can benefit bond buyers.

“If a corporation started going into decline, you aren’t going to see the debt rolling over and being refinanced,” said Stan Garstka, accounting professor at the Yale School of Management.

To be sure, there are signs of progress for municipalities. Over the summer, Moody’s Investors Service raised its outlook for U.S. states to stable from negative, saying “the slowly improving U.S. economy continues supporting state revenues and reserves.”

Other municipal entities have employed scoop-and-toss strategies recently. Suffolk County, N.Y., which recently declared a fiscal emergency, last year sold through an authority about $38 million in bonds backed by tobacco revenues to help cover other debt payments that were due in 2012 and 2013.

In California, the Foothill/Eastern Transportation Corridor Agency, which operates toll roads in Orange County, is looking into a scoop and toss that would pay off bonds from 1999 and extend the maturity of the debt by 13 years to 2053. The bonds are backed primarily by revenues from tolls, but traffic on the roads has grown slower than expected.

Fitch said the plan makes it easier for the authority to pay off its bonds. In 2040, the year the authority will have to pay the most, payments fall to $243 million from $297 million under the new plan. Without scoop and toss, Fitch said it would likely downgrade the outstanding bonds to junk status.

By MIKE CHERNEY

Dec. 2, 2013 8:40 p.m. ET

WSJ: Volcker Rule Could Raise Municipal Borrowing Costs, California Treasurer Says.

Worry Is That Banks May Boost Fees to Sell Municipal Securities

Implementing the Volcker rule could result in higher borrowing costs for municipalities as banks may boost fees they charge to sell securities that finance state budgets, schools and other public needs, California’s top treasury official said on Wednesday.

California Treasurer Bill Lockyer said he thought banks may boost fees on bond deals as one way to offset profits lost due to the Volcker rule. Regulators are set to vote on a final version of the rule next week. It is part of the 2010 Dodd-Frank financial overhaul legislation, and intends to curb banks from making risky bets on their own behalf.

“Borrowing costs may increase,” Mr. Lockyer said. The concern is that if banks don’t make a profit from proprietary trading, they will boost the fees they charge to customers, just as they might to anyone with a checking account, he told The Wall Street Journal. Mr. Lockyer was attending a conference in New York of the National Association of State Treasurers.

Mr. Lockyer’s comments come as the municipal bond market suffered this year amid fears of rising interest rates and the ripple effects of large defaults, such as Detroit’s. Investors have redeemed a record $51 billion from municipal bond funds this year, according to Lipper, and some analysts predict the trend to continue into 2014.

California's bond issues are routinely oversubscribed, suggesting the state is gaining, not losing, investor confidence, Mr. Lockyer said. But there are "segments where there is greater perceived risk," he said.

While higher fees are a concern, inflation and interest rates are still the "more substantial" long-term concerns surrounding the state's borrowing costs, he said.

By AL YOON

NYT: Pension Ruling in Detroit Echoes West to California.

The ruling by Judge Steven W. Rhodes, who is presiding in Detroit's bankruptcy case, that public pensions are not protected from cuts could alter the course of bankrupt cities like Stockton and San Bernardino, Calif., that had been operating under the assumption that pensions were untouchable.

Stockton's bankruptcy case, for instance, is further along than Detroit's, and until Tuesday it seemed likely to leave public pensions fully intact. Stockton sought bankruptcy protection last year and has already filed a plan of debt adjustment with the bankruptcy court in Sacramento. Its plan, which is subject to court approval, would leave city workers' pensions unchanged: They would continue to accrue benefits at the same rate as they did before the bankruptcy. (A new state law does permit Stockton to provide smaller pensions to workers hired after Jan. 1.)

That is a better deal than workers at bankrupt companies often receive. City leaders based it on the thinking that public workers had already sacrificed enough, given that the plan of adjustment already calls for them to give up contractual pay increases and valuable retiree health benefits.

Opponents of that plan have raised concerns that it would not save enough money. They point to the city of Vallejo, Calif., which spent three years in bankruptcy, emerged in 2011 without touching its workers' pensions, and is again having trouble balancing its budget. Many cities in California are struggling with pension costs because of a big benefit increase in 1999 that has been much more expensive than anticipated. State laws make it hard for cities to raise taxes enough to keep up with the costs, and because pensions are considered untouchable, local officials have had to reduce services, like policing, to balance their budgets.

Some say the situation is unsustainable. Last month, another city, Desert Hot Springs, said that its pension costs were unaffordable and that it might have to declare bankruptcy.

Early in Stockton's bankruptcy, several financial institutions tried to block its case, arguing that it had not negotiated as required with the California Public Employees' Retirement System, known as Calpers, which administers pensions for many municipalities. Those motions were denied, and in the months since then, all but one of the institutions have reached settlements with the city and stopped arguing about pensions.

The one remaining creditor is Franklin Templeton Investments, a mutual fund company that holds about $35 million worth of Stockton's bonds. Stockton's plan of adjustment proposes to give Franklin less than a penny on the dollar for its bankruptcy claims, according to court filings. Federal bankruptcy law allows for such "cramdowns" — deals that force big losses on unwilling creditors — but for a cramdown to be approved by a bankruptcy judge, it must meet certain requirements. It must be "fair and equitable," for example, and it must not discriminate against one creditor in favor of others.

Even before Tuesday, Franklin was warning that it would challenge to Stockton's plan. Documents on file with the court suggest it was planning to argue that no plan could be "fair and equitable" if Calpers were paid in full while Franklin received less than a cent on the dollar.

"Their argument just got strengthened," said Karol K. Denniston, a bankruptcy lawyer at Schiff Hardin in San Francisco who has been advising a taxpayers group that formed after Stockton declared bankruptcy. Referring to the judge's decision in Detroit, she said, "Franklin Templeton is going to have a lot to say about this ruling."

Another bankrupt city in California, San Bernardino, has taken a different tack from Stockton. It wants to reduce its pension obligations in bankruptcy and has already stopped sending its regular contributions to Calpers. That is something a company in Chapter 11 bankruptcy would normally do, but Calpers is fighting the move in San Bernardino's Chapter 9 case. It argues that the city does not sincerely wish to adjust its debts, as required by bankruptcy law, but simply wants to "languish" in court. Calpers maintains that pensions cannot be reduced in California and that the only way for a city to freeze its plan is to pay a giant fee.

So far, San Bernardino's bankruptcy judge, Meredith A. Jury, has ruled against Calpers and refused to grant it an expedited appeal to the United States Court of Appeals for the Ninth Circuit. The city's creditors are now trying to come up with a settlement plan in mediation.

"This gives them clarity," Ms. Denniston said. "It changes the dynamic at the negotiating table in a major way, because we've now had a bankruptcy judge say you can impair pensions. We're going to go through a huge period of uncertainty because that's going to be appealed, but for right now, that's the law."

Judge Rhodes's decision in Detroit's bankruptcy case was also noteworthy for what it did not say: It did not offer specific instructions for how large or small any pension cuts should be. Instead, he said the question should be resolved in mediation, which is already running in Detroit but has so far borne little fruit.

James E. Spiotto, a bankruptcy lawyer at Chapman & Cutler in Chicago, said officials in other cities might want to change course now if they worried that they might have promised more than they could deliver.

"If you're not able to pay, the best thing to do is address it now," Mr. Spiotto said. "Pay as much as you can without adversely affecting the future of the city."

By MARY WILLIAMS WALSH

Illinois General Assembly Passes "Landmark" Pension Changes.

CHICAGO — The Illinois General Assembly approved an overhaul to the state's pension system billed by its backers as a "landmark" reform that will stabilize both the system and the state's fiscal foundation.

Critics attacked the plan as being either too hard on workers or too weak to repair a system saddled with $100.5 billion of unfunded liabilities. Some lawmakers also raised concerns over whether the plan can withstand the legal challenge expected from unions after Gov. Pat Quinn signs the package.

After two years of false starts and political bickering among lawmakers over how to restructure the pension system, Gov. Pat Quinn had nothing but praise for the plan and lawmakers who approved it.

“This landmark legislation is a bipartisan solution that squarely addresses the most difficult fiscal issue Illinois has ever confronted,” Quinn, who faces re-election next year, said shortly after the vote. “This bill will ensure retirement security for those who have faithfully contributed to the pension systems, end the squeeze on critical education and healthcare services, and support economic growth.”

In addition to praising the General Assembly’s leaders and members of the conference committee appointed in June to assemble a compromise plan, the Democratic governor said: “I salute the members of the General Assembly who showed great political courage by voting yes for pension reform.”

The plan is estimated to trim $160 billion off state payments owed to the system, with the goal of reaching full funded status in 30 years primarily by cutting benefits and infusing the system with supplemental state contributions in addition to scheduled annual payments. The changes would trim about $21 billion of the state’s unfunded liability tab.

The state’s five funds are currently just 39.3% funded. Contributions have been rising steadily, consuming 20% of the fiscal 2014 general fund budget, up from 12% in fiscal 2010. Under the existing funding schedule that level would rise to 26% in 2045.

The state’s pension woes and political impasse over how to overhaul the system have driven the state’s credit deterioration, with its ratings now the weakest among states, at the low-single-A level.

In addition to tarnishing its own reputation with investors, the state’s credit struggles have driven up the costs of borrowing for most Illinois-based issuers, especially those dependent on the state for aid, such as its public universities. It’s called by market participants the “Illinois penalty” or “Illinois effect.”

The state hopes to see a positive impact on its interest rates from the action as soon as next week when it takes competitively bids on a $350 million taxable general obligation issue. The three major rating agencies all assign a negative outlook to the credit. It’s unclear whether an outlook shift would occur so quickly as analysts digest the impact of the reforms and a legal challenge looms.

The vote in each chamber was nearly simultaneous and followed several hours of debate Tuesday, less than a week after the General Assembly’s leaders announced they had agreed on a plan.

Without action, House Minority Leader Rep. Jim Durkin, R-Western Springs, warned the rating agencies could “move our credit rating even lower.”

While some lawmakers warned the package didn’t go far enough to warrant a label of “comprehensive” reform, others said it went too far. Sen. William Delgado, D-Chicago, called the changes “morally wrong, morally corrupt” because of the impact on public sector employees and retirees.

The Senate tally came first with 30 members voting for the legislation which was presented in the form of a conference committee report and 24 against and three voting present. The yes votes included 20 Democrats and 10 Republicans.

The House voted 62 to 53 in favor of the report with one voting present. The yes votes included 47 Democrats and 15 GOP members. Democrats hold a majority in the General Assembly.

BY YVETTE SHIELDS

Liabilities Growth Still Outpacing Assets, Report Finds.

The largest U.S. public retirement systems had an aggregate 0.9% growth in assets in fiscal year 2012, but a 4.1% growth in liabilities, according to the Public Fund Survey released Wednesday. In aggregate, assets increased to $2.67 trillion, while liabilities reached $3.63 trillion at the end of fiscal year 2012.

The survey, sponsored by the National Association of State Retirement Administrators and the National Council on Teacher Retirement, covers 85% of the state and local government retirement systems. The 126 plans in the survey had a median funding level of 73.1%.

The survey found most retirement systems have recognized investment losses incurred in 2008 and 2009, or are close to doing so. Retirement systems with fiscal years ending Dec. 31 had a one-year median return of 13.1%, while those with a June 30 fiscal year-end, which represent three-fourths of the plans, had a median return of 1.2%.

“We’re right on the cusp of two things: having recognized the market losses of ’08 and ’09, and the beginning of recognizing the strong gains experienced in the last months,” said Keith Brainard, NASRA research director, in an interview.

For the first time in the survey’s 12-year history, the median employee contribution rate changed, to 5.7% from 5%. Increasing employee contribution rates has been the most common change in recent years, along with an upward trend in employer contributions, Mr. Brainard said.

BY HAZEL BRADFORD

Bond Buyer: Indiana Finance Authority Named Deal of the Year.

The Indiana Finance Authority won The Bond Buyer’s 12th annual Deal of the Year award Thursday night for its Ohio River Bridges East End Crossing Project.

The public-private partnership was funded through the sale of around $675 million of tax-exempt private activity bonds, including $195 million of milestone PABs, a new security type that can serve as a template for other P3 concessions.

The deal — the largest P3 PAB offering completed to date in the U.S. municipal market — “financed a large infrastructure project that fulfilled a public need. It was innovative, replicable, and took an immense amount of cooperation across a number of sectors to come to fruition,” said Michael Scarchilli, editor in chief of The Bond Buyer, when presenting the award at a ceremony held at the Waldorf Astoria hotel in New York City.

The transaction also won the Deal of the Year award for the Midwest region, making this the second consecutive victory for that region. It also marked the first time the Deal of the Year award was given to a P3 transaction. WVB East End Partners, a consortium comprised of Vinci Concessions, Walsh Investors and Bilfinger Project Investments, was the private sector partner.

The East End Crossing was Indiana's portion of the Ohio River Bridges project, which necessitated a bi-state agreement between Indiana and Kentucky to develop two bridges, one in downtown Louisville to be developed by Kentucky, and the East End Crossing in Indiana. Kentucky plans to sell $747 million of tax-exempt and taxable debt in the week of Dec. 9 to fund its portion of the project.

This year's Freda Johnson Award honoring Trailblazing Women Issuers was given to Philadelphia Treasurer Nancy Winkler. The award recognizes a woman affiliated with an issuer who has been a leader, innovator and mentor.

For more than a decade, the editors of The Bond Buyer have selected the outstanding municipal bond transactions for special recognition, honoring the issuers who overcame myriad challenges to bring these deals to fruition.

This prestigious competition has drawn nominations that represent the full diversity of the communities and public purposes that are served by the municipal finance market. The 2013 awards, which considered deals that closed between Oct. 1, 2012, and Sept. 30, 2013, drew a record number of nominations for transactions ranging in size from a few million to billions of dollars.

Nominees this year faced stiff competition from a host of qualified deals. The transactions considered included financings of hospitals, housing, toll roads and airports. Deals ranged from cost-saving refundings representing turnaround stories for issuers once in distress, to alternative energy financing projects to a host of innovative public-private and public-public partnerships. In fact, this year, The Bond Buyer honored three P3 transactions with Deal of the Year awards, a first for this ceremony.

This year, issuers in eight categories were selected as Deal of the Year awardees. The honorees were first revealed Nov. 4-8 via individual video announcements at BondBuyer.com, along with additional information on the awards.

The other finalists were:

NORTHEAST REGION

The Allentown Neighborhood Improvement Zone Development Authority's sale of $224 million in tax revenue bonds to fund a new 8,500-seat arena, which would act as a catalyst for further redevelopment in downtown Allentown, Pa. The bonds were authorized under the Neighborhood Improvement Zone Act, under which certain taxes paid by qualified businesses within the NIZ are pledged as security towards the debt.

Allentown's 50-year concession lease of the city's water and sewer systems through a public-public partnership with the Lehigh County Authority, which generated a significant up-front payment to stabilize the city's rapidly growing unfunded pension liability and provided a foundation and path for fiscal stability.

*The two Allentown transactions, which represent a turnaround story from an economically suppressed area, were co-honorees in the Northeast category.

SOUTHWEST REGION

Dallas and Fort Worth, Texas' $2.73 billion of refunding and new-money transactions on behalf of Dallas/Fort Worth International Airport. The series of financings — mainly to finance the airport's Terminal Renewal and Improvement Program — accounted for 28% of national airport issuance over the Deal of the Year judging period.

SOUTHEAST REGION

Harnett County, N.C.’s $20 million sale of limited obligation bonds, used to purchase the general obligation debt of the county’s seven small, unrated water and sewer districts, which had difficulty accessing the public capital markets individually.

FAR WEST REGION

The California Pollution Control Financing Authority’s $733 million sale of water furnishing revenue bonds, issued on behalf of the San Diego County Water Authority — to fund the Carlsbad Desalination Project. The deal, executed as a public-private partnership with Poseidon Resources, represents the first-ever project financing of a seawater desalination plant in the municipal market, establishing a new asset class for investors.

NON-TRADITIONAL FINANCING

The New York Metropolitan Transportation Authority’s $200 million sale of principal at-risk variable-rate notes, sold via conduit issuer MetroCat. The proceeds effectively collateralize three years of reinsurance coverage from MetroCat, a newly created Bermudan special purpose insurer, for storm surge losses incurred by the MTA through its captive insurer. The innovative, non-traditional structure allowed the MTA to close its storm surge insurance gap, following $4.9 billion in storm surge-related losses as a result of Superstorm Sandy.

HEALTH CARE FINANCING

The billion-dollar financing program resulting from the New Jersey Medical & Health Sciences Restructuring Act, which provided for the dissolution of the University of Medicine and Dentistry of New Jersey, the defeasance of its $668 million in outstanding debt, and the transfer and integration of UMDNJ assets to Rutgers University, Rowan University, and University Hospital. The complex transaction represented the largest higher education merger in United States history, and provided for the complete overhaul of New Jersey’s system of public health sciences education and research.

SMALL ISSUER FINANCING

The New York State Energy Research and Development Authority’s $24.3 million sale of residential energy efficiency financing revenue bonds. NYSERDA’s collaboration on the transaction with the New York State Environmental Facilities Corp., which guaranteed the bonds through its State Revolving Fund program, provided the first-ever linkage between clean water and clean energy programs. Aggregating and applying QECB allocations, along with the SRF wrap, significantly lowered the bond debt service and established a nationally replicable model.

Moody's Teleconference: Outlook for US States and Local Governments.

Thursday, 12-Dec-2013 – Thursday, 12-Dec-2013

3:00 PM EST / 12:00 PM PST

On Thursday, December 12, 2013, Moody’s Investors Service will hold a teleconference to discuss our revision of the US Local Governments sector outlook to stable from negative, and our stable outlook for the US State Governments sector.

The following topics will be discussed:

Local Governments

- Revised outlook to stable after maintaining negative outlook since 2009
- Stable outlook applies to most of the sector, but pockets of credit pressure remain
- Local governments' "New Stable" reigns as the era of constrained resources persists, but the worst is over
- Housing markets, property tax revenues and state funding have mostly stabilized as local governments are controlling costs; however, pension remain a drag

State Governments

- Stabilizing national economy supports growth in state revenues and reserves
- Aggregate state revenue growth continues, exceeding many fiscal 2013 state budgets
- Highly rated states are rebuilding reserves to level consistent with long-term median
- Areas of caution remain, as some states continue to feel pressure

You must register for the event in order to receive the dial in numbers.

A replay of this discussion will be available via a post event follow up email once the event has been completed.

Register at:

https://www.cvent.com/events/moody-s-teleconference-outlook-for-us-states-a-d-local-governments/registrati-n-7A9E99FB192F4C54AA9694E6EA7F60EB.aspx?i=276e5569-ff28-41dd-8b57-1746a949da19

Fitch U.S. Public Finance 2014 Outlook Teleconferences Schedule.

Fitch Ratings will host a series of teleconferences on its 2014 U.S. Public Finance Outlooks, including state & local governments, education & non-profits, transportation, healthcare, public power, and water & sewer.

View the full teleconference schedule:

https://www.fitchratings.com/creditdesk/press_releases/detail.cfm?pr_id=810136

Dial-in number for U.S. participants is +1-877-467-8597.

Dial-in number for international participants is +1-706-643-6296

SIFMA Insurance and Risk Linked Securities Conference.

March 4-5, 2014

Grand Hyatt

New York, NY

SIFMA's annual Insurance-and-Risk-Linked Securities Conference is the leading forum for updates, strategies and insights into the top industry issues in the coming year.

A range of topics will be explored – from identifying and mobilizing new sources of capital, examining reinsurance's evolving role – to emerging legal issues and broadening the industry's scope.

Learn more and register at:

https://mbrservices.net/ConferenceRegistration/MeetingRegistration.aspx?meetingid=1184

Morgan Stanley's Outlook for Munis in 2014 isn't Pretty.

In most likely scenario, bonds expected to lose as much as 4.1%

This year has been tough for municipal bonds, and unfortunately for investors, it's going to get worse before it gets better, according to Morgan Stanley Research.

Morgan Stanley forecasts an 80% chance that municipal bonds will lose money again next year, primarily because of rising interest rates. Year-to-date through Tuesday, the average national intermediate-term bond fund is down 2.16%.

Morgan Stanley's base-case scenario, detailed in its "Municipal Bond Outlook for 2014" research note, calls for municipal bonds to lose between 1.7% and 4.1% next year as interest rates rise due to a strengthening economy and the beginning of the Federal Reserve's move to cut back on its asset purchasing program, known as quantitative easing.

The forecasters believe there is a 60% chance that the base case will play out.

Bond prices move in the opposite direction of interest rates, and Morgan Stanley's base case calls for the yield on the 10-year Treasury to rise to 3.45% next year. It was trading at 2.83% Wednesday following a strong November jobs report from payroll processor ADP Inc.

The U.S. private sector added 215,000 new jobs in November, according to ADP, better than the 173,000 expected by economists.

The worst-case scenario for municipal bonds, which Morgan Stanley says has a 20% probability, would see U.S. economic growth continuing to surprise on the up side and the 10-year Treasury yield topping 4%. In that case, munis could lose between 6.2% and 7.8% next year.

Muni bonds have developed an "outsized vulnerability" to interest rates relative to other fixed-income assets, according to Michael Zezas, a municipal bond strategist at Morgan Stanley.

"In recent years, muni performance hinged on lower rates moves, an improving credit story and investor thirst for yield," he wrote in the research note. "This resulted in valuations that amplified munis' vulnerability to higher rates."

At muni bonds' current yields, it would only take an interest rate move of 34 to 44 basis points to cause returns to go negative. That's better than it was at this time in 2012, when muni bonds only

had a cushion of about 18 basis points.

The good news is that as rates rise, the cushion will continue to grow and eventually the falling price of municipal bond funds will translate into yields that are enticing enough to even out the reduced interest rate risk, Morgan Stanley predicts.

Enticing yields might be the only thing that can get investors back into muni bonds. Right now, they're in the midst of their worst selloff ever. November was the ninth straight month in which municipal bond funds suffered net outflows, according to the Investment Company Institute. Over that time, more than $57 billion was pulled out.

There is still a chance municipal bond performance will be good next year, Morgan Stanley said, but it would require the U.S. economy to continue its sluggish growth without any improvement.

By Jason Kephart

Detroit Bankruptcy Decision May Mean Big Trouble for Muni Holders.

The U.S. Bankruptcy Court decision Tuesday that Detroit can proceed with its bankruptcy filing was a warning shot for municipal bond investors around the country.

Detroit's bankruptcy, unlike past municipal bankruptcies, treats general obligation (GO) muni bondholders as unsecured creditors. The city already has defaulted on some GO bonds.

"If they allow Detroit bondholders to be impaired significantly, this could cause in Michigan and maybe also municipalities across the country their GO bondholders to have the perception that this could happen anywhere," Patrick Stoffel, municipal bond analyst at Wells Fargo Advisors, told CNBC.

"That could increase borrowing costs for municipalities and issuers. It could cause prices of GO bonds to be affected in the market."

But Richard Larkin, director of credit analysis at HJ Sims, said Detroit won't necessarily start a trend.

"If this is the future for Detroit, it doesn't necessarily set the tone for the future for other state and local governments," he said in a commentary obtained by CNBC.

"Detroit has yet to feel the fiscal pain of being treated as a pariah by the municipal bond market over the long term."

Judge Steven Rhodes ruled that Detroit can use bankruptcy to cut employee pensions and relieve itself of other debts, handing a defeat to the city's unions and retirees.

The judge ruled pensions can be altered just like any contract because the Michigan Constitution does not offer ironclad protection for employee benefits.

"This once proud and prosperous city can't pay its debts. It's insolvent," Rhodes said in formally granting Detroit the largest public bankruptcy in U.S. history. "At the same time, it also has an opportunity for a fresh start."

The court ruling throws into question whether retired public workers' pensions can be reduced.

"It does send a message to retirees that you can't assume that because there's a state constitutional protection that your pension can't be cut," Peter Henning, a professor of constitutional law at Wayne State University in Detroit, told Bloomberg.

Elsewhere, analyst Mark Palmer of BTIG Research told Forbes.com that the Detroit ruling is actually good news for municipal bondholders and the companies that insure them.

"The fact the judge in the Detroit bankruptcy case ruled that pensions are not sacrosanct, and they can be cut, translates into potentially higher recoveries for bondholders in future bankruptcies," Palmer told Forbes. "The assumption was pensions were super-senior, and bondholders would get any residual value beyond the pensions."

By Dan Weil

UBS Puerto Rico Faces 'Whopper' of a Problem Over Muni Bond Funds.

Individual claims on BrokerCheck show one big-name rep has $50.9 million in investor complaints

The woes stemming from UBS AG's unit in Puerto Rico over the sale of local, closed-end municipal bond funds have landed squarely in the lap of UBS brokers and financial advisers in the island commonwealth.

The market for Puerto Rico's $70 billion muni debt bottomed out over the summer after Detroit filed for bankruptcy in July. UBS Financial Services Inc. of Puerto Rico is a significant player in the muni-debt market in Puerto Rico, having packaged and sold $10 billion in proprietary closed-end bond funds through the end of last year.

Investor complaints filed with the arbitration unit of the Financial Industry Regulatory Authority Inc. have now begun to surface on individual broker profiles on BrokerCheck.

And at least one broker is facing a staggering amount of damages stemming from the investor claims.

Jose Gabriel Ramirez Jr., who is nicknamed "The Whopper," according to plaintiff's attorneys, in October and November had seven investor complaints totaling $50.9 million, according to his BrokerCheck report.

The seven complaints range from $1 million to $26 million in alleged damages, with investors' allegations the same in each case: "Client alleges overconcentration and misrepresentations concerning closed-end funds. Time frame: 2004/2008-present."

UBS spokeswoman Karina Byrne said that Mr. Ramirez is on administrative leave and that the firm will defend itself vigorously in these arbitration claims.

He was a prominent UBS broker in Puerto Rico, said one plaintiff's attorney.

"There's no question that [Mr. Ramirez] had a big book of business," said Scott Silver, a plaintiff's attorney with three claims against various UBS advisers over its Puerto Rico closed-end funds. "We have several cases involving the issue of UBS bank loans from other advisers."

Since the bond funds began to lose their value, several plaintiff's lawyers have said that clients were encouraged by UBS brokers to take out non-purpose loans to buy closed-end funds.

As the value of the closed-end bond funds plummeted by 50% to 60% over the second half of the year, clients with margin accounts have been required to sell their muni bond funds or individual bonds to pay interest on those loans.

By Bruce Kelly

- *Expedia, Inc. v. City of New York Dept. of Finance* – Court upholds constitutionality of expansion of city's tax on hotel occupants to include fees earned by online travel companies.
- *Internatl. Bhd. of Elec. Workers Local Union No. 8 v. Bd. of Defiance Cty. Commrs.* – Appeals court concludes that federal funds were used in the construction of a public improvement and, therefore, the project was exempted from Ohio prevailing wage laws.
- *Hartney Fuel Oil Co. v. Hamer* – The Supreme Court of Illinois concludes that the "Jurisdictional Questions" regulations embodied in 86 Ill. Adm.Code 220.115, 270.115, and 320.115 which define situs for retail occupancy tax where purchase order acceptance occurs, with sale at retail and the purchaser taking delivery within the state, impermissibly narrowed the local ROT Acts, contrary to legislature's intention to allow local governments to collect taxes from retailers in their jurisdictions, and, thus, the regulations were invalid.
- NYT: Detroit Is Ruled Eligible for Bankruptcy.
- Missouri Brings New Case Against Moberly Bond Underwriter.
- GASB Resolves Transition Issue in Pension Standards.
- 5 Big Regulatory Changes Coming in 2014.
- Bond Insurers Charging Less to Take on Risk.
- NABL Seeks Guidance on Political Subdivision Question.
- In the middle of a fairly routine eminent domain action, the court drops this deadpan stunner, "Plaintiff appears to allege that these incidents led to the deprivation of his constitutional rights, which caused physical and emotional injuries, but other parts of the complaint suggest that Plaintiff may be dead."
- And finally, should you find yourself in the Catskills, drop in for the "monthly pagan brunch" or the "monthly, more secular, bisexual brunch." Your call.

INVERSE CONDEMNATION - CALIFORNIA

Smith v. County of Santa Cruz

United States District Court, N.D. California., San Jose Division - November 26, 2013 - Not Reported in F.Supp.2d - 2013 WL 6185238

Plaintiff brought Fifth Amendment regulatory takings claim for eminent domain through inverse condemnation. Specifically, his allegations suggested that Defendants improperly tagged Plaintiff's property for violating local housing code. However, as Plaintiff failed to pursue inverse condemnation remedies in state court, he failed to allege the second element of an as-applied takings claim under the Fifth Amendment.

The remarkable part of this case is the following deadpan statement by the court, "Plaintiff appears to allege that these incidents led to the deprivation of his constitutional rights, which caused

physical and emotional injuries, but other parts of the complaint suggest that Plaintiff may be dead."

Plaintiff was granted leave to amend, with the stipulation that, "Any amendment should clear up the ambiguity in the current complaint with regard to whether Plaintiff is alive."

LIABILITY - COLORADO

Rieger v. Wat Buddhawararam of Denver, Inc.

Colorado Court of Appeals, Div. A - November 21, 2013 - P.3d - 2013 COA 156

Tree trimmer brought action against temple premises owner after he was struck and injured by falling tree limb. After temple designated lead volunteer as a nonparty at fault, tree trimmer filed amended complaint naming lead volunteer as a defendant, voluntarily dismissing lead volunteer from the action on immunity grounds, and seeking to hold temple vicariously liable for lead volunteer's negligence. The District Court granted temple's motion for summary judgment, and tree trimmer appealed.

The Court of Appeals held that:

- Tree trimmer was a "volunteer";
- Tree trimmer was a "licensee"; and
- As a matter of first impression, temple was not vicariously liable under the Colorado Premises Liability Act for lead volunteer's negligence.

Volunteer Service Act provision stating that nothing in the Act "shall be construed to bar any cause of action against a nonprofit organization" or "change the liability otherwise provided by law of a nonprofit organization" arising out of an act or omission of a volunteer exempt from liability under the Act does not create a new cause of action that does not otherwise exist under the law, nor does it expand landowner liability beyond that recognized in the Colorado Premises Liability Act.

Temple premises owner was not vicariously liable under the Colorado Premises Liability Act for lead volunteer's negligence in allowing tree limb to fall on volunteer tree trimmer while conducting tree trimming on temple property, as tree trimmer was a licensee rather than an invitee, and temple did not create any danger, nor did it provide any supervision or control over the project or the volunteers.

LIABILITY - CONNECTICUT

Stroud v. Mid-Town Tire and Supply, Inc.

Appellate Court of Connecticut - December 3, 2013 - A.3d - 2013 WL 6173860

On March 24, 2008, the Middletown Board of Education (Board) hired Mid–Town to move a storage container located on the premises of Middletown High School. Mid-Town positioned a tow truck on the east side of Huntinghill Avenue and stretched a winch cable from the tow truck, across the width of Huntinghill Avenue, to the storage container positioned near the western side of the road. You see where this is headed, right?

Plaintiff police officer, unaware that the winch cable was running across his lane of travel, violently collided with the cable. Plaintiff brought a negligence claim against Mid-Town and the Board.

Defendant filed a motion to dismiss the third count of the plaintiff's complaint on the ground that the allegations set forth therein amounted to "a cause of action against a municipality or its employees for injuries attributable to a defective roadway…." The defendant argued that pursuant to General Statutes § 52–557n, the plaintiff's exclusive remedy was to bring a claim pursuant to the municipal highway defect statute, General Statutes § 13a–149. The defendant asserted that insofar as the plaintiff did not satisfy the notice requirements of § 13a–149,3 he did not properly bring a claim pursuant to that statute and, thus, his claim should be dismissed for lack of subject matter jurisdiction.

Plaintiff asserted that his cause of action sounded in negligence. He argued that the action could not properly have been brought pursuant to § 13a–149 because he brought the action against the defendant, an employee of the board, which was not responsible for the maintenance of the roadways in the city, rather than against the city itself. Additionally, the plaintiff asserted that "there is and will be a factual dispute that at the time of the accident, Huntinghill Avenue was closed." On this ground, the plaintiff argued, Huntinghill Avenue was not a roadway within the purview of § 13a–149.

The trial court granted the defendant's motion to dismiss, agreeing with the defendant that the plaintiff failed to bring his claim pursuant to §13a149, his exclusive remedy. The court concluded that the condition at issue in the plaintiff's complaint, namely, a winch cable stretched across the travel lanes of Huntinghill Avenue, clearly brought the claim within the purview of the municipal highway defect statute. Further, the court concluded that, pursuant to § 7–465(a), the defendant was an employee of the city and that, if the count were to proceed, the city ultimately would be liable for his negligent acts. The appeals court affirmed.

LIABILITY - GEORGIA

Stevenson v. City of Doraville

Supreme Court of Georgia - November 25, 2013 - S.E.2d - 2013 WL 6188123

Motorist who stepped out of his disabled vehicle on interstate and was struck by another vehicle filed negligence action against city, alleging that police officer in nearby police vehicle was actively negligent by creating hazards that diverted traffic towards motorist's disabled vehicle. The State Court granted summary judgment to city. Motorist appealed. The Court of Appeals affirmed. Motorist sought writ of certiorari.

After granting writ, the Supreme Court of Georgia held that:

- Public duty doctrine did not preclude motorist's claims against city based on misfeasance; but
- There was no evidence that actions of police officer contributed to motorist being hit by oncoming traffic; and
- Officer did not have special duty to motorist, as would remove motorist's claims of nonfeasance from preclusion of public duty doctrine.

LIABILITY - GEORGIA

Atkinson v. City of Atlanta

Court of Appeals of Georgia - November 21, 2013 - S.E.2d - 2013 WL 6097941

Homeowner whose yard, trees, shrubs, driveway, and fence were damaged by flooding caused by broken water main near his property brought nuisance action against city. The trial court granted summary judgment in favor of city. Plaintiff appealed.

The Court of Appeals held that:

- City could not be held liable in nuisance for failing to act within reasonable time to repair broken water main, absent evidence establishing how long it took the city to begin the repair work;
- Single isolated incident of flooding on plaintiff's property caused by broken water main was not continuous, repetitious, or of sufficient duration to support nuisance claim against city; and
- City did not have a duty to repair damage to plaintiff's property caused by flooding from water main break, as required to support nuisance claim against city for failure to timely repair the property.

To be held liable for maintenance of nuisance, a municipality must be chargeable with performing continuous or regularly repetitious acts, or creating continuous or regularly repetitious condition, which causes hurt, inconvenience or injury. Municipality must have knowledge or be chargeable with notice of the dangerous condition; and, if the municipality did not perform an act creating the dangerous conditions, the failure of the municipality to rectify the dangerous condition must be in violation of a duty to act.

To hold a municipality liable for creating or maintaining a nuisance, the defect or degree of misfeasance must exceed mere negligence (as distinguished from a single act). The act complained of must be of some duration and the maintenance of the act or defect must be continuous or regularly repetitious and there must be a failure of municipal action within a reasonable time after knowledge of the defect or dangerous condition.

TAX - ILLINOIS

Hartney Fuel Oil Co. v. Hamer

Supreme Court of Illinois - November 21, 2013 - N.E.2d - 2013 IL 115130

This case concerned the proper situs for tax liability under retail occupation taxes arising under three Illinois statutes: the Home Rule County Retailers' Occupation Tax Law, the Home Rule Municipal Retailers' Occupation Tax Act, and the Regional Transportation Authority Act (collectively, the "local ROT Acts").

The Illinois Department of Revenue (DOR) determined through audit that Hartney Fuel Oil Company's sales at retail were attributable to the company's Forest View office, rather than the Village of Mark location reported by the company. The change in location made Hartney subject to retail occupation taxes imposed by the Village of Forest View, Cook County, and the Regional Transportation Authority. The Department issued a notice of tax liability, which Hartney paid under protest. Hartney then filed for relief in the circuit court.

The circuit court ruled in favor of Hartney, concluding that it had accepted both its long-term sales and daily order sales in the Village of Mark, and that the regulations relevant to each section established a bright-line test for situs of sale: where purchase orders are accepted, tax liability is incurred. The appellate court affirmed.

The circuit court and appellate court both found the regulations to establish a bright-line test: "If the purchase order is accepted at the seller's place of business within the county, municipality and/or

metropolitan region, ROT liability is fixed in that respective county, municipality and/or metropolitan region." The DOR and Local Governments argued that the regulations instead presented a fact-intensive inquiry, looking to the totality of the circumstances. They argued that only a totality-of-t-e-circumstances view accords with the legislative intent of the local ROT Acts and the Supreme Court's prior interpretation of the "business of selling" under the local ROT Acts.

The Supreme Court of Illinois concluded that the "Jurisdictional Questions" regulations embodied in 86 Ill. Adm.Code 220.115, 270.115, and 320.115 which define situs for ROT where purchase order acceptance occurs, with sale at retail and the purchaser taking delivery within the state impermissibly narrowed the local ROT Acts, contrary to legislature's intention to allow local governments to collect taxes from retailers in their jurisdictions, and, thus, the regulations were invalid.

The regulations did not amply prescribe the fact-intensive inquiry contemplated by the Supreme Court, and by allowing for only one, potentially minor step in the business of selling to conclusively govern tax situs, the regulations impermissibly constricted the scope of intended taxation.

The court went on to note that, "We do not disturb the findings by the trial and appellate courts that, under the regulations, Hartney accepted its purchase orders and long-term contracts in Mark. Because of the Department's erroneous regulations, the Department has a duty under the Taxpayers' Bill of Rights Act to abate Hartney's penalties and retail occupation tax liability of Forest View, Cook County, and the Regional Transportation Authority for the audit period."

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LIABILITY - ILLINOIS

Harden v. City of Chicago

Appellate Court of Illinois, First District, Fifth Division - November 22, 2013 - N.E.2d - 2013 IL App (1st) 120846

Pedestrian who, while attempting to cross city street, broke bones in her leg and ankle after her foot became stuck in hole in six foot by four foot metal plate located on street, adjacent to crosswalk, brought negligence action against city. The Circuit Court granted summary judgment in favor of city. Pedestrian appealed.

The Appellate Court held that:

- Pedestrian was not "intended and permitted" user of street, such that city did not owe pedestrian a duty to maintain street in reasonably safe condition for use by pedestrian, and
- Even assuming that presence of snow had obscured visibility of marked crosswalk, city did not owe pedestrian a duty of reasonable care to maintain street and metal plate in reasonably safe condition, absent evidence that location of pedestrian's fall was within boundaries of unmarked crosswalk.

Pedestrian who was injured while attempting to cross city street after her foot became stuck in hole in six foot by four foot metal plate located on street, adjacent to crosswalk, was not an "intended and permitted user" of the street, and thus, city did not owe injured pedestrian a duty of reasonable care to maintain street in reasonably safe condition for use by pedestrian under Local Governmental and Governmental Employees Tort Immunity Act. Pedestrian, instead of using the marked crosswalk that the city had provided for pedestrian traffic to cross street, chose to walk across metal plate located approximate three feet outside marked crosswalk.

IMMUNITY - INDIANA

F.D. v. Indiana Dept. of Child Services

Supreme Court of Indiana - November 26, 2013 - N.E.2d - 2013 WL 6182967

Parents, individually and on behalf of their children, brought action against Department of Child Services (DCS) and city police department, alleging mishandling of child abuse reports. The Superior Court granted summary judgment in favor of defendants on grounds of immunity. Parents appealed.

On transfer, the Supreme Court held that:

- Indiana Tort Claims Act (ITCA) provision of immunity for initiation of a judicial or an administrative proceeding did not apply to claim against DCS;
- Police had no duty to notify parents of juvenile's admission to molesting parent's daughter;
- Police department was entitled to law enforcement immunity upon claim that it was negligent in failing to pursue charges against juvenile; and
- Immunity provision of the child abuse reporting statute did not apply to claim against DCS.

INVERSE CONDEMNATION - LOUISIANA

Welborn v. St. Bernard Parish Government

United States District Court, E.D. Louisiana - November 25, 2013 - Slip Copy - 2013 WL 6184983

Plaintiff's home in St. Bernard Parish had been damaged in Hurricane Katrina and subsequently demolished by the defendant. Plaintiff sought damages for the alleged denial of his due process under the Fifth and Fourteenth Amendment and for the wrongful taking of property.

Defendant argued that the federal claim for wrongful taking under the Fifth Amendment was not ripe because the plaintiff has not used available state procedures for inverse condemnation and had not been denied just compensation. In opposition to the motion to dismiss, the plaintiff argued that the defense argument is "generally correct," but that the state remedies are insufficient because any judgment by a state court "may not be paid for many years or even decades."

"The plaintiff here admits that he did not use the state procedures for redress and has not been denied compensation as a result of that process. Instead, he argues futility in opposition to this motion based on the anticipated delay in being paid on any judgment against the defendant. Assuming that this fact is accurate, the Court finds that it is insufficient to constitute the required futility as a matter of law."

LIABILITY - MARYLAND

Ellis v. Housing Authority of Baltimore City

Court of Appeals of Maryland - November 26, 2013 - A.3d - 2013 WL 6182545

Residents brought action against city housing authority, alleging claims for negligence and violation of the Consumer Protection Act (CPA) arising from residents' alleged exposure to lead paint at property owned and operated by housing authority. The Circuit Court entered summary judgment in

favor of housing authority, and residents appealed.

The Court of Appeals held that:

- Residents failed to substantially comply with notice requirement of Local Government Tort Claims Act (LGTCA);
- Residents did not show good cause for their failure to comply with notice requirement; and
- Notice requirement did not violate residents' right of access to courts.

ZONING - MINNESOTA

Meldahl v. City of Minneapolis

Court of Appeals of Minnesota - November 25, 2013 - Not Reported in N.W.2d - 2013 WL 6152196

Steven Meldahl owns 85 rental properties located in City of Minneapolis. From approximately 2008 through 2011, the properties accrued delinquent utility (water, sewage, and solid waste) bills, and the city conducted nuisance-abatement work and sidewalk repairs to address uncorrected code violations. Additionally, the city determined that three of Meldahl's properties were subject to a vacant-building registration (VBR) fee.

Meldahl challenged the district court's grant of summary judgment to city. He argued that (1) the city's assessment appeal procedures are inadequate and the city failed to adequately review the assessments it adopted; (2) two city ordinances are unconstitutionally vague; (3) the city's VBR fee did not reflect the regulatory costs associated with his vacant buildings; (4) the district court erred in ordering reassessments for only one of eight properties for which the parties agreed reassessment was warranted; and (5) the city did not provide proper notice of sidewalk-repair assessments.

The court of appeals affirmed the district court's ruling on each of the counts.

ZONING - MISSOURI

Babb v. Missouri Public Service Com'n

Missouri Court of Appeals, Western District - November 26, 2013 - S.W.3d - 2013 WL 6170640

Homeowners brought declaratory judgment action seeking review of denial of special use permit (SUP) for installation of a solar energy system on home. The Circuit Court granted summary judgment to homeowners. City appealed.

The Court of Appeals held that:

- City ordinance requiring SUP for residential solar energy systems and setting out requirements for installation of residential solar panels were merely regulatory, not prohibitive, and thus did not conflict with state statute; but
- Homeowners were not required to seek juridical review of city's denial of SUP under statute addressing procedure for review of boards of adjustment; and
- Homeowners were not required to seek review by Public Service Commission (PSC) before bringing declaratory judgment action.

MUNICIPAL ORDINANCE - MISSOURI

Damon v. City of Kansas City

Missouri Court of Appeals, Western District - November 26, 2013 - S.W.3d - 2013 WL 6170565

Automobile owners brought class action against city and company that operated city's red-light camera enforcement system, challenging validity of city's red-light camera ordinance. The Circuit Court dismissed action. Owners appealed.

The Court of Appeals held that:

- The Court of Appeals has jurisdiction to consider the validity and constitutionality of a municipal ordinance;
- Owners who paid fine without going to court had standing to challenge ordinance;
- Owners who paid fine without going to court did not waive their right to raise constitutional challenges in a court of law;
- Owners facing prosecution did not have an adequate remedy at law as would preclude their declaratory judgment claim;
- Allegations were sufficient to survive motion to dismiss on grounds that ordinance was a proper exercise of city's police power;
- Ordinance conflicted with state law characterizing running a red light as a moving violation, and thus was void;
- Resolution of validity of ordinance's rebuttable presumption was not appropriate for review on a motion to dismiss; and
- Owners who paid fine stated claim for unjust enrichment, notwithstanding voluntary payment doctrine.

PUBLIC UTILITIES - NEW JERSEY

Borough of Lodi v. Passaic Valley Water Com'n

Superior Court of New Jersey, Appellate Division - November 22, 2013 - Not Reported in A.3d - 2013 WL 6122592

In 2008, defendant Passaic Valley Water Commission (PVWC or Commission) concluded that, for approximately one decade, it had erred in failing to raise the rates it charged to plaintiff Borough of Lodi (Lodi or Borough) pursuant to a lease provision that permitted rate increases based on increases in wholesale water costs. PVWC made "corrective rate increases" totaling 49% over two years that were designed to bring the rates charged to the level where they would have been if increases in wholesale water costs had been passed on to Lodi.

Lodi filed suit, challenging the increases. The trial court ruled that rate increases to Lodi in 2009 and 2010 were unconscionable; required it to roll back rates to 2008 levels with defined annual increases; required the refund of rates deemed excessive; and restricted future annual rate increases. PVWC appealed.

The appeals court concluded that the term "wholesale water costs" means the costs incurred in delivering water to the Lodi retail distribution system. As for rate increases based upon the increase in "wholesale water costs," PVWC was authorized to implement such increases only based upon increases in the wholesale water rates for the year preceding the rate increase. To the extent the

"corrective rate increases" exceeded the increases available pursuant to this interpretation of the lease, they were not authorized by the lease. Those increases must be rescinded and any amount collected pursuant to the unauthorized increases must be credited or returned to the retail customers.

EMPLOYMENT - NEW YORK

Mowry v. DiNapoli

Supreme Court, Appellate Division, Third Department, New York - November 21, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07794

Petitioner was hired as the attorney for the Mexico Central School District in 1974 and served in that capacity until his retirement in 2002. Similarly, petitioner served as the attorney for the Village of Mexico during roughly that same time frame. During these periods, petitioner also served as an attorney for other public entities and maintained a private law practice. In 2010, eight years after his retirement, petitioner received a letter determination from respondent New York State and Local Retirement System informing him that, based upon a review of petitioner's relationship with both the school district and the Village, he had incorrectly been reported as an employee, rather than as an independent contractor.

Petitioner brought Article 78 proceeding challenging determination of State Comptroller denying his application for salary and service credits for his service as school district and village attorney.

The Supreme Court, Appellate Division, held that:

- Attorney was employee of the school district, not an independent contractor;
- Substantial evidence supported Comptroller's determination that attorney was an independent contractor and not an employee of the Village; and
- That determination was not barred by laches.

TAX - NEW YORK

Expedia, Inc. v. City of New York Dept. of Finance

Court of Appeals of New York - November 21, 2013 - N.E.2d - 2013 N.Y. Slip Op. 07759

Taxpayers, on-line travel intermediaries that facilitated hotel room reservations, brought suit seeking declaration that expansion of city's tax on hotel occupants to fees earned by them was unconstitutional. The Supreme Court, New York County, dismissed claim and taxpayers appealed. The Supreme Court, Appellate Division, that tax violated state constitution. City appealed.

The Court of Appeals upheld the tax expansion, finding that city properly exercised broad authority conveyed by plain language of enabling statute.

Plain language of enabling statute authorized city to impose "a tax . . . such as the Legislature has or would have the power and authority to impose on persons occupying hotel rooms in [the] city," and city properly exercised this broad authority when it enacted local law to expand city's tax on hotel occupants to fees earned by on-line travel intermediaries that facilitated hotel room reservations. By its terms, statute extended taxing power to city coextensive with that of state and permitted broad range of taxation on any "rent or charge" paid to hotel owner or "person entitled to be paid the rent

or charge," and local law imposed tax within those limitations on charges paid to intermediaries.

TAX - NEW YORK

Greater Jamaica Development Corp. v. New York City Tax Com'n

Supreme Court, Appellate Division, Second Department, New York - November 27, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07972

Greater Jamaica Development Corporation (GJDC) was organized in 1967 as a charitable, not-fo--profit corporation with a mission to promote the development of the business-commercial-retail district of Jamaica, Queens. In 1998, GJDC formed the Jamaica First Parking, LLC (hereinafter JFP), with GJDC as its sole member, in order to acquire, develop, and operate public parking facilities in the Jamaica community on a nonprofit basis. Thereafter, JFP came to own and operate five such public parking facilities. These five parking facilities allegedly offered significantly lower rates than similar for-profit facilities so as to attract visitors, consumers, retailers, and other businesses to the area.

In a private letter ruling issued in 2001, the IRS concluded that the operation of public parking facilities by JFP would not adversely affect GJDC's federal tax exempt status, in large part because such activity was "substantially related" to GJDC's charitable tax-exempt purposes and would "lessen the burdens of government" as defined by certain tax regulations. In 2007, New York City Department of Finance (DOF) granted an exemption from real property taxes pursuant to Real Property Tax Law § 420–a on the public parking facilities owned and operated by JFP.

In February 2011, the DOF revoked the real property tax exemption, beginning with the 2011/2012 tax year, on the ground that, inter alia, the operation of parking facilities, in and of itself, was not a charitable activity as contemplated by RPTL 420–a. Subsequently, GJDC and JFP commenced a proceeding against the DOF and the New York City Tax Commission.

The appeals court found that the revocation of the tax exemption did not have a rational basis and was, therefore, arbitrary and capricious.

TAX - NEW YORK

Maetreum of Cybele, Magna Mater, Inc. v. McCoy

Supreme Court, Appellate Division, Third Department, New York - November 21, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07788

Not-for-profit religious corporation commenced proceeding under Article 78, seeking review of town board of assessment review's denial of its applications for real property tax exemptions. Town contended that the property in question was used primarily to provide cooperative housing because, in essence, the few adherents of the religion had in effect just continued the property's former residential use.

The Supreme Court, Appellate Division, held that religious corporation had met its burden of demonstrating that the property was used primarily for religious or charitable purposes, and, thus, it was tax exempt.

To qualify for the property tax exemption for property used for religious or charitable purposes: (1)

the petitioner must be organized exclusively for the purposes enumerated in the statute; (2) the property in question must be used primarily for the furtherance of such purposes; (3) no pecuniary profit, apart from reasonable compensation, may inure to the benefit of any officers, members, or employees; and (4) petitioner may not be simply used as a guise for profit-making operations.

Property uses that are merely auxiliary or incidental to the main and exempt purpose and use will not defeat the property tax exemption for property used for religious or charitable purposes.

INVERSE CONDEMNATION - NORTH CAROLINA

Department of Transp. v. Webster

Court of Appeals of North Carolina - November 19, 2013 - S.E.2d - 2013 WL 6073033

Following condemnation of private road, Department of Transportation (DOT) moved for a hearing to determine whether DOT's actions in granting a driveway access to a business 18 months after the date of taking constituted a compensable taking of the defendants' property, or whether the actions constituted a non-compensable exercise of the State's police power. The Superior Court ordered that evidence of the driveway permit and its effects should not be included as elements of damage at the trial in condemnation proceeding. Defendant property owners appealed.

The Court of Appeals held that:

- Trial court was authorized to address whether increased traffic flow was a compensable damage subject to a jury's determination in hearing under statute providing that judge may hear and determine any and all issues raised by condemnation pleadings other than damages, and
- Any effects related to increased traffic due to the driveway permit did not constitute a taking or compensable damages to adjacent properties.

BONDS - OHIO

Internatl. Bhd. of Elec. Workers Local Union No. 8 v. Bd. of Defiance Cty. Commrs.

Court of Appeals of Ohio, Third District, Defiance County - November 25, 2013 - Slip Cop - 2013 -Ohio- 5198

Union filed a R.C. 4115.16(B) interested party prevailing wage enforcement action against County, alleging violations of the Ohio prevailing wage law during a Defiance County building project at the Historic Jail Building (the "Project).

The County began planning the Project in Fall 2009. The County then advertised for bids on the Project, initially stating that Ohio prevailing wage law would apply to the Project. On December 24, 2009, the County adopted Resolution No. 09–12–848, which declared the entire area within the County as a "Recovery Zone." On February 4, 2010, the County issued County Building Improvement General Obligation Bonds, Series 2010 (Federally Taxable—Recovery Zone Economic Development Bonds) (the "Bonds") to finance the construction of the Project. The United States Treasury agreed to pay the County an amount equal to 45 percent of the interest payable on the Bonds, which triggered the application of the Davis–Bacon Act. Funding for the Treasury payments derived from the American Recovery and Reinvestment Act ("ARRA").

On January 5, 2010, the County requested that each of the lowest bidders for the Project execute an acknowledgment stating that the provisions of Ohio prevailing wage law no longer applied, and that instead, the provisions of the Davis–Bacon Act applied to the Project. Each of the bidders executed the acknowledgments, which were then attached to the original construction contracts. On February 4, 2010, the Bonds were issued by the County and sold to Fifth Third Securities, Inc. The County deposited the proceeds from the Bonds into the County's Permanent Improvement Fund, which was used to pay for the construction of the Project.

Meanwhile, the County deposited the Treasury's reimbursement payments into a Bond Retirement Fund in order to extinguish its interest and principal obligations under the Bonds. Although no money from the Bond Retirement Fund was transferred into the Permanent Improvement Fund, the funding for the Project was obtained from the Bonds that will be retired through the Bond Retirement Fund. Checks to pay Project expenses were linked to the Permanent Improvement Fund.

The Union argued that the trial court erred by finding that the County was exempted from the Ohio prevailing wage law under R.C. 4115.04(B)(1). According to Local No. 8, the funds that were actually used to construct the Project came from the proceeds of the sale of the Bonds, which were deposited in the County's Permanent Improvement Fund and thus it was the County's Permanent Improvement Fund that paid for the "actual" construction of the Project. Thus, the federal funding, which was deposited into the Bond Retirement Fund, did not contribute to the actual construction of the Project. Like the trial court, found that this argument was "contrary to reason and common sense."

The appeals court concluded that federal funds were used in the construction of a public improvement, and therefore, the Project is exempted under Ohio prevailing wage laws under R.C. 4115.03(B). As such, it was proper for the trial court to grant summary judgment in favor of the County and to deny Local No. 8's motion for summary judgment.

SCHOOLS - PENNSYLVANIA

Moeck v. Pleasant Valley School Dist.

United States District Court, M.D. Pennsylvania - November 14, 2013 - F.Supp.2d - 2013 WL 6048131

Wrestlers, who were brother and sister, brought action against wrestling coach, school district, and school officials under § 1983 and Title IX, asserting claims based on male wrestler's alleged injuries from practice where he wrestled a teammate who outweighed him by 70 pounds, and sexual harassment claims as to female wrestler. School district and officials moved to dismiss complaint.

The District Court held that:

- Male wrestler sufficiently alleged causation based on failure to train policy, as required to state cause of action under § 1983 for vicarious liability of district;
- Issue of whether officials violated male wrestler's substantive due process rights could not be resolved at motion to dismiss stage;
- Male wrestler sufficiently alleged that coach's conduct shocked the conscience, as required to state cause of action under state-created danger theory;
- Male wrestler's right to bodily integrity was clearly established at time of his alleged injury, so officials were not qualifiedly immune from liability for any violation of such right; and
- If female wrestler told principal and vice principal about alleged sexual harassment from coach,

then district would have had notice such harassment.

LIABILITY - UTAH

Dedelow v. City of Heber

United States District Court, D. Utah, Central Division - November 25, 2013 - Not Reported in F.Supp.2d - 2013 WL 6158953

Plaintiff Ryan Dedelow was cited for speeding in Heber City on April 25, 2004. His citation was additionally filed in Wasatch County. Though Mr. Dedelow paid the citation to the City within the allotted time, the City failed to notify the County that the citation had been resolved. This resulted in an active arrest warrant for Mr. Dedelow.

Mr. Dedelow was stopped for a minor traffic violation where a warrant check revealed an active, eight-year-old arrest warrant. He was subsequently arrested and booked into jail. His pregnant wife was left at the side of the highway in Sardine Canyon and required to find her own way home. Mr. Dedelow alleges that he suffered embarrassment and humiliation as a result of being arrested, booked into jail, and having his new wife's family bail him out and pick him up from jail.

Mr. Dedelow brourght an action under 42 U.S.C. § 1983 claiming the City failed to notify Wasatch County that the citation had been appropriately resolved. He also claims the County failed to inquire into whether the citation had been resolved, keeping an arrest warrant active for eight years. Therefore, Plaintiff alleges that the City and County Defendants negligently failed to ensure their employees followed proper administrative procedures.

The court granted the City's motion to dismiss, finding that Mr. Dedelow's complaint lacked factual allegations to support a plausible claim of relief under § 1983.

"Mr. Dedelow's allegations center on the theory of inadequate training—that the municipal custom or policy itself comprised a failure to act, which was the result of a deliberate indifference to the rights of Plaintiff. However, the Complaint lacks facts supporting the allegation of deliberate indifference. Mr. Dedelow provides no factual allegations of a pattern of unconstitutional arrest and detention resulting from failure to resolve traffic citations that would put Defendants on notice. The Complaint also lacks facts supporting an allegation that Defendants failed to train their employees to follow proper procedures in recurrent situations that present an obvious potential for constitutional violations. Without more, Defendant's failure to act in this instance does not suggest a custom or policy of inadequate training as a result of deliberate indifference to the rights of Plaintiff."

PORT AUTHORITY - WASHINGTON

Lane v. Port of Seattle

Court of Appeals of Washington, Division 1 - November 25, 2013 - P.3d - 2013 WL 6169310

The Port of Seattle purchased the Eastside Rail Corridor from Burlington Northern Santa Fe Railway Company (BNSF) for $81.4 million and sold portions to King County and the city of Redmond. Taxpayer contended the Port lacked statutory authority to make the purchase because the northern part of the corridor lies outside the port district and will not be used to run cargo to or from existing port facilities.

The Court of Appeals held that:

- Purchase of portion of rail corridor fell within port's statutory powers, even though portion had no physical connection to existing port facilities and was outside of port boundaries;
- Fact that port commission failed to adopt formal resolution until after purchase did not render the purchase ultra vires;
- Port commission's finding of reasonable necessity for purchase was not arbitrary and capricious; and
- Evidence supported port commission's finding that acquisition of rail corridor property would stimulate economic development and that purchase was therefore necessary for port district's purposes.

IMMUNITY - WEST VIRGINIA

Polk v. Town of Sophia

United States District Court, S.D. West Virginia - November 27, 2013 - Slip Copy - 2013 WL 6195727

Following sexual assault on arrestee by police officer in this police car, plaintiff brought multiple claims against municipality.

The District Court found that the plaintiff had pled sufficient facts to survive the threshold 12(b)(6) inquiry. Plaintiff had alleged a custom or policy of the Town of Sophia with regard to male officers transporting female prisoners to jail without supervision, and allowing officers the ability to turn off their vehicle's camera unilaterally. Further, the Plaintiff has alleged that this policy or custom directly led to her injuries. Thus, the motion to dismiss the Plaintiff's 42 U.S.C. § 1983 claim against the Town of Sophia should not be granted.

Reminder to Register for the MSRB EMMA Webinar.

It's not too late to register for the Monday, December 9, 2013 "EMMA® for Municipal Advisors" webinar at 3:00 p.m. to 4:00 p.m. ET. This webinar introduces EMMA, the MSRB's Electronic Municipal Market Access website, and describes the municipal market information, tools and resources available on EMMA for municipal advisors and their issuer clients.

Register for the webinar:

https://www2.gotomeeting.com/register/664261442

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5 Big Regulatory Changes Coming in 2014.

Want to prepare your practice for potential changes in the year ahead? Keep your eye on these five areas

As I attempt to look at what's on the 2014 horizon in terms of regulation, compliance and other best practices, I can't overcome the feeling of déjà vu. Or perhaps I am just repeating myself.

Many of the topics here — a fiduciary standard, industry reorganization, arbitration methods — are not new. Yet, after years of effort, the months ahead might finally lead to changes in these hotly debated areas. Or not. Here are my predictions:

1. FIDUCIARY STANDARD

Sticks and stones may break my bones, but a fiduciary will never hurt me.

Acting in the best interest of the client does not have to be to the detriment of the financial advisor. A commission-based product may be in the best interest of the investor. A fee-based product may be in the best interest of the investor. Whether a financial advisor makes a fee or a commission, the financial professional is being compensated for services.

Fiduciaries can break laws and steal client money. Commissioned reps can have the highest of ethics. (And vice versa.) So it is not the label or the law that makes one honest; it is if one is actually honest that counts.

Let's get beyond the in-fighting. The SEC should adopt a fiduciary standard for all financial services professionals, albeit with allowances for differences between investment advisor representatives and broker/dealer representatives. All financial advisors should have full disclosure of services, fees, conflicts of interest, and act in the best interest of the client. Send the lawbreakers to jail.

2. HARMONIZATION

Brokerage and advisory services are indistinguishable to investors.

Here is my ideal futuristic shape of the industry: We will be under one regulatory regime. No longer will we have the broker/dealer and registered investment advisor industries. There will be one registration for the company, one fee, one filing. One registration for reps, one fee, one grand-slam exam. One full-disclosure document used by all to replace the Form ADV.

Wealth management, life planning, financial planning, asset management, or simple buy-and-sell securities recommendations will be done under one roof. There will be a choice of fee structures, based on client suitability. Some specialist firms will continue to exist — with wealth management on one side of the spectrum and traditional brokerages on the other — but they will all fall under one regulatory scheme. The Financial Advisory and Investment Transaction Services Act of 2023 (FAITS Act) and its rules and regulations will be streamlined. Under this imaginary FAITS Act, some rules will apply for transactional trades, and other rules will apply for services that are advisory in nature — but all under one coordinated act.

Hmmm … I actually made this prediction 10 years ago. So I am adding on another 10 years to my dream regime.

3. ARBITRATION CLAUSES

You may believe arbitration is the civil way to resolve a dispute, but it could bring on the wrath of the state regulators.

When your client wants to pick a fight with you, would you rather get your day in court in front of a jury, or face a panel of arbitrators? It is not uncommon to see mandatory pre-dispute arbitration agreements in broker/dealer and investment advisor contracts.

It is not my job, in the space of this article, to counsel you on your choice of forum. Broker/dealers

utilize arbitration clauses under the good graces of FINRA. Federally covered registered investment advisors will find the SEC sitting on the fence on this matter. State registered investment advisors may find that these clauses are (or soon will be) prohibited in some states.

The North American Securities Administrators Association (NASAA) announced its strong support for the Investor Choice Act of 2013 (H.R. 2998), which would (if passed) prohibit the use of mandatory pre-dispute agreements by broker/dealers and registered investment advisors.

The Investor Choice Act would not in any way prevent investors from voluntarily electing to resolve a dispute through arbitration or mediation after the facts and circumstances of the dispute have been discovered. The Investor Choice Act may die in committee.

The SEC has authority, under the Dodd-Frank Act, to either ban arbitration clauses in advisory contracts or, at a minimum, commence a study of the use of pre-dispute arbitration. The SEC has not acted in the three years since the Dodd-Frank Act was passed, much to the dismay of NASAA.

4. BUSINESS CONTINUITY PLANS

How will you get back up and running if your office becomes uninhabitable? Your files disappear? Your staff can't get to work? Your phone lines go down?

It has been approximately 10 years since both the SEC and FINRA adopted rules for investment advisors and broker/dealers to implement a business continuity plan (BCP). The BCP addresses events that could cause a significant business disruption and how the business will regain functionality within the shortest possible time span.

Yet, year after year, disaster after disaster (think Katrina and Sandy), financial advisors are still getting caught off guard without a viable BCP in place. The SEC, CFTC and FINRA recently issued a joint advisory to suggest effective practices. The SEC Office of Compliance Inspections and Examinations issued a separate risk alert for investment advisors.

5. IDENTITY THEFT

Can you spot the red flags for identity theft and prevent losses from your client accounts?

The Federal Trade Commission's (FTC) Red Flags Rule implemented obligations imposed by the Fair and Accurate Credit Transactions Act of 2003 (FACT Act). Many firms are already in compliance based on this original FTC rule; others firms hesitated to adopt policies, believing the FTC rule did not apply to them.

SEC Regulation S-ID recently implemented provisions in the Dodd-Frank Act, which amended the FACT Act and directed the SEC (and the CFTC) to adopt rules for identity theft red flags. For those firms that now need to come into compliance with the SEC rule, it was effective May 20, 2013, with a final compliance date of Nov. 20, 2013.

The Red Flags Rule requires specified firms to create a written identity theft prevention program (ITPP) that is designed to identify, detect and respond to red flags — patterns, practices or specific activities — that could indicate identity theft.

The Red Flags Rule requires firms to prepare an ITPP if they are either a "financial institution" or a "creditor" and offer "covered accounts." It's important to look closely at how the rule defines "financial institution" and "creditor" because the terms apply to groups that might not typically use those words to describe themselves.

An investment advisor who directly or indirectly holds transaction accounts and is permitted to direct payments or transfers out of those accounts to third parties is an example of an SEC-regulated entity that could fall within the meaning of the term “financial institution.”

Investment advisors who have the ability to direct transfers or payments from accounts belonging to individuals to third parties upon the individuals’ instructions — or who act as agents on behalf of the individuals — are susceptible to the same types of risks of fraud as other financial institutions. And individuals who hold transaction accounts with these investment advisors bear the same types of risks of identity theft and loss of assets as consumers holding accounts with other financial institutions. If such an advisor does not have a program in place to verify investors’ identities and detect identity theft red flags, another individual may deceive the advisor by posing as an investor.

By Nancy Lininger

SEC Puts Fiduciary Duty on 2014 Agenda as "Long-term action."

DOL’s fiduciary rule for retirement plans due out in August

The Securities and Exchange Commission is pursuing a rule that would raise investment-advice standards for brokers — just not in the near future.

But that is enough to give fiduciary-duty advocates hope.

The SEC put the rule on a 2014 regulatory agenda that included 43 items.

It was slated for “long-term action” without a specific timetable. Topics in the “proposed-rule stage” and “final-rule stage” were higher on the priority list.

Meanwhile, the Labor Department indicated on its 2014 priority list that in August it would re-propose its fiduciary-duty rule for investment advice pertaining to retirement plans. The measure was first floated in 2010 but withdrawn after fierce financial industry protest that its requirements would drive brokers out of the market for individual retirement accounts.

The SEC took off its list for next year a rule regarding mutual fund distribution fees.

The regulatory outlook, which was released last week by the Office of Management and Budget, covers a time period from now until next October. Neither agency has to follow the agenda strictly.

It can act on items that don’t currently appear.

The Dodd-Frank financial reform law gave the SEC the authority to promulgate a regulation that would require brokers to act in the best interests of their clients when providing retail investment advice — a more stringent standard than the suitability requirement that now governs sales of investment products. Investment advisers must act in the best interests of their clients.

The SEC is conducting a cost-benefit analysis of a potential fiduciary-duty rule.

Although action isn’t imminent on a proposal, one advocate noted that it is one of the few non-mandatory Dodd-Frank provisions that appears on the 2014 regulatory agenda.

“There is real interest in this at the SEC,” said Neil Simon, vice president for government relations

at the Investment Adviser Association.

“It is a priority but not a top priority,” he said. “I do believe in time they will proceed.”

The SEC Investor Advisory Committee on Nov. 22 urged the commission to advance a fiduciary-duty regulation. That move, however, didn’t appear to move fiduciary duty up on the SEC’s regulatory agenda.

For 2013, it was listed under the heading of “pre-rule stage” – a designation that is about the same as “long-term action.”

“They’ve been looking at it for long time,” said Nancy Lininger, founder of The Consortium, a compliance consultant for investment advisers and brokers.

“Obviously, it’s not high on the list,” she said. “I thought [the IAC vote] would be the kick in the butt that would get the SEC going, but I guess not.”

The SEC and Labor Department agendas demonstrate that each regulator continues to move at its own pace regarding their fiduciary-duty rules. In October, the House passed a bill that would require the Labor Department to delay its rule until the SEC has acted.

“Maybe extending the timeline just a bit will allow them to get their ducks in a row and line up support for the proposal,” Mr. Simon said.

By Mark Schoeff Jr.

NYT: Detroit Is Ruled Eligible for Bankruptcy.

DETROIT — The struggling metropolis of Detroit, overwhelmed by debt and groping for a path forward, on Tuesday became the largest American city ever to qualify for bankruptcy protection.

Judge Steven W. Rhodes of the United States Bankruptcy Court, found that Detroit was insolvent and that the pension checks of retirees could be cut during a bankruptcy proceeding, a crucial part of his decision.

Under the ruling, the vastly diminished city, once the nation’s fourth largest and the cradle of the American auto industry, will now be allowed to search for a way to pay off some portion of its debts and restore essential services to tolerable levels under court supervision. The goal, according to an emergency manager appointed by the state of Michigan, is to emerge next year from court protection with a formal plan for starting over.

“This once proud and prosperous city cannot pay its debts. It is insolvent. It’s eligible for bankruptcy,” Judge Rhodes said Tuesday. “But it also has an opportunity for a fresh start.”

The decision was an essential step in municipal bankruptcy proceedings, which are extremely rare. Lawyers for the city’s public sector unions and retirees, who contend that Detroit’s request for bankruptcy protection earlier this year came before city officials truly tried to negotiate deals with city workers and creditors, have said they intend to appeal.

The city needs help, he said. As the proceedings unfolded, protesters with signs gathered outside and the police blocked the street to traffic in front of federal courthouse.

Detroit filed for municipal bankruptcy protection in July, with approval from Gov. Rick Snyder, , making it the largest city in the nation's history to take such a rare step. The filing was also the largest ever in terms of municipal debt; the emergency manager, Kevyn Orr, says the city carries about $18 billion in debt, including $3.5 billion in unfunded pension obligations.

Most agreed the situation was dire: annual operating deficits since 2008, a pattern of new borrowing to pay for old borrowing, a shrunken population and tax base, and miserably diminished city services. But under federal bankruptcy provisions for municipalities, known as Chapter 9, a city must first prove its eligibility for protection before it can proceed with a plan to pay diminished sums to creditors.

Under the law, a city must not only be deemed insolvent, but also must negotiate in "good faith" with its creditors, who expect to be offered far less than they are owed, or be unable to negotiate with them because such talks are unworkable. For months, municipal bankruptcy experts have said it might be difficult to prove that city and state officials had failed to meet such a standard. "There isn't a bright-line definition of 'good faith' in this context," Douglas C. Bernstein, a Michigan lawyer and bankruptcy expert, said.

Detroit's public workers and retirees had hoped to keep the city out of federal bankruptcy court, for fear that the proceedings there would allow for cuts in their benefits, especially pensions. Other than in bankruptcy, the state constitution prohibits reducing pensions that public workers have already earned. But there appears to be too little money set aside in Detroit's pension fund to cover the full cost of those accruals.

Judge Rhodes ruled Tuesday that Michigan's protections for public pensions "do not apply to the federal bankruptcy court," adding that pensions are not entitled to "any extraordinary attention" compared with other debts.

Labor agreements, including pensions, are subject to changes during a bankruptcy proceeding, the judge said, but the court "will not lightly or casually exercise the power to impair pensions."

Those objecting to the city's pursuit of bankruptcy protection, including Detroit's employee unions and representatives of its retirees, say Mr. Orr, who was appointed by Governor Snyder, failed to negotiate with them in good faith. During nine days of heated and sometimes emotional testimony in recent weeks, the opponents had suggested that Mr. Snyder and Mr. Orr had forced the city into bankruptcy without truly searching for some other solution. They said that the officials were seeking a way around the state's constitutional protection of pensions without giving workers and retirees a chance to negotiate concessions.

Lawyers for the state and for Detroit, in turn, said that the city's slide into insolvency had been years in the making, and that state officials had tried for more than a year to find some alternative approach to solving the financial crisis, — through efforts by elected leaders at Detroit's city hall and later a consent agreement with the city. They said that the city could no longer afford its current pension plan and must replace it with a less costly one. Representatives for city workers and retirees had never suggested some way to solve the problem without cutting pensions, the lawyers said. In a deposition, Mr. Snyder, a Republican whose first term as governor has been defined by the bankruptcy filing by the state's most populous city, said good faith negotiations over the issue had broken down, and that officials found themselves "at that last resort point."

Regardless of the court's eligibility decision, some experts said the task ahead for Detroit remained largely the same — whether in or out of the courts. "Ultimately the creditors have to come together with the debtor and realize that they need to work together to come up with a solution," said James

E. Spiotto, a Chicago lawyer and an expert on municipal bankruptcy. “No matter what, at some point, that reality needs to sink in.”

Residential Property Taxes in the United States.

This brief presents an overview of residential property taxes. The brief considers recent trends in aggregate property tax revenues and examines the property tax at the county level. Property taxes are an important source of revenue for local governments, though effective property tax rates vary substantially by state and region. The counties with the highest property tax burdens tend to be in New York and New Jersey, while the counties with the lowest property tax burdens are located in Alabama and Louisiana. Most counties levy property taxes that are around $1,000 per homeowner and below 1 percent of house value.

Benjamin H. Harris, Brian David Moore

Read complete document:

http://www.urban.org/UploadedPDF/412959-Residential-Property-Taxes.pdf

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DOL Fiduciary Redraft Likely Out by May.

The Department of Labor’s redraft of its fiduciary rule was said to be on Labor Secretary Thomas Perez’s desk in mid-November, so it’s likely the redraft could be at the Office of Management and Budget by year-end, with a proposed regulation out by April or May, said Brian Graff, executive director of the American Society of Pension Professionals and Actuaries (ASPPA) and the National Association of Plan Advisors (NAPA).

As Phyllis Borzi, assistant secretary of labor for DOL’s Employee Benefits Security Administration, said Oct. 29 at ASPPA’s annual conference, EBSA is coming “very close” to finishing its work on the reproposed rule.

Even if the SEC had a larger budget and more resources, it is doubtful that the Commission would have the resources to regularly examine all RIAs. Therefore, the SEC is likely to continue relying on risk-based oversight to fulfill its mission of protecting investors.

Advertising Advisor Services and Credentials

Section 206 of the Investment Advisers Act contains the anti-fraud provision of the statute and ensures that RIAs’ advertising and marketing practices are consistent with the fiduciary duty owed to clients and prospective clients.

In his comments at the Schwab IMPACT conference in Washington, Graff noted the problems he sees with the DOL’s fiduciary reproposal.

“It’s not so much that more people will be fiduciaries” under the proposal, Graff said, “but how they will get paid.” From an enforcement standpoint, DOL will get at the fiduciary problem “by limiting

forms of compensation."

The potential limit on compensation will affect the small-business market in that if a small business "doesn't have a [401(k)] savings plan, who's going to sell them a plan if they won't get paid?"

Another problem, Graff said, is DOL including IRAs in the reproposal—which Borzi has confirmed will happen. If the definition of fiduciary advice is the same for retirement plans and IRAs, the DOL "will not have the authority to enforce" the IRA portion, Graff said, as IRAs are the jurisdiction of the Internal Revenue Service. The IRS, he said, has six employees devoted to IRAs.

"If there's no enforcement teeth, [DOL] could be creating a Wild West."

By Melanie Waddell, ThinkAdvisor

SEC Loudens Drumbeat On FA Conflict Of Interest, Fee Warnings

The Securities and Exchange Commission loudened the drumbeat on the importance of conflict of interest and fee compliance at a meeting of financial advisory firm internal and external lawyers Friday in Washington, D.C.

Amplifying warnings regularly voiced for months, these two issues are what the SEC sees as the biggest problem areas for advisors, officials with the agency's Office of Compliance, Inspections and Examinations and the Investment Management and Enforcement Division told the session.

In a rebuke to the industry, OCIE Chief Counsel and Chief Compliance and Ethics Officer Paula Drake said she could never understand the "paranoia" advisory firms have when Enforcement Division people are with OCIE staffers in on-site inspections.

"It is one SEC," Drake said.

She noted 11 percent to 14 percent of OCIE exams find violations that are referred to Enforcement.

The OCIE executive said the unit is halfway through its plan to have specialized focus exams of 25 percent of the 1,600 private fund advisors who were required to register with the SEC for the first time by the Dodd-Frank Act.

While Dodd-Frank ordered the SEC's Division of Investment Management to have its own exam staff, Investment Management Division Deputy Director David Grim said the chances of an advisor having an exam by Investment Management or seeing an IM staffer along with OCIE on an inspection are minimal. The primary reason, he noted, is that OCIE has 1,000 examiners while IM only has 10.

"You're not going to get one of our examiners knocking on your door after [OCIE examiners] are there," he told the investment advisor attorneys.

The SEC officials spoke during the American Bar Association Business Law Section's annual fall conference in Washington, D.C.

During the meeting, new SEC Democratic Commissioner Kara Stein said the agency's Dodd-Frank mandated Office of Investor Advocate is beginning to get established.

"It can be a powerful force for investors," she said.

Stein said that while the JOBS Act rules have opened the door to mass advertising of hedge funds and other private offerings, it is important that those investment vehicles are only sold to accredited investors who can truly bear the risks.

Speaking to the technology glitches that have roiled the markets, the commissioner said investors need to know a computer error won't wipe out their retirement accounts.

Recently departed SEC Republican Commissioner Troy Parades told the gathering that interpretive guidance by SEC divisions is not a perfect substitute for rule-making by commissioners because guidance doesn't have the benefit of public comment before the directives are issued.

NOVEMBER 25, 2013 • TED KNUTSON

NABL Seeks Guidance on Political Subdivision Question.

Allen Robertson of the National Association of Bond Lawyers has submitted to Treasury a memorandum requesting guidance on whether an issuer with a limited number of property owners, electors, or taxpayers is a political subdivision for purposes of section 103.

November 21, 2013

Vicky Tsilas

Associate Tax Legislative Counsel

Office of the Tax Legislative Counsel

Department of the Treasury

1500 Pennsylvania Avenue, NW Room 3044

Washington DC 20220

James Polfer

Branch V Chief, Financial Institutions and Products

Internal Revenue Service

1111 Constitution Ave NW

Washington, DC 20224-0001

Dear Ms. Tsilas and Mr. Polfer:

The National Association of Bond Lawyers ("NABL") respectfully submits the attached memorandum requesting guidance on whether an issuer with a limited number of property owners, electors or taxpayers is a political subdivision for purposes of section 103 of the Internal Revenue Code. This guidance is necessary as a result of Technical Advice Memorandum 201334038 (the "TAM"), which NABL believes is contrary to established legal authority. The TAM has had an immediate chilling effect on the issuance of tax-exempt bonds by such issuers throughout the country and has raised

questions in the market about outstanding bonds of such issuers, which may result in a loss in value of those bonds for current holders. This memorandum was prepared by an ad hoc taskforce comprised of those individuals listed on Exhibit A, and was approved by the NABL Board of Directors.

NABL exists to promote the integrity of the municipal market by advancing the understanding of and compliance with the law affecting public finance. We respectfully provide this submission in furtherance of that mission.

If NABL can provide further assistance, please do not hesitate to contact Bill Daly in our Washington, D.C. office at (202) 503-3300.

Sincerely,

Allen K. Robertson

National Association of Bond

Lawyers

Washington, DC

* * * * *

MEMORANDUM

GUIDANCE ON "POLITICAL SUBDIVISION"

Technical Advice Memorandum 201334038, dated August 23, 2013 (the "TAM"), has raised concerns in the bond community regarding the issuance of tax-advantaged obligations by certain issuers having a limited number of property owners, electors or taxpayers ("Districts"). The National Association of Bond Lawyers ("NABL") is concerned that the Internal Revenue Service's position in the TAM is contrary to established legal authority regarding the requirements for a District to qualify as a political subdivision and that this change has had an immediate chilling effect on the issuance of tax-exempt bonds by Districts throughout the country.

Under the traditional legal analysis that has been applied by the courts, the IRS, and practitioners for many years, the determination of whether an entity is properly considered a political subdivision for federal income tax purposes is based on whether it has been delegated the right to exercise substantial sovereign powers.1 These sovereign powers include the power to tax, the power of eminent domain and the police power. A qualified issuer need not have all three powers but it must have more than an insubstantial amount of at least one of the sovereign powers.

The TAM raises serious concerns with respect to certain issuers. The TAM calls into question whether Districts with a limited number of property owners, electors or taxpayers may ever qualify as a "division of a state or local government" by asserting that "an entity that is organized and operated in a manner intended to perpetuate private control, and to avoid indefinitely responsibility to a public electorate, cannot be a political subdivision of a State," effectively requiring that the governing board of a District either be elected by a broad-based electorate or be appointed by a state or local government that is itself elected by a broad-based electorate.

Position in TAM Not Supported by Existing Authority.

The TAM cites Revenue Ruling 83-1312 for the proposition that an essential factor to be considered in determining whether a District is a political subdivision is whether the District is controlled by a state or local government.

The entities considered in Revenue Ruling 83-131 were North Carolina electric and telephone membership corporations that provided utility services, and the ruling addressed the applicability of an exception to the excise tax imposed on the sale or use of diesel fuel under then section 4041 of the Code. Former section 4041(g)(2) of the Code provided an exception from the diesel fuel excise tax "with respect to the sale of any liquid for the exclusive use of any State, any political subdivision of a State, or the District of Columbia, or with respect to the use by any of the foregoing of any liquid as a fuel." The ruling stated that "the term political subdivision has been defined consistently for all federal tax purposes as denoting either a division of a state or local government that is a municipal corporation or a division of a state or local government that has been delegated the right to exercise sovereign power." The ruling stated that the corporations at issue did not have the power to tax or police power, and that their power of eminent domain was significantly limited, and therefore "the corporations do not have sufficient sovereign power to qualify as political subdivisions."

Revenue Ruling 83-131 proceeded to state that "[a]lthough the corporations are not political subdivisions, they still would come within the scope of the exemption in question if sales to them could be considered to be made for the exclusive use of a state or local government." The ruling then provides that "[i]n determining whether a sale to, or use by, an organization is for the exclusive use of a state or local government, it must be established that the organization either (a) is controlled, directly or indirectly, by an agency of a state or local government, or (b) is performing a traditional governmental function on a nonprofit basis." Thus, the language in Revenue Ruling 83-131 which is the sole authority cited in the TAM for the proposition that control by a state or local government is an essential element for qualification as a political subdivision was not from the part of the ruling dealing with political subdivision status, but rather was from the part of the ruling that analyzed whether, even though the corporations were not political subdivisions, sales to such corporations might nonetheless be considered made "for the exclusive use of a state or local government." In determining that the corporations at issue were not political subdivisions, Revenue Ruling 83-131 relied exclusively on the traditional analysis described above regarding whether the corporations had been delegated authority to exercise more than an insubstantial amount of one or more of the sovereign powers.3

Not only does the lone authority cited in the TAM not support the position asserted in the TAM as described above, we are aware of no other authority supporting the proposition that a District having a limited number of property owners, electors or taxpayers cannot qualify as a political subdivision. In fact, such a proposition is contrary to other precedents in which Districts were respected notwithstanding the fact that all or substantially all of the property in the District is owned by a single landowner (or related landowners). In Commissioner v. Birch Ranch & Oil Co., 192 F.2d 924 (9th Cir. 1951), the court held that the taxpayer was entitled to deduct payments made to a District, stating:

Since the district met the requirements of California law, its status as a district entity, not to be confused with the owners of the ranch, or the taxpayer-corporation, cannot be questioned regardless of the fact that the district served but a single ranch, (plus one 240 acre parcel). The western states have long considered that the reclamation, even of a single parcel of land in a single ownership, may justify the exercise of sovereign powers. Here the power afforded is that of taxation.

Id. at 928. Similarly, in Rutland v. Tomlinson, 63-1 U.S.T.C. ¶ 9173 (DC. Fla. 1963), the court upheld the taxpayer's deductions for taxes paid to a District in which the taxpayer owned approximately 95 percent of the land comprising the District. See also Rev. Rul. 76-45, 1976-1 C.B. 54 (holding that

taxes imposed by a District formed and controlled by a single taxpayer are deductible to the extent allocable to maintenance or interest charges).

It also should be noted that in Announcement 2011-78, 2011-51 I.R.B. 874, in an advance notice of proposed rulemaking relating to governmental employee benefit plans under section 414 of the Code, the IRS proposed a definition of political subdivision that included a requirement that the governing officers of the entity be either appointed by State officials or publicly elected. The Announcement acknowledged that the term "political subdivision" is also used for other purposes of the Code, and provided that the proposed definition would not apply for any other purposes of the Code, with a specific reference to section 103 of the Code, thus recognizing that the proposed definition in the Announcement would be contrary to existing authority under section 103 and should not be applied for purposes of section 103.

IRS Concern over Private Entities

It appears that the principal concern of the IRS underlying the analysis set forth in the TAM is the possibility that a non-governmental entity could assert political subdivision status solely by reason of being delegated a limited right to exercise sovereign power. The IRS states in the TAM that "the mere delegation of sovereign power is not sufficient to create a political subdivision. If it were sufficient, then a clearly private entity with powers of eminent domain, including some railroads and utilities, could issue bonds without any political oversight."

While we appreciate the IRS's concern regarding private entities asserting the ability to issue tax-exempt bonds, a number of factors make the typical District clearly distinguishable from such private entities. Districts typically are formed under specific state statutes containing detailed requirements regarding how a District must be formed, the powers a District may exercise, the activities a District may undertake, how a District's governing body is elected or appointed, and disposition of the District's assets upon dissolution. Moreover, under applicable governing statutes, formation and operation of a District may also involve state or local government approval of a service or business plan, intergovernmental agreements relating to the provision of facilities and services, approval of property platting, permitting and/or licensing, oversight of finances and operations through required periodic reporting, a contribution of funds to the financing by a state or local governmental unit, and judicial validation of the entity's creation and/or issuance of its debt. In addition, state law often provides that Districts are considered political subdivisions and/or governmental entities for state law purposes, resulting in the District being subject to numerous state law requirements generally applicable to governmental entities, such as open meeting and public records laws, requirements to adopt a budget and conduct an audit, governing body members being subject to conflict of interest and disclosure laws, and governing body members or employees being treated as governmental/public officials or employees.

Thus, under State law, the typical District is subject to substantial controls over its formation and operation, and is subject to numerous requirements generally applicable to governmental entities, all intended to ensure that such Districts are used solely in furtherance of the public purposes that were intended by the State legislature to be furthered when the legislation authorizing the formation of such Districts was enacted. All of these factors are evidence of the public control and public accountability that typically apply to Districts, as governmental entities, and that exist regardless of the number of property owners, electors or taxpayers that may exist in the District.

Request for a Safe Harbor.

NABL is concerned that the reasoning of the TAM has led to confusion among issuers and their counsel as to the appropriate standard to be applied in determining whether a District qualifies as a

political subdivision eligible to issue tax-advantaged bonds. As a result, transactions that would have otherwise gone forward have been put on hold pending clarification as to whether the holding of the TAM represents a change of what was thought to be well-established law, and bonds that were previously issued are trading at reduced prices as a result of the uncertainty, causing losses in value to current holders.

The Internal Revenue Service and Treasury have often issued guidance to establish “safe harbors” for issuers of tax-exempt obligations. Generally, if an issuer is within the confines of a safe harbor, it is able to market its obligations to investors, invest its bond proceeds or undertake an action related to its bond-financed property with the comfort that the Internal Revenue Service will not challenge a particular issue of law. Given the concerns raised by the TAM, NABL believes that a safe harbor that, if satisfied, would result in a District being recognized as a political subdivision for purposes of the issuance of tax-advantaged obligations is appropriate. The requirements of the safe harbor are intended to reflect the requirements of existing authority, while also addressing the IRS’s concerns over private entities potentially claiming political subdivisions status.

NABL respectfully suggests the following safe harbor:

An issuer will be a political subdivision for purposes of section 103 of the Code if:

1. The issuer is treated as a political subdivision, political body or municipal corporation under applicable State law,

2. The issuer has been delegated more than an insubstantial amount of the power of eminent domain, the power to tax or the police power; and

3. Upon the dissolution of the issuer, the assets of the issuer are distributed to, or at the direction of, a State or an entity that is treated as a political subdivision, political body or municipal corporation under applicable State law.

For purposes of the foregoing, an entity is generally treated as a political subdivision, political body or municipal corporation under applicable State law if, e.g., it is subject to legal requirements such as open meeting and public records laws, it is required to adopt a budget and conduct an audit, it is required to obtain State or local government approval of a business or service plan, it is subject to judicial validation procedures, its governing body members are subject to public conflict of interest and disclosure laws, or its governing body members or employees are treated as governmental officials or employees.

* * * * *

Exhibit A

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November 21, 2013

FOOTNOTES

1 See Comm'r v. Shamberg's Estate, 144 F.2d 998 (2d Cir. 1944), cert. denied, 323 U.S. 792 (1945), dealing with bonds issued by the Port Authority of New York; Texas Learning Technology Group v. Comm'r, 96 T.C. 686 (1991); Rev. Proc. 84-37, 1984-1 C.B. 513; Rev. Rul. 77-164, 1977-1 C.B. 20. See also Ellen P. Aprill, "Municipal Bonds and Accountability to the General Electorate" Tax Notes (November 4, 2013), pp. 547-553.

2 1983-2 C.B. 184.

3 Although not specifically relied upon in the ruling, a distinction between Revenue Ruling 83-131 and a prior ruling (Revenue Ruling 57-193, 1957-1 C.B. 364) which had held that North Carolina electric and telephone membership corporations qualified as political subdivisions, was the fact that the applicable State statute had been amended such that assets of the corporation would no longer be distributed to the State upon dissolution.

IRS LTR: Installment Method Not Required for Additional Payment.

The IRS ruled that a taxpayer could recognize gain on additional compensation paid to the taxpayer for property seized under eminent domain using a method of accounting other than the installment method.

Index Number: 1374.00-00, 453.10-02

Release Date: 11/29/2013

Date: August 28, 2013

Refer Reply To: CC:ITA:B04 – PLR-113874-13

Dear * * *:

This letter responds to your request for rulings under § 453 of the Internal Revenue Code and § 1.337(d)-7 of the Income Tax Regulations concerning the $z payment that Taxpayer received as just compensation for property seized by State.

FACTS

During Month 1, State seized property that Taxpayer owned under State eminent domain law and paid Taxpayer $x. Pursuant to that law, Taxpayer treated the $x payment as partial compensation while pursuing a claim against State for just compensation for the seized property. Taxpayer deferred recognition of the gain on the $x payment under § 1033. On Date 1, Taxpayer converted from a C Corporation to a REIT. In Year 1, after vigorous litigation extending over several years, Taxpayer was awarded a final judgment of $y, of which $z was additional just compensation for the seizure and the remainder was interest and costs. If Taxpayer receives the rulings it has requested, Taxpayer intends to include the gain on the $z payment on its Year 1 federal income tax return.

LAW

Section 453(a) provides, in general, that income from an installment sale is taken into account under the installment method. Under § 453(b) (1) an installment sale means a disposition of property where at least 1 payment is to be received after the close of the taxable year in which the disposition occurs.

RULINGS

Ruling 1: Based strictly on the facts taken together that Taxpayer's property was seized by State, Taxpayer vigorously litigated the amount of the just compensation in State courts over several years, and the $z payment was pursuant to an adverse final judgment of the State court, we rule that Taxpayer may properly recognize the gain on the $z payment on its Year 1 federal income tax return, using a method of accounting other than the installment method under § 453.

Ruling 2: Based strictly on Ruling 1, we rule that if Taxpayer reports the $z payment on its Year 1 federal income tax return, the payment will not be subject to tax under § 1.337(d)-7 of the Income Tax Regulations. Section 1374(d)(7)(C).

Except as expressly provided in rulings 1 and 2, we do not express or imply an opinion concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

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.

The taxpayer must attach a copy of this letter to any income tax return to which it is relevant. Alternatively, a taxpayer filing its returns electronically may satisfy this requirement by attaching a statement to the return that provides the date and control number of the letter ruling.

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.

In accordance with the Power of Attorney on file with this office, we will send a copy of this letter to your authorized representative.

Sincerely,

Michael J. Montemurro

Chief, Branch 4

Office of Associate Chief Counsel

(Income Tax & Accounting)

Citations: LTR 201348007

Impact of Clergy Rental Exclusion Holding Could Be Big, Practitioners Say.

A U.S. district court decision striking down the rental allowance exclusion for ministers could have a major impact on churches and clergy if it is upheld, practitioners and representatives of religious denominations said November 25.

A U.S. district court decision striking down the rental allowance exclusion for ministers could have a major impact on churches and clergy if it is upheld, practitioners and representatives of religious denominations said November 25.

In a November 22 holding on a suit brought by the Freedom From Religion Foundation Inc. (FFRF) against the IRS, the U.S. District Court for the Western District of Wisconsin said that section 107(2), which provides for the exclusion, violates the establishment clause of the First Amendment because it benefits only religious people even though the benefit is not needed to ease a special burden on the exercise of religion. Although the exclusion benefits many ministers who may feel its loss if it is taken away, it violates the First Amendment principle that a person's religion should not affect one's legal rights, duties, or benefits, Judge Barbara B. Crabb wrote.

The FFRF rejoiced at the news. "This decision agrees with us that Congress may not reward ministers for fighting a 'godless and anti-religious' movement by letting them pay less income tax. The rest of us should not pay more because clergy pay less," FFRF co-presidents Annie Laurie Gaylor and Dan Barker said in a statement .

FFRF's attorney, Richard L. Bolton, said the holding is not hostile to religion and should not be considered controversial: "The Court has simply recognized the reality that a tax free housing allowance available only to ministers is a significant benefit from the government unconstitutionally provided on the basis of religion."

Michael E. Batts of Batts Morrison Wales & Lee, who has served as chair of the Commission on Accountability and Policy for Religious Organizations, told Tax Analysts the decision, if upheld, would have a massive impact on houses of worship and clergy across the United States. It would affect the ability of churches and other religious organizations to compensate clergy, he said, adding that churches might have to devote more of their budgets to clergy compensation at the expense of

other areas.

In a statement , Russell D. Moore, president of the Ethics and Religious Liberty Commission of the Southern Baptist Convention, said the holding ultimately could harm clergy serving small congregations. “The clergy housing allowance isn’t a government establishment of religion, but just the reverse,” he said. “The allowance is neutral to all religions. Without it, clergy in small congregations of all sorts would be penalized and harmed.”

Crabb stayed enforcement of her decision pending an appeal.

The court’s decision did not implicate the section 107(1) exclusion for clergy living in parsonages provided by churches.

by Fred Stokeld

Court Holds Ministers' Housing Allowance Exemption Is Unconstitutional.

A U.S. district court held that section 107(2), which excludes the rental allowance paid to a minister from gross income, is an unconstitutional violation of the establishment clause and enjoined its enforcement, finding that it provides a benefit to religious persons that it does not give to others.

The Freedom From Religion Foundation (FFRF) and its co-presidents filed a suit in U.S. district court challenging the availability of federal income tax exemptions for “ministers of the gospel” under section 107, arguing that the exemptions violate the Constitution’s establishment and equal protection clauses.

U.S. District Judge Barbara B. Crabb rejected the government’s argument that FFRF and its co-presidents lacked standing to challenge the law, finding that the injury is clear from the face of the statute and that the co-presidents weren’t required to first claim the exemption and have it rejected before filing suit. Crabb said she found it difficult to take seriously the government’s argument that FFRF’s co-presidents may qualify as ministers of the gospel. The court concluded that the statute denied FFRF’s co-presidents an exemption, that they suffered an injury, and that the injury was traceable to those in the government who implement the tax code.

Crabb then addressed the merits of the case and found that based on the Supreme Court’s decision in Texas Monthly Inc. v. Bullock, 489 U.S. 1 (1989), the exemption in section 107(2) violates the establishment clause. In that decision, the Supreme Court held that a state sales tax exemption provided only to publishers of religious writings was unconstitutional. Crabb acknowledged that the withdrawal of the exemption would greatly affect ministers and their churches, but she said that only underscores the preferential treatment that she found to have violated the First Amendment. Crabb concluded her opinion by saying the government isn’t powerless to provide exemptions to benefit religion and that Congress can rewrite the provision so that it complies with the principles established by the Supreme Court.

FREEDOM FROM RELIGION FOUNDATION, INC.,

ANNIE LAURIE GAYLOR AND DAN BARKER,

Plaintiffs,

v.

JACOB LEW AND DANIEL WERFEL,

Defendants.1

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

OPINION AND ORDER

Plaintiff Freedom from Religion Foundation, Inc. and its two co-presidents, plaintiffs Annie Laurie Gaylor and Dan Barker, brought this lawsuit under the Administrative Procedure Act, 5 U.S.C. § 702, contending that certain federal income tax exemptions received by "ministers of the gospel" under 26 U.S.C. § 107 violate the establishment clause of the First Amendment and the equal protection component of the Fifth Amendment. Defendants Timothy Geithner and Douglas Schulman (now succeeded by Jacob Lew and Daniel Werfel) have filed a motion for summary judgment, dkt. #40, which is ready for review.

In their complaint, plaintiffs challenged both § 107(1) and § 107(2), but in response to defendants' motion for summary judgment, plaintiffs narrowed their claim to § 107(2), which excludes from gross income a minister's "rental allowance paid to him as part of his compensation." (Section 107(1) excludes "the rental value of a home furnished to [the minister] as part of his compensation.") Because plaintiffs have not opposed defendants' argument that plaintiffs lack standing to challenge § 107(1), I will grant defendants' motion as to that aspect of plaintiffs' claim.

With respect to plaintiffs' challenge to § 107(2), I adhere to my conclusion in the order denying defendants' motion to dismiss, dkt. #30, that plaintiffs have standing to sue because it is clear from the face of the statute that plaintiffs are excluded from an exemption granted to others. With respect to the merits, I conclude that § 107(2) violates the establishment clause under the holding in Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989), because the exemption provides a benefit to religious persons and no one else, even though doing so is not necessary to alleviate a special burden on religious exercise. This conclusion makes it unnecessary to consider plaintiffs' equal protection argument.

Although plaintiffs did not file their own motion for summary judgment, "[d]istrict courts have the authority to enter summary judgment sua sponte as long as the losing party was on notice that it had to come forward with all its evidence." Ellis v. DHL Exp. Inc. (USA), 633 F.3d 522, 529 (7th Cir. 2011). In this case, the parties have fully briefed the relevant issues, which are primarily legal rather than factual. Further, plaintiffs asked the court to enter judgment in their favor in their brief in opposition to defendants' motion for summary judgment. Dkt. #52 at 66. Although defendants objected to this request in their reply brief, dkt. #53 at 3, it was on the same grounds that defendants believe that they are entitled to summary judgment. Defendants do not suggest that they would have raised any other arguments or presented any additional facts if plaintiffs had filed their own motion. Under these circumstances, I conclude that it is appropriate to deny defendants' motion for summary judgment and grant summary judgment in plaintiffs' favor with respect to § 107(2).

In concluding that § 107(2) violates the Constitution, I acknowledge the benefit that the exemption provides to many ministers (and the churches that employ them) and the loss that may be felt if the exemption is withdrawn. Clergy Housing Allowance Clarification Act of 2002, 148 Cong. Rec. H1299-01 (Apr. 16, 2002) (statement of Congressman Jim Ramstad) (in 2002, estimating that § 107 would

relieve ministers of $2.3 billion in taxes over next five years). However, the significance of the benefit simply underscores the problem with the law, which is that it violates the well-established principle under the First Amendment that "[a]bsent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment). Some might view a rule against preferential treatment as exhibiting hostility toward religion, but equality should never be mistaken for hostility.

It is important to remember that the establishment clause protects the religious and nonreligious alike. Linnemeir v. Board of Trustees of Purdue University, 260 F.3d 757, 765 (7th Cir. 2001) ("The Supreme Court has consistently described the Establishment Clause as forbidding not only state action motivated by a desire to advance religion, but also action intended to 'disapprove,' 'inhibit,' or evince 'hostility' toward religion."). If a statute imposed a tax solely against ministers (or granted an exemption to everyone except ministers) without a secular reason for doing so, that law would violate the Constitution just as § 107(2) does. Stated another way, if the government were free to grant discriminatory tax exemptions in favor of religion, then it would be free to impose discriminatory taxes against religion as well. Under the First Amendment, everyone is free to worship or not worship, believe or not believe, without government interference or discrimination, regardless what the prevailing view on religion is at any particular time, thus "preserving religious liberty to the fullest extent possible in a pluralistic society." McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, 545 U.S. 844, 882 (2005) (O'Connor, J., concurring).

OPINION

A. Standing

As they did in their motion to dismiss, defendants argue that plaintiffs do not have standing to challenge § 107(2). To obtain standing, plaintiffs must show that they suffered an injury in fact that is fairly traceable to defendants' conduct and capable of being redressed by a favorable decision from the court. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

Plaintiffs Gaylor's and Barker's alleged injury is the unequal treatment they receive under § 107(2):

In the case of a minister of the gospel, gross income does not include —

* * *

(2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home, including furnishings and appurtenances such as a garage, plus the cost of utilities.

In particular, plaintiffs argue that "ministers of the gospel" receive a tax exemption under § 107(2) that Gaylor and Barker do not, even though a portion of the salary Gaylor and Barker receive from Freedom from Religion Foundation is designated as a housing allowance. Plts.' PFOF ¶ 2, dkt. #50; Dfts.' Resp. to Plts.' PFOF ¶ 2, dkt. #55. In addition, plaintiffs argue that an order enjoining § 107(2) would redress their injury because it would eliminate the unequal treatment. The parties agree that Gaylor and Barker are both members of the foundation and that the purpose of the foundation is related to the claims in this case, so if the individual plaintiffs have standing, then the foundation does as well. Sierra Club v. Franklin County Power of Illinois, LLC, 546 F.3d 918, 924 (7th Cir. 2008).

Defendants do not deny that a person who is denied a tax exemption that others receive has suffered

an injury in fact. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 7-8 (1989) (general interest magazine had standing to challenge state tax exemption received by religious publications); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 224-25 (1987) (same). See also Arizona Christian School Tuition Organization v. Winn, ___ U.S. ___, 131 S. Ct. 1436, 1439 (2011) ("[P]laintiffs may demonstrate standing on the ground that they have incurred a cost or been denied a benefit on account of their religion. Those costs and benefits can result from alleged discrimination in the tax code, such as when the availability of a tax exemption is conditioned on religious affiliation."). In addition, defendants do not deny that a discriminatory tax exemption may be redressed by eliminating the exemption for everyone. Heckler v. Mathews, 465 U.S. 728, 740, (1984) ("We have often recognized that the victims of a discriminatory government program may be remedied by an end to preferential treatment for others."). However, defendants argue that the lawsuit is premature because plaintiffs have never tried to claim the exemption. Until the Internal Revenue Service denies a claim, defendants say, plaintiffs have not suffered an injury.

As an initial matter, it is not clear whether plaintiffs would have standing to challenge § 107(2) in the context of a proceeding to claim the exemption. In several cases, courts have rejected establishment clause challenges to tax exemptions brought by parties who filed claims for the exemption that were denied. In each of those cases, the court held that the party could not receive the exemption if the court declared it to be unconstitutional, so a favorable decision could not redress their injury. Templeton v. Commissioner of Internal Revenue, 719 F.2d 1408, 1412 (7th Cir. 1983); Ward v. Commissioner of Internal Revnue, 608 F.2d 599, 601 (5th Cir. 1979); Kirk v. Commissioner of Internal Revenue, 425 F.2d 492, 495 (D.C. Cir. 1970). Thus, if accepted, defendants' view could insulate § 107 from challenge by anyone.

In any event, I considered and rejected defendants' argument in the context of denying their motion to dismiss. Dkt. #30. In particular, I concluded that plaintiffs' alleged injury is clear from the face of the statute and that there is no plausible argument that the individual plaintiffs could qualify for an exemption as "ministers of the gospel," so it would serve no legitimate purpose to require plaintiffs to claim the exemption and wait for the inevitable denial of the claim. Finlator v. Powers, 902 F.2d 1158, 1162 (4th Cir. 1990) (concluding that nonexempt taxpayers had standing to challenge exemption without first claiming exemption because plaintiffs' "injury is created by the very fact that the [law] imposes additional [tax] burdens on the appellants not placed on" those entitled to exemption). See also California Medical Association v. Federal Electric Commission, 453 U.S. 182, 192 (1981) (concluding that plaintiffs had standing, noting that they "expressly challenge the statute on its face, and there is no suggestion that the statute is susceptible to an interpretation that would remove the need for resolving the constitutional questions raised"); Harp Advertising Illinois, Inc. v. Village of Chicago Ridge, Illinois, 9 F.3d 1290, 1291-92 (7th Cir. 1993) ("Challenges to statutes as written, without inquiring into their application, are appropriate when details of implementation are inconsequential.").

The Supreme Court has not addressed this question explicitly, but in Walz v. Tax Commission of City of New York, 397 U.S. 664, 666-67 (1970), the plaintiff was an owner of real estate in New York City who objected to the issuance of "property tax exemptions to religious organizations." Although there was no indication in the opinion that the owner requested an exemption for himself before bringing his lawsuit, the Court reached the merits of his claim under the establishment clause. In Winn, 131 S. Ct. at 1449, the Court acknowledged that it had omitted a discussion of standing from the decision in Walz but suggested that the plaintiff could have relied on the alleged discriminatory treatment among different property owners to demonstrate standing to sue.

In their motion for summary judgment, defendants do not ask the court to reconsider the conclusion that plaintiffs have standing to challenge § 107(2) if it is clear from the face of the statute that they

are not entitled to the exemption. Instead, defendants expand an argument that was relegated to a footnote in their motion to dismiss, dkt. #23 at 10 n.3, which is that it is not clear from the face of the statute and the implementing regulations that plaintiffs are ineligible for the exemption under § 107(2). Rather, defendants say that it is "conceivable" that atheists such as Gaylor and Barker could qualify as "ministers of the gospel" under § 107, so they should be required to claim the exemption before challenging the statute.

Although defendants devote a substantial amount of their briefs to this argument, it is difficult to take it seriously. Under no remotely plausible interpretation of § 107 could plaintiffs Gaylor and Barker qualify as "ministers of the gospel." However, for the sake of completeness, I will address the primary arguments that defendants raise in their briefs on this issue.

Much of defendants' argument rests on Kaufman v. McCaughtry, 419 F.3d 678, 682 (7th Cir. 2005), in which the court concluded that atheism could qualify as a religion under the free exercise clause in the context of a claim brought by an atheist prisoner who wanted to start an atheist study group. (The court went on to reject the prisoner's claim because he could not show that the absence of an atheist study group imposed a substantial burden on his religious exercise, id. at 683, without explaining how an atheist could make that showing in a different case.) However, the issue in this case is not the scope of the free exercise clause of the First Amendment as interpreted in the context of one case decided in 2005, but the proper interpretation of the phrase "ministers of the gospel" in a statute enacted in 1954, so cases such as Kaufman provide little guidance.

Alternatively, defendants says that the IRS regulations promulgated under § 107 do not discriminate against "nontheistic beliefs" and that the IRS does not evaluate the "content" of a claimant's professed religion, but these arguments are red herrings as well. As I noted in the order denying defendants' motion to dismiss, the IRS has interpreted § 107 liberally to include members of non-Christian faiths. E.g., Salkov v. Commissioner of Internal Revenue, 46 T.C. 190, 194 (1966) (approving tax exemption for Jewish cantor after rejecting interpretation of term "gospel" as being limited to books of New Testament and instead construing term to mean "glad tidings or a message, teaching, doctrine, or course of action having certain efficacy or validity"). However, even if I assume that IRS would continue to stretch the plain meaning of § 107, there is a difference between non-theistic faiths such as Buddhism and having no faith at all. Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (distinguishing "those religions based on a belief in the existence of God," "those religions founded on different beliefs" and "non-believers"). Defendants point to no regulations or decisions suggesting that a person who did not subscribe to any faith could qualify for an exemption under § 107(2).

Regardless whether the IRS might recognize atheism as a religion, this does not answer the question whether it would recognize an atheist "minister," which is the only question that matters. Defendants cite no evidence that atheists have "ministers" as that term is used in § 107, which is sufficient reason to reject an argument that an atheist could qualify for an exemption under that statute.

Even if I assume that there are atheists ministers, neither plaintiff Gaylor nor plaintiff Barker could qualify as one. Under the federal regulations, the key question is whether the claimant is seeking an exemption for "services performed by a minister [that] are performed in the exercise of his ministry." 26 C.F.R. § 1.1402(c)-5(b)(2). The tax court has struggled to come up with a consistent framework to answer that question, applying different tests in cases such as Good v. Commissioner of Internal Revenue, 104 T.C.M. (CCH) 595 (T.C. 2012), Mosley v. Commissioner of Internal Revenue, 68 T.C.M. (CCH) 708 (T.C. 1994), and Lawrence v. Commissioner of Internal Revenue, 50 T.C. 494 (1968), but both sides in this case cite Knight v. Commissioner of Internal Revenue, 92 T.C. 199, 205 (1989), as identifying all the relevant factors. In Knight, the court considered whether the

claimant: (1) performs sacerdotal functions under the tenets and practices of the particular religious body constituting his church or church denomination; (2) conducts worship services; (3) performs services in the control, conduct, and maintenance of a religious organization that operates under the authority of a church or church denomination; (4) is ordained, commissioned, or licensed; and (5) is considered to be a spiritual leader by his religious body.

Plaintiffs do not come close to meeting any of these factors. Defendants cite no persuasive evidence that either Gaylor or Barker is ordained, that they perform "sacerdotal" functions or conduct "worship" services, that anyone in the foundation considers Gaylor and Barker to be "spiritual" leaders or that the foundation is under the authority of a "church."

Again, even assuming that atheism is a religion, the Freedom from Religion Foundation is not an "atheist" organization in the sense that the purpose of the group is to "practice" atheism like the prisoner in Kaufman. Rather, the foundation is open to non-atheists, Barker Decl. ¶ 19, dkt. #48, and the purpose of the foundation, according to its bylaws, is to advocate and educate. Gaylor Decl., dkt. #47 exh. 1 at 1 (purpose of foundation is to promote "the constitutional principle of separation of church and state and to educate the public on matters related to non-theistic beliefs"). Defendants do not identify a single "religious" belief espoused by the foundation. In fact, defendants admit that the foundation is not a church or a religious organization operating under the authority of a church, that plaintiffs Gaylor's and Barker's roles as co-presidents of the foundation do not constitute an ordination, commissioning or licensing as ministers and that the foundation does not engage in worship. Dfts.' Resp. to Plts.' PFOF ¶¶ 14, 22, 29, dkt. #55.

Although some of Gaylor's and Barker's work may relate to religious issues, this is in the context of political and legal advocacy, similar to organizations such as the American Center for Law and Justice or the Anti-Defamation League. Tanenbaum v. Commissioner of Internal Revenue, 58 T.C. 1, 8 (1972) (denying exemption for employee of American Jewish Committee because he "was not hired to perform 'sacerdotal functions' or to conduct 'religious worship'; rather, his job is to encourage and promote understanding of the history, ideals, and problems of Jews by other religious groups"). See also Flowers v. United States, No. CA 4-79-376-E, 1981 WL 1928, *6 (N.D. Tex. Nov. 25, 1981) (upholding denial of exemption because housing allowance was for educational rather than sacerdotal functions); Colbert v. Commissioner, 61 T.C. 449 (1974) (taxpayer did not qualify for exemption because his "primary emphasis . . . was in warning and awakening people to the dangers of communism and in educating them as to the principles of communism" rather than "religious instruction in the principles laid down by Christ"). In other words, even if I were to assume that the foundation is an "atheist organization," that is not enough to qualify plaintiffs as ministers because they do not engage in the activities that a minister performs. Kirk, 425 F.2d at 495 (affirming denial of claim under § 107 by church employee in part because "all the services performed by petitioner in this case were of secular nature").

Defendants argue that plaintiff Barker engages in a number of activities that could be classified as "sacerdotal," such as performing "de-baptisms," lecturing, performing marriages, counseling, promoting free thought and writing "free thought" songs. (The regulations do not define the term "sacerdotal" except to say that it "depends on the tenets and practices of the particular religious body constituting [a claimant's] church or church denomination." 26 C.F.R. § 1.1402(c)-5(b)(2)(i).) Defendants' argument is a nonstarter because it does not apply to Gaylor, only to Barker; defendants admit that Gaylor is not a minister. Dfts.' Resp. to Plts.' PFOF ¶ 14, dkt. #55. "Where at least one plaintiff has standing, jurisdiction is secure and the court will adjudicate the case whether the additional plaintiffs have standing or not." Ezell vs. City of Chicago, 651 F.3d 684, 696 (7th Cir. 2011).

In any event, none of this evidence provides any support for a view that Barker could qualify as a

minister of the gospel. As an initial matter, defendants do not deny that Barker engaged in some of the activities (such as writing songs and books) before working for the foundation, Dfts.' Rep. to Plts.' Resp. to Dfts.' PFOF ¶ 6, dkt. #54, and that any marriages he officiates are done on his own time, not as an employee of the foundation. Barker Decl. ¶ 24, dkt. #48. See also Tanenbaum, 58 T.C. at 8 (refusing to consider "[a]ny other functions [the claimant] may perform . . . by virtue of his own personal desires but are not cause for remuneration by the" employer). The counseling Barker performs relates to issues such as "how to deal with religious relatives," "how to start an FFRF chapter" and "how to teach children about morality without religion." Dfts.' PFOF ¶ 6(a), dkt. #41 (emphasis added). The "debaptismal certificate" can be downloaded by anyone off the internet and will be signed by Barker for five dollars. Dkt. #42-15. Each certificate includes the saying "With soap, baptism is a good thing." Id. Barker describes the certificates as "a tongue-in-cheek way to bring attention to opting out of religion." Barker Decl. ¶ 25, dkt. #48. I do not see how any of this conduct could relate "to the tenets and practices" of a particular religious body and defendants do not even attempt to develop an argument on this point.

In their reply brief, defendants argue that it "does not matter whether Ms. Gaylor or Mr. Barker would or would not be eligible for the exclusion provided in § 107 if they claimed it. What matters is that an atheist may lawfully make a claim for the exclusion." Dkt. #53 at 6. This argument is puzzling because it rests on a premise that a plaintiff's own experience is irrelevant to the question of standing. That is obviously incorrect. A plaintiff's standing to sue is determined not by asking whether some hypothetical third party is being injured, but by whether the plaintiff is being injured. Kowalski v. Tesmer, 543 U.S. 125, 129 (2004) ("We have adhered to the rule that a party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.") (internal quotations omitted). Defendants seem to concede now that plaintiffs have been injured because they cannot qualify for the exemption. Defendants do not explain why that injury "does not matter" so long as it would be possible for some atheist to qualify under some set of circumstances, but they seem to be confusing standing with the merits. To the extent defendants are arguing that § 107(2) is constitutional if it would allow an exemption for an "atheist minister" in the abstract, that argument has nothing to do with standing.

Defendants make a related argument in their reply brief that plaintiffs' alleged injury would not be fairly traceable to any "religious discrimination" by defendants if § 107 were interpreted as encompassing an "atheist minister." Dfts.' Br., dkt. #53, at 12. Again, this argument rests on a misunderstanding of standing requirements. The question is whether the plaintiff's injury is fairly traceable to the defendant's conduct, Massachusetts v. EPA, 549 U.S. 497, 536 (2007), not whether the plaintiff will be able to prove that the injury was caused by a violation of a particular right, which is another question on the merits. Arreola v. Godinez, 546 F.3d 788, 794-95 (7th Cir. 2008) ("Although the two concepts unfortunately are blurred at times, standing and entitlement to relief are not the same thing.").

Accordingly, I conclude that plaintiffs have standing to bring a facial challenge to § 107(2) because the statute denies them an exemption that others receive, the injury is fairly traceable to the conduct of defendants as those responsible for implementing the tax code and plaintiff's injury is redressable by a declaration that § 107(2) is unconstitutional and an order enjoining its enforcement.

Finally, defendants raise other arguments about whether the case is ripe for adjudication and whether the Administrative Procedure Act waives the government's sovereign immunity under the facts of this case, but both of these arguments are contingent on a finding that § 107(2) does not harm plaintiffs. Because I have rejected that argument, I need not address defendants' other arguments separately.

B. Merits

1. Standard of review

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const., Amend. I. The first question in every case brought under the establishment clause is the proper standard of review.

The test applied most commonly by courts was articulated first in Lemon v. Kurtzman, 403 U.S. 602 (1971). Under Lemon, government action violates the establishment clause if (1) it has no secular purpose; (2) its primary effect advances or inhibits religion; or (3) it fosters an excessive entanglement with religion. Although individual justices have criticized the test, e.g., Santa Fe Independent School District v. Doe, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting); Tangipahoa Parish Board of Education v. Freiler, 530 U.S. 1251 (2000) (Scalia, J., dissenting from denial of certiorari), the Supreme Court as a whole continues to apply it. E.g., McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, 545 U.S. 844, 859-67 (2005). Further, it is the test the Court of Appeals for the Seventh Circuit has employed in recent cases brought under the establishment clause. E.g., Doe ex rel. Doe v. Elmbrook School District, 687 F.3d 840, 849 (7th Cir. 2012); Sherman ex rel. Sherman v. Koch, 623 F.3d 501, 507 (7th Cir. 2010); Milwaukee Deputy Sheriffs' Association v. Clarke, 588 F.3d 523, 527 (7th Cir. 2009); Vision Church v. Village of Long Grove, 468 F.3d 975, 991-92 (7th Cir. 2006).

In Lynch v. Donnelly, 465 U.S. 668, 691 (1984), Justice O'Connor offered what she later described as a "refinement" of the first two parts of the Lemon test, under which the court asks "whether the government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement," Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring), viewed from the perspective of a "reasonable observer." Elk Grove Unified School District v. Newdow, 542 U.S. 1, 34 (2004) (O'Connor, J., concurring in the judgment). The Supreme Court has applied Justice O'Connor's test in several subsequent cases, e.g., McCreary County, 545 U.S. at 866; Zelman v. Simmons-Harris, 536 U.S. 639, 654-55 (2002); County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 620 (1989), as has the Court of Appeals for the Seventh Circuit. Clarke, 588 F.3d at 529; Linnemeir v. Board of Trustees of Purdue University, 260 F.3d 757, 764 (7th Cir. 2001); Freedom from Religion Foundation, Inc. v. City of Marshfield, Wisconsin, 203 F.3d 487, 493 (7th Cir. 2000). See also Salazar v. Buono, 559 U.S. 700, 721 (2010) (assuming that "reasonable observer" test applied).

Although the Supreme Court has articulated other tests as well over the years, e.g., Lee v. Weisman, 505 U.S. 577 (1992); Marsh v. Chambers, 463 U.S. 783, 787 (1983), the parties rely on the modified version of the Lemon test, so I will do the same.

2. Texas Monthly, Inc. v. Bullock

Consideration of the question whether § 107(2) violates the establishment clause must begin with Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989), the only case in which the Supreme Court has addressed the constitutionality of a tax exemption granted solely to religious persons. In Texas Monthly, the statute at issue exempted from the state sales tax "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith."

The justices in the plurality opinion (Justices Brennan, Marshall and Stevens) and those concurring in the judgment (Justices Blackmun and O'Connor) agreed that the statute violated the establishment clause. The plurality applied the familiar test under Lemon, 403 U.S. at 612, as well as the endorsement test. In concluding that the statute did not have a secular purpose or effect and conveyed a message of religious endorsement, the plurality emphasized that the exemption provided

a benefit to religious publications only, without a corresponding showing that the exemption was necessary to alleviate a significant burden on free exercise:

Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become indirect and vicarious "donors." Insofar as that subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause. However, when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, as Texas has done, it provides unjustifiable awards of assistance to religious organizations and cannot but convey a message of endorsement to slighted members of the community.

Id. 14-15 (internal quotations, citations and alterations omitted). In addition, the plurality stated that the statute seemed "to produce greater state entanglement with religion than the denial of an exemption" because the statute required the government to "evaluat[e] the relative merits of differing religious claims" in order to determine whether a publication qualified for the exemption. Id. at 20.

In the concurring opinion, Justices Blackmun and O'Connor concluded that "a tax exemption limited to the sale of religious literature by religious organizations violates the Establishment Clause" because it results in "preferential support for the communication of religious messages." Id. at 28. They added that "[a] statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable." Id.

Because no single opinion garnered at least five votes in Texas Monthly, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977) (internal quotation marks omitted). Although the rule in Marks likely would make Justice Blackmun's opinion controlling, the differences between the plurality and concurring opinions in Texas Monthly are minimal for the purpose of this case. Under either opinion, a tax exemption provided only to religious persons violates the establishment clause, at least when the exemption results in preferential treatment for religious messages. Haller v. Commissioner of the Dept. of Revenue, 728 A.2d 351, 354-55 (Pa. 1999) ("[A] majority of the Court in Texas Monthly clearly recognized that tax exemptions that include religious organizations must have an overarching secular purpose that equally benefits similarly situated nonreligious organizations.").

Because a primary function of a "minister of the gospel" is to disseminate a religious message, a tax exemption provided only to ministers results in preferential treatment for religious messages over secular ones. Accordingly, I conclude that Texas Monthly controls the outcome of this case. Although this case involves an income tax exemption instead of a sales tax exemption, neither the plurality nor the concurrence placed any importance on the type of tax involved and defendants do not provide any grounds for distinguishing the two types. Even Justice Scalia in his dissent in Texas Monthly stated that § 107 is a "tax exemptio[n] of the type the Court invalidates today." Texas Monthly, 489 U.S. at 33 (Scalia, J., dissenting).

3. Accommodation of religion

Tellingly, defendants make little effort to distinguish Texas Monthly. They make a fleeting reference to the plurality's statement that preferential treatment for religious groups may be permissible if it

"remov[es] a significant state-imposed deterrent to the free exercise of religion," Texas Monthly, 489 U.S. at 14, but they do not explain how that statement might apply to this case. Of course, "[a]ny [government action] pertaining to religion can be viewed as an 'accommodation' of free exercise rights," Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 347 (1987) (O'Connor, J., concurring in the judgment), but the "principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." Lee, 505 U.S. at 587.

Although it is undoubtedly true that taxes impose a burden on ministers, the same is true for all taxpayers. Defendants do not identify any reason why a requirement on ministers to pay taxes on a housing allowance is more burdensome for them than for the many millions of others who must pay taxes on income used for housing expenses. In any event, the Supreme Court has rejected the view that the mere payment of a generally applicable tax may qualify as a substantial burden on free exercise. Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378, 391 (1990) ("[T]o the extent that imposition of a generally applicable tax merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant.").

Defendants cite several cases in which courts have found that 26 U.S.C. § 1402(e) and (g), which give exemptions to certain religious persons from paying taxes related to Social Security, are permissible accommodations of religion. E.g., Droz v. Commissioner of Internal Revenue, 48 F.3d 1120, 1121 (9th Cir. 1995); Hatcher v. Commissioner of Internal Revenue, 688 F.2d 82, 84 (10th Cir. 1979). See also Templeton, 719 F.2d at 1413-14 (rejecting equal protection challenge to same provisions). However, the exemptions in § 1402 are limited to those who have a religious objection to receiving public insurance and belong to a religion that will provide the assistance that others ordinarily would receive under Social Security. Thus, § 1402 is distinguishable from § 107 because § 1402 limits the exemption to those whose religious exercise would be substantially burdened. In addition, there is no preferential treatment to religious persons because the exemption is limited to those who will receive from their religious sect (rather than the government) the benefits the tax is designed to provide. Droz, 48 F.3d at 1121 (§ 1402(g) is a permissible accommodation because it is "an exemption narrowly drawn to maintain a fiscally sound Social Security system and to ensure that all persons are provided for, either by the Social Security system or by their church"); Hatcher, 688 F.2d at 84 ("That the principal purpose of the legislation is not to advance or inhibit religion is evident in the mandate that those who receive the exemption forego the benefit of the program. To further assure that one claiming the exemption does not become a public charge Congress required that the exemption only be given to persons belonging to organizations that make provision for dependent members.").

Along the same lines, the cases in which the Supreme Court has upheld religious accommodations are in contexts that otherwise would result in severe restrictions on free exercise. Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687, 705 (1994) ("The Constitution allows the State to accommodate religious needs by alleviating special burdens.") (emphasis added). For example, in Amos, 483 U.S. at 335, the Court upheld a religious exemption in an antidiscrimination law that otherwise would have required religious groups to violate their own religious beliefs, such as by requiring Catholic churches to ordain women as priests. And in Cutter v. Wilkinson, 544 U.S. 709 (2005), the Court concluded that a law requiring administrators to provide religious accommodations to persons housed in state institutions was justified by the reality of institutionalization, which is "severely disabling to private religious exercise." Id. at 720-21. Thus, in both situations, the accommodations are best described not as singling out religious persons for more favorable treatment, but as an attempt to prevent inequality caused by government-imposed burdens. School District of Abington Township v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J.,

concurring) ("[H]ostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion.").

As noted above, in this case, the burden of taxes is borne equally by everyone who pays them, regardless of religious affiliation, so concerns about free exercise do not justify a special exemption. In 1984, the Treasury Secretary himself recognized this point in a memorandum in which he recommended the repeal of § 107 because "[t]here is no evidence that the financial circumstances of ministers justify special tax treatment. The average minister's compensation is low compared to other professionals, but not compared to taxpayers in general." U.S. Dept. of Treasury, Tax Reform for Fairness, Simplicity, and Economic Growth: The Department Report to the President, vol. II 49 (1984). In fact, the Secretary argued that § 107 "provides a disproportionately greater benefit to relatively affluent ministers, due to the higher marginal tax rates applicable to their incomes." Id. (The Treasury Department withdrew the recommendation after many members of the clergy objected to it. Gabriel O. Aitsebaomo, Challenges to Federal Income Tax Exemption of the Clergy and Government Support of Sectarian Schools through Tax Credits Device and the Unresolved Questions after Arizona v. Winn, 28 Akron Tax J. 1, 15 (2013).) Under these circumstances, I see no basis for concluding that § 107(2) may be justified as an accommodation of religion.

4. Walz v. Tax Commission of City of New York

Instead of Texas Monthly, defendants rely on Walz, 397 U.S. 664, in which the Supreme Court rejected a challenge under the establishment clause to a statute that gave a tax exemption to property used for "religious, educational or charitable purposes." Id. at 666-67. The obvious distinction between Walz and this case is that the statute in Walz was not a tax exemption benefiting religious persons only, but a wide variety of nonprofit endeavors. See also Schempp, 374 U.S. at 301-02 (1963) (Brennan, J., concurring) (no establishment clause violation when "certain tax deductions or exemptions . . . incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations" because, in that situation "religious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups").

Defendants argue that the broader scope of the statute in Walz "was not dispositive for the majority," Dfts.' Br., dkt. #44, at 42, but that view is contradicted by the opinion itself as well as later decisions applying it. In concluding that the purpose of the exemption was not to advance religion, the Court observed that the state "has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups." Walz, 397 U.S. at 673. It went on to say that the statute applies to groups that have "beneficial and stabilizing influences in community life" as opposed to "private profit institutions." Id. See also id. at 687, 689 (Brennan, J., concurring) ("These organizations are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community. . . . Government may properly include religious institutions among the variety of private, nonprofit groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society."); id. at 697 n.1 (Harlan, J., concurring) (tax exemption does not violate establishment clause "because New York has created a general class so broad that it would be difficult to conclude that religious organizations cannot properly be included in it").

In Texas Monthly, 489 U.S. at 11, the plurality stated that "[t]he breadth of New York's property tax

exemption was essential to our holding [in Walz] that it was not aimed at establishing, sponsoring, or supporting religion, but rather possessed the legitimate secular purpose and effect of contributing to the community's moral and intellectual diversity and encouraging private groups to undertake projects that advanced the community's well-being and that would otherwise have to be funded by tax revenues or left undone." Further, the plurality reviewed other cases in which the Court had upheld benefits to religious organizations and concluded that they too involved a broader array of groups. "[W]ere those benefits confined to religious organizations, they could not have appeared other than as state sponsorship of religion; if that were so, we would not have hesitated to strike them down for lacking a secular purpose and effect." Texas Monthly, 489 U.S. at 10-11 (plurality opinion) (citing Widmar v. Vincent, 454 U.S. 263 (1981); Mueller v. Allen, 463 U.S. 388 (1983); and Walz, 397 U.S. 664). See also Grumet, 512 U.S. at 704 ("We have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges," including in Walz.).

To support their argument that the holding in Walz was not limited to exemptions that include nonreligious groups, defendants cite the statement by the Court that it was "unnecessary to justify the tax exemption on the social welfare services or 'good works' that some churches perform for parishioners and others-family counselling, aid to the elderly and the infirm, and to children." Walz, 397 U.S. at 674. However, defendants are taking the statement out of context. The Court went on to explain that it did not want the government to have to evaluate whether a religious body's good works were "good enough" to qualify because that could "produc[e] a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." Id. Thus, the Court's observation is best read as an attempt to avoid a justification for an exemption that would lead to greater entanglement between church and state. The Court did not suggest that the government was free to provide tax exemptions to religious entities without including other groups.

Defendants also rely on Walz for the proposition that a "tax exemption does not implicate the same constitutional concerns as a direct subsidy," Dfts.' Br., dkt. #44, at 43, quoting the Court's statement that "[t]he grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state." Walz, 397 U.S. at 675. Taken to its logical conclusion, an argument relying on a distinction between exemptions and subsidies would permit the government to eliminate all taxes for religious organizations, an extreme position that defendants do not advance. However, in the absence of a categorical approach, it is not clear how exemptions could be treated differently from subsidies and defendants do not provide any suggestions.

In any event, to the extent that Walz suggested a different analysis for exemptions, that view is inconsistent with both the plurality and concurring opinions in Texas Monthly, neither of which made a distinction between the two types of support. It was rejected explicitly by the plurality, which stated that "[e]very tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become 'indirect and vicarious 'donors.'" Texas Monthly, 489 U.S. at 14 (quoting Bob Jones University v. United States, 461 U.S. 574, 591 (1983)). The Court has resisted the distinction in other opinions as well. Ragland, 481 U.S. at 236 ("Our opinions have long recognized — in First Amendment contexts as elsewhere — the reality that tax exemptions, credits, and deductions are a form of subsidy that is administered through the tax system.") (internal citations omitted); Regan v. Taxation With Representation of Washington, 461 U.S. 540, 544 (1983) ("Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system."). See also Walz, 397 U.S. at 701 (Douglas, J., dissenting) ("[O]ne of the best ways to 'establish' one or more religions is to subsidize them, which a tax exemption does."); Adler, The Internal Revenue Code, The Constitution, and the Courts: The Use of Tax Expenditure Analysis in Judicial Decision Making, 28 Wake Forest L. Rev. 855, 862 n.30 (1993) ("[T]he large body of literature about tax expenditures

accepts the basic concept that special exemptions from tax function as subsidies."), quoted with approval in Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

Defendants cite Winn, 131 S. Ct. at 1439, as an example of a recent case in which the Court distinguished between exemptions and subsidies. However, Winn was a case about determining a plaintiff's injury for the purpose of taxpayer standing, a doctrine the Court has taken great effort to cabin. Id. at 1445 (emphasizing "the general rule against taxpayer standing"). The Court did not rely on Walz for the distinction it made between exemptions and subsidies in the standing context and defendants do not explain how the distinction in Winn applies to a case about the substantive scope of the establishment clause. In sum, I conclude that defendants cannot rely on Walz or Winn to preserve § 107(2).

5. Other cases

In addition to Texas Monthly, there are other cases in which the Supreme Court has held that it violates the establishment clause to single out religious beliefs for preferential treatment without providing a similar benefit to secular individuals or groups. For example, in Community for Public Education v. Nyquist, 413 U.S. 756, 793 (1973), the Court concluded that tax exemptions for parents of children in sectarian schools violated the establishment clause, reasoning that "[s]pecial tax benefits . . . cannot be squared with the principle of neutrality established by the decisions of this Court." And in Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985), in an opinion by Chief Justice Burger (the author of Walz), the Court held that it violated the establishment clause to give employees an "unqualified" right not to work on the Sabbath because it meant "that Sabbath religious concerns automatically control over all secular interests at the workplace" and "the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." Id. at 709. See also Grumet, 512 U.S. at 708-09 ("[A] statute [may] not tailor its benefits to apply only to one religious group.").

In addition to these Supreme Court cases, there are several cases in which other courts have concluded that tax exemptions violated the establishment clause when they benefited religious groups only. E.g., Finlator, 902 F.2d at 1162 (striking down sales tax exemption for Bibles); Haller, 728 A.2d at 355 (striking down sales tax exemption for "religious publications"); Appeal of Springmoor, Inc., 498 S.E.2d 177 (N.C. 1998) (striking down property tax exemption for nursing homes "owned, operated and managed by a religious or Masonic organization"); Thayer v. South Carolina Tax Commission, 413 S.E.2d 810, 813 (S.C. 1992) (striking down sales tax exemption for "religious publications"). See also American Civil Liberties Union Foundation of Louisiana v. Crawford, CIV.A. 00-1614, 2002 WL 461649 (E.D. La. Mar. 21, 2002) (granting preliminary injunction against tax exemption provided to places of accommodation "operated by religious organizations for religious purposes"). Defendants cite no cases to the contrary, with the exception of cases involving § 1402, which are distinguishable for the reasons explained above.

6. Purpose and effect of § 107(2)

In an attempt to show that neither the purpose nor the effect of § 107(2) is to advance or endorse religion, defendants argue that the provision actually eliminates discrimination among different religions and between religious and nonreligious persons. In support of this view, defendants say that the impetus for both § 107(1) and § 107(2) can be traced to the "convenience of the employer" doctrine, under which employees would not be taxed under certain circumstances on the value of housing provided by their employer. Commissioner of Internal Revenue v. Kowalski, 434 U.S. 77, 85-86 (1977). The Treasury Department began applying the doctrine in 1919, shortly after the federal government began collecting income tax, using the rationale that housing should not be viewed as

compensation if it is provided by the employer to enable an employee to do his job properly. Id. at 84-90. Examples of employees who received the exemption included seamen and hospital workers who were required to be on call 24 hours a day. Id. at 84, 86. In 1954, Congress codified the exemption in 26 U.S.C. § 119, which allows an employee to exclude from his gross income "the value of any . . . lodging furnished to him, . . . but only if . . . the employee is required to accept such lodging on the business premises of his employer as a condition of his employment."

According to defendants, in 1921 the Treasury Department refused to apply the convenience of the employer doctrine to ministers who lived in church-provided housing. (Plaintiffs dispute that view, but I need not resolve that dispute for the purpose of this opinion.) Defendants say that, in response, Congress passed § 213(b)(11) of the Revenue Act of 1921, which allowed ministers of the gospel to exclude from their gross income the rental value of housing they received as part of their compensation. (That exemption later became § 107(1).) Finally, defendants say that the purpose of § 107(2) when it was enacted in 1954 was to eliminate discrimination against ministers who could not claim the already existing exemption for ministers who lived in parsonages. In particular, defendants say that § 107(2) was needed to help "less-established and less wealthy religions [that] were not able to provide housing for their spiritual leaders." Dfts.' Br., dkt. #44, at 33. Defendants cite a committee report from the House of Representatives in support of their view:

Under present law, the rental value of a home furnished a minister of the gospel as a part of his salary is not included in his gross income. This is unfair to those ministers who are not furnished a parsonage, but who receive larger salaries (which are taxable) to compensate them for expenses they incur in supplying their own home.

Your committee has removed the discrimination in existing law by providing that the present exclusion is to apply to rental allowances paid to ministers to the extent used by them to rent or provide a home.

H.R. Rep. No. 1337, at 15, available in U.S. Code Congressional and Administrative News, 83rd Congress, Second Session, at 4040 (1954).

Plaintiffs challenge defendants' view that the purpose of § 107(2) was to eliminate religious discrimination by quoting a statement from Representative Peter Mack, the sponsor of the 1954 law,:

Certainly, in these times when we are being threatened by a godless and anti-religious world movement we should correct this discrimination against certain ministers of the gospel who are carrying on such a courageous fight against this. Certainly this is not too much to do for these people who are caring for our spiritual welfare.

Hearings Before the H. Comm. on Ways & Means, 83rd Cong. 1, at 1574-75 (June 9, 1953) (statement of Peter F. Mack, Jr.), dkt. #51-9. Plaintiffs argue that Mack's statement shows that § 107(2) "was deliberately intended to send a message of support for religion during the Cold War." Plts.' Br., dkt. #52, at 52.

The difference between plaintiffs' and defendants' view of the purpose of § 107(2) is more semantic than substantive. Under either view, the point of the law was to assist a subset of religious groups, which, as I will explain below, is not a secular purpose under the establishment clause.

Because the validity of § 107(1) is not before the court, I must assume for the purpose of this case that Congress did not violate the establishment clause by granting a tax exemption on the rental value of a home provided to a minister as part of his compensation. However, by defendants' own

assertion, the purpose of § 107(1) was to eliminate discrimination between secular and religious employees by giving ministers a similar exemption to the one now codified in 26 U.S.C. § 119 for housing provided to an employee for the convenience of the employer. Assuming this is correct, it does little to help justify the later enactment of § 107(2), which expanded the exemption to include not just the value of any housing provided but also the portion of the minister's salary designated for housing expenses. Defendants say that § 107(2) was needed to eliminate discrimination against certain religious sects, particularly those that were "less wealthy and less established," but there are multiple problems with that argument.

To begin with, defendants are wrong to suggest that § 107(2) was needed to eliminate religious discrimination. Section 107(1) is not discriminatory in the sense that it singles out certain religions for more favorable treatment; rather, it gives a benefit to ministers who meet certain housing criteria, just as § 119 gives a benefit to employees who meet certain housing criteria. Although not all ministers can qualify for the exemption, the same is true for secular employees under § 119. In other words, § 107(1) no more "discriminates" against ministers who purchase their own housing than § 119 "discriminates" against secular employees who purchase their own housing. Because the distinction made in both statutes relates to the type of housing the employee has rather than religious affiliation, there is no religious discrimination. Under defendants' view, if one religious person received a tax exemption, then Congress would be compelled to give every religious person the same exemption, even if the exemption had nothing to do with religion.

Further, to the extent that § 107(1) discriminates among religions, § 107(2) does not eliminate that discrimination but merely shifts it. In particular, § 107(2) discriminates against those religions that do not have ministers. Erwin Chemerinsky, The Parsonage Exemption Violates the Establishment Clause and Should Be Declared Unconstitutional, 24 Whittier L. Rev. 707, 723 (2003) ("[S]ection 107(2) itself discriminates among religions: It offers a huge financial benefit to those religions and churches that have clergy as compared to those which do not. Moreover, it discriminates among clergy based on the specific tasks they are performing."); Thomas E. O'Neill, A Constitutional Challenge to Section 107 of the Internal Revenue Code, 57 Notre Dame L. Rev. 853, 865-66 (1982) ("Section 107(2) may unconstitutionally prefer certain religions over others. For example, a congregational religion with no permanent or specifically designated ministers would not receive section 107(2)'s financial benefits as would a centralized religion with a designated ministry."). In addition, § 107(2) creates an imbalance even with respect to those ministers who benefit from § 107(1) because ministers who get an exemption under § 107(2) can use their housing allowance to purchase a home that will appreciate in value and still can deduct interest they pay on their mortgage and property taxes, resulting in a greater benefit than that received under § 107(1). Chemerinsky, 24 Whittier L. Rev. at 712; 26 U.S.C. § 265(a)(6) ("No deduction shall be denied under this section for interest on a mortgage on, or real property taxes on, the home of the taxpayer by reason of the receipt of an amount as . . . (B) a parsonage allowance excludable from gross income under section 107").

In any event, even if I assume that the exemption in § 107(2) applies equally to all religions, that would not solve the problem because the provision applies to religious persons only. Congress did not incorporate an exemption for secular employees into § 107(2) or expand § 119 to accomplish a similar result. Kowalski, 434 U.S. at 84-96 (rejecting interpretation of § 119 that would extend it to cash allowances). A desire to assist disadvantaged churches and ministers is not a secular purpose and it does not produce a secular effect when similarly disadvantaged secular organizations and employees are excluded from the benefit. Nyquist, 413 U.S. at 788-89 (law motivated by desire to help "low-income parents" send children to sectarian schools "can only be regarded as one 'advancing' religion"). The establishment clause requires neutrality not just among the various religious sects but between religious and secular groups as well. McCreary County, 545 U.S. at 875-

76 ("[T]he government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause."); Nyquist, 413 U.S. at 771 ("[I]t is now firmly established that a law may be one 'respecting an establishment of religion' even though its consequence is not to promote a 'state religion,' and even though it does not aid one religion more than another but merely benefits all religions alike.") (internal citation omitted); Gillette v. United States, 401 U.S. 437, 450 (1971) ("[T]he Establishment Clause prohibits government from abandoning secular purposes . . . to favor the adherents of any sect or religious organization."). Under defendants' view, there would be no limit to the amount of support the government could provide to religious groups over secular ones.

Alternatively, defendants cite provisions in the tax code granting housing allowance exemptions for nonreligious reasons as evidence that § 107(2) does not advance religion. First, under 26 U.S.C. § 134, members of the military may exclude from their gross income any "qualified military benefit," which includes a housing allowance. 37 U.S.C. § 403. Second, under 26 U.S.C. § 911, United States citizens who live abroad may deduct a portion of their housing expenses from their gross income. Finally, under 26 U.S.C. § 912, certain federal employees who live abroad may exclude from their gross income "foreign area allowances," which may include housing expenses.

In Texas Monthly, 489 U.S. at 14, the plurality acknowledged that a tax exemption benefiting sectarian groups could survive a challenge under the establishment clause if the exemption was "conferred upon a wide array of nonsectarian groups as well." However, the Court rejected the argument that it was enough to point to a small number of secular groups that could receive a similar exemption for a different reason:

The fact that Texas grants other sales tax exemptions (e.g., for sales of food, agricultural items, and property used in the manufacture of articles for ultimate sale) for different purposes does not rescue the exemption for religious periodicals from invalidation. What is crucial is that any subsidy afforded religious organizations be warranted by some overarching secular purpose that justifies like benefits for nonreligious groups.

Texas Monthly, 489 U.S. at 15 n.4.

In this case, defendants have not identified an "overarching secular purpose" that justifies both § 107(2) and the other exemptions they cite. Defendants suggest vaguely that all of the recipients have "unique housing needs," Dfts.' Br., dkt. #44, at 39, but they never identify how the needs of ministers who do not live in employer housing are different from those of any other taxpayer. In their reply brief, defendants say that § 107 is like the other statutes in that all of them involve "[p]eople whose housing is dictated by their work," Dfts.' Br., dkt. #53, at 20, but that argument is disingenuous because it applies only to § 107(1), which is not at issue in this case. Section 107(2) does not include any limitations on the type or location of housing that a minister purchases or rents, so it cannot be described as being related to the convenience of the employer doctrine.

Each of the other statutes defendants cite involving exemptions for secular employees was motivated by a purpose specific to the particular group involved. For example, the purpose of § 911 is to protect American business people living overseas from double taxation, Brewster v. Commissioner of Internal Revenue, 473 F.2d 160, 163 (D.C. Cir. 1972), and the purpose of § 912 is to insure that "federal civilian employees should be adequately reimbursed for additional expenses necessarily incurred because of their overseas services." Anderson v. United States, 16 Cl. Ct. 530, 534 (1989). Thus, both of these statutes are less about giving a particular group preferential treatment and more about attempting to avoid penalizing particular taxpayers for engaging in work that provides a benefit to the United States.

Although I did not uncover a discussion of the purpose of § 134 in the case law, it seems obvious that it would be a mistake to rely on any benefit members of the military receive as providing an "overarching secular purpose" for giving a similar benefit to ministers or anyone else. Because members of the military are unique in the level of service they give to the government and the sacrifices they make, it is not surprising that they receive certain benefits not available to the general public. A housing allowance is only one of many "qualified military benefits" that may be excluded from gross income.

Defendants say that § 912 (relating to federal civilian employees living overseas) is similar to § 107 in that its original scope was limited to employees who lived in housing provided by the government, but Congress expanded the exemption to cover housing allowances as well. Anderson, 16 Cl. Ct. at 534-35. This argument is a nonstarter because it does not change the fact that, unlike § 107(2), the purpose of both exemptions in § 912 is to alleviate special burdens experienced by certain taxpayers as a result of their living situation. In any event, any superficial similarity between § 107 and § 912 is irrelevant because a decision by the federal government to expand the scope of an exemption to more of its own employees as it did in § 912 does not implicate the establishment clause as does an exemption that singles out religious persons for more favorable treatment.

In sum, defendants cite no evidence that the concerns that motivated § 134, § 911 and § 912 have anything to do with § 107(2). Accordingly, I agree with plaintiffs that § 107(2) does not have a secular purpose or effect and that a reasonable observer would view § 107(2) as an endorsement of religion.

7. Applicability of § 107(2) to atheists

As discussed above, defendants argued in the context of addressing plaintiffs' standing to sue that it is "conceivable" that an atheist could qualify as a "minister of the gospel" under § 107. Dfts.' Br., dkt. #44, at 10. In the context of discussing the merits in their reply brief, defendants make a similar statement that an atheist could "make a claim" that he or she is a minister of the gospel under § 107. Dfts.' Br., dkt. #53, at 27. In support of an argument that construing § 107(2) to include atheists would defeat plaintiffs' claim, defendants cite a passage in Justice Blackmun's concurring opinion in Texas Monthly that the tax exemption at issue in that case "might survive Establishment Clause scrutiny" if it included "atheistic literature distributed by an atheistic organization." Texas Monthly, 489 U.S. at 49 (Blackmun, J., concurring in the judgment). However, defendants never go so far as to argue that the phrase "minister of the gospel" § 107 could be interpreted reasonably as applying to an atheist. In fact, they decline expressly to take a position on that issue. Dfts.' Br., dkt. #44, at 10 ("The United States is not taking the position that any particular person would, in fact, qualify to claim the exclusion under § 107(2).").

I am not aware of any decision in which a majority of the Supreme Court considered whether a claim under the establishment clause would be defeated if the particular benefit at issue were granted to atheists, but still excluded secular groups. At least in the context of this case, there is a plausible argument that the claim would survive. Under Lemon, the question is whether the government has "advanced religion." Thus, if atheism were included under the umbrella of "religion," § 107(2) still would advance religion over secular interests, even if the provision applied to atheists, because secular taxpayers still would be excluded from the benefit. Further, regardless whether § 107(2) could be read to include an "atheist minister," the statute still discriminates against religions that do not employ ministers, as noted above.

Regardless, to the extent defendants mean to argue that § 107(2) is constitutional because of an abstract possibility that an atheist could qualify as a minister of the gospel, I disagree. Defendants are correct that courts must construe statutes to "avoid constitutional difficulties," Clark v.

Martinez, 543 U.S. 371, 381-382 (2005), but that canon applies only if the statute is "readily susceptible to such a construction." Reno v. American Civil Liberties Union, 521 U.S. 844, 884 (1997). A court may not "rewrite a . . . law to conform it to constitutional requirements." Id. at 884-885.

In this case, no reasonable construction of § 107 would include atheists. In the concurring opinion in Texas Monthly that defendants cite, Justice Blackmun rejected as "facially implausible" an argument that atheistic literature could be included as part of "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith." Texas Monthly, 489 U.S. at 29 (Blackmun, J., concurring in the judgment). Defendants do not explain why they believe interpreting § 107 to include atheists is any more plausible. Hearings Before the H. Comm. on Ways & Means, 83rd Cong. at 1574-75 (sponsor of § 107(2) stating that purpose of law was to help ministers who are "fight[ing] against" a "godless and anti-religious world movement").

The only authority defendants cite is Kaufman, 419 F.3d at 682, in which the court concluded that atheism could qualify as a religion under the free exercise clause for the purpose of that case. However, the question under § 107 is not whether atheism is a religion but whether an atheist can be a "minister of the gospel," a very different question. In Kaufman, the court cited Reed v. Great Lakes Cos., 330 F.3d 931, 934 (7th Cir. 2003), for the proposition that religion under the free exercise could be defined simply as "taking a position on divinity," Kaufman, 419 F.3d at 682, but, as discussed above, qualifying as a "minister of the gospel" is much more complicated. Defendants cite no evidence that an "atheist minister" exists (a term that many might view as an oxymoron), let alone an atheist that satisfies the IRS's criteria for a "minister of the gospel," by performing "sacerdotal" functions, conducting "worship" services or acting as a "spiritual" leader under the authority of a "church."

8. Entanglement

With respect to the question whether § 107(2) fosters excessive entanglement between church and state, I see little distinction between this case and Texas Monthly, in which the plurality concluded that the Texas statute "appear[ed], on its face, to produce greater state entanglement with religion than the denial of an exemption" because granting the exemption required the government to "evaluat[e] the relative merits of differing religious claims" and created "[t]he prospect of inconsistent treatment and government embroilment in controversies over religious doctrine." Texas Monthly, 489 U.S. at 20 (plurality opinion). Defendants argue that "it is constitutionally permissible for a government to determine whether a person's belief is 'religious' and sincerely held," Dfts.' Br., dkt. #53, at 25, but, as discussed above, § 107 and its implementing regulations go well beyond a determination whether a belief is "religious," involving a complex and inherently ambiguous multifactor test. Compare Kaufman, 419 F.3d at 682 (concluding in four paragraphs that atheism could qualify as a religion under free exercise clause) with Foundation of Human Understanding v. United States, 88 Fed. Cl. 203 (Fed. Cl. 2009) (32-page decision devoted entirely to question whether organization qualified as "church" under tax code). See also Justin Butterfield, Hiram Sasser and Reed Smith, The Parsonage Exemption Deserves Broad Protection, 16 Tex. Rev. L. & Pol. 251, 264 (2012) (arguing in favor of the constitutionality of § 107, but acknowledging that "there is an entanglement problem" with the implementing regulations).

More persuasive is defendants' reliance on Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, ___ U.S. ___, 132 S. Ct. 694, 699 (2012), in which the Supreme Court concluded that a "minister" could not sue a church for employment discrimination under Title VII. Although the Court did not consider expressly whether a "ministerial" exception to Title VII created excessive entanglement, the Court applied the exception to the facts of the case without expressing any

reservations.

Hosanna-Tabor is not on all fours with this case because, like Amos, it involved countervailing concerns that a contrary rule would lead to interference with "a religious group's right to shape its own faith and mission through its appointments." Hosanna-Tabor, 132 S. Ct. at 706. In any event, because I have concluded that § 107(2) does not have a secular purpose or effect, I need not decide whether the provision fosters excessive entanglement between church and state. Doe, 687 F.3d at 851 n. 15 ("Since we conclude that the District acted unconstitutionally on other grounds, we need not . . . consider the District's actions under Lemon's entanglement prong.").

C. Conclusion

Although I conclude that § 107(2) violates the establishment clause and must be enjoined, this does not mean that the government is powerless to enact tax exemptions that benefit religion. "[P]olicies providing incidental benefits to religion do not contravene the Establishment Clause." Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753, 768 (1995) (plurality opinion). In particular, because "[t]he nonsectarian aims of government and the interests of religious groups often overlap," the government is not "required [to] refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur." Texas Monthly, 489 U.S. at 10 (plurality opinion). Thus, if Congress believes that there are important secular reasons for granting the exemption in § 107(2), it is free to rewrite the provision in accordance with the principles laid down in Texas Monthly and Walz so that it includes ministers as part of a larger group of beneficiaries. Haller, 728 A.2d at 356 (noting that Texas amended statute at issue in Texas Monthly to grant sales tax exemption to broader range of groups). As it stands now, however, § 107(2) is unconstitutional.

ORDER

IT IS ORDERED that

1. The motion for summary judgment filed by defendants Timothy Geithner and Douglas Schulman (now succeeded by Jacob Lew and Daniel Werfel), dkt. #40, is GRANTED with respect to plaintiffs' Freedom from Religion Foundation, Inc.'s, Annie Laurie Gaylor's and Dan Barker's challenge to 26 U.S.C. § 107(1). Plaintiff's complaint is DISMISSED as to that claim for lack of standing.

2. Defendants' motion for summary judgment is DENIED as to plaintiffs' challenge to 26 U.S.C. § 107(2). On the court's own motion, summary judgment is GRANTED to plaintiffs as to that claim.

3. It is DECLARED that 26 U.S.C. § 107(2) violates the establishment clause of the First Amendment to the United States Constitution.

4. Defendants are ENJOINED from enforcing § 107(2). The injunction shall take effect at the conclusion of any appeals filed by defendants or the expiration of defendants' deadline for filing an appeal, whichever is later.

5. The clerk of court is directed to enter judgment in favor of plaintiffs and close this case.

ENTERED this 21st day of November, 2013.

By the Court:

Barbara B. Crabb

District Judge

FOOTNOTE

1 Initially, plaintiffs sued Timothy Geithner and Douglas Schulman in their official capacities as Secretary of the Treasury Department and Commissioner of the Internal Revenue Service. Pursuant to Fed. R. Civ. P. 25(d), I have substituted the new Secretary, Jacob Lew, and the Acting Commissioner, Daniel Werfel.

Citations: Freedom From Religion Foundation Inc. et al. v. Jacob Lew et al.; No. 3:11-cv-00626

Treasury, IRS Will Issue Proposed Guidance for Tax-Exempt Social Welfare Organizations.

WASHINGTON — The U.S. Department of the Treasury and the Internal Revenue Service today will issue initial guidance regarding qualification requirements for tax-exemption as a social welfare organization under section 501(c)(4) of the Internal Revenue Code. This proposed guidance defines the term "candidate-related political activity," and would amend current regulations by indicating that the promotion of social welfare does not include this type of activity. The proposed guidance also seeks initial comments on other aspects of the qualification requirements, including what proportion of a 501(c)(4) organization's activities must promote social welfare.

The proposed guidance is expected to be posted on the Federal Register later today.

There are a number of steps in the regulatory process that must be taken before any final guidance can be issued. Given the significant public interest in these and related issues, Treasury and the IRS expect to receive a large number of comments. Treasury and the IRS are committed to carefully and comprehensively considering all of the comments received before issuing additional proposed guidance or final rules.

"This is part of ongoing efforts within the IRS that are improving our work in the tax-exempt area," said IRS Acting Commissioner Danny Werfel. "Once final, this proposed guidance will continue moving us forward and provide clarity for this important segment of exempt organizations."

"This proposed guidance is a first critical step toward creating clear-cut definitions of political activity by tax-exempt social welfare organizations," said Treasury Assistant Secretary for Tax Policy Mark J. Mazur. "We are committed to getting this right before issuing final guidance that may affect a broad group of organizations. It will take time to work through the regulatory process and carefully consider all public feedback as we strive to ensure that the standards for tax-exemption are clear and can be applied consistently."

Organizations may apply for tax-exempt status under section 501(c)(4) of the tax code if they operate to promote social welfare. The IRS currently applies a "facts and circumstances" test to determine whether an organization is engaged in political campaign activities that do not promote social welfare. Today's proposed guidance would reduce the need to conduct fact-intensive inquiries by replacing this test with more definitive rules.

In defining the new term, "candidate-related political activity," Treasury and the IRS drew upon existing definitions of political activity under federal and state campaign finance laws, other IRS provisions, as well as suggestions made in unsolicited public comments.

Under the proposed guidelines, candidate-related political activity includes:

1. Communications

Communications that expressly advocate for a clearly identified political candidate or candidates of a political party.

Communications that are made within 60 days of a general election (or within 30 days of a primary election) and clearly identify a candidate or political party.

Communications expenditures that must be reported to the Federal Election Commission.

2. Grants and Contributions

Any contribution that is recognized under campaign finance law as a reportable contribution.

Grants to section 527 political organizations and other tax-exempt organizations that conduct candidate-related political activities (note that a grantor can rely on a written certification from a grantee stating that it does not engage in, and will not use grant funds for, candidate-related political activity).

3. Activities Closely Related to Elections or Candidates

Voter registration drives and "get-out-the-vote" drives.

Distribution of any material prepared by or on behalf of a candidate or by a section 527 political organization.

Preparation or distribution of voter guides that refer to candidates (or, in a general election, to political parties).

Holding an event within 60 days of a general election (or within 30 days of a primary election) at which a candidate appears as part of the program.

These proposed rules reduce the need to conduct fact-intensive inquiries, including inquiries into whether activities or communications are neutral and unbiased.

Treasury and the IRS are planning to issue additional guidance that will address other issues relating to the standards for tax exemption under section 501(c)(4). In particular, there has been considerable public focus regarding the proportion of a section 501(c)(4) organization's activities that must promote social welfare. Due to the importance of this aspect of the regulation, the proposed guidance requests initial comments on this issue.

The proposed guidance also seeks comments regarding whether standards similar to those proposed today should be adopted to define the political activities that do not further the tax-exempt purposes of other tax-exempt organizations and to promote consistent definitions across the tax-exempt sector.

Proposed Regs Define Candidate-Related Political Activities for Social

Welfare Groups.

The IRS has issued proposed regulations (REG-134417-13) that provide guidance on political activities related to candidates that don't promote social welfare for purposes of tax-exempt status under section 501(c)(4). Comments and public hearing requests are due by February 27.

Organizations may apply for tax-exempt status under section 501(c)(4) if they operate to promote social welfare, which under the current rules doesn't include participation or intervention in political campaigns on behalf of, or in opposition to, any candidate for public office. The preamble to the proposed regs highlights the history of the "political campaign intervention" standard and the facts and circumstances analysis the IRS has applied over the years to determine whether an organization is engaged in that activity.

Treasury and the IRS have determined that more definitive rules on political activities related to candidates — rather than the current, fact-intensive analysis — would be helpful in applying the rules on qualification for tax-exempt status under section 501(c)(4). Accordingly, the proposed regs amend the current rules to provide that the promotion of social welfare does not include "candidate-related political activity," as defined under the regs.

Under the proposed regs, candidate-related political activity includes communications that expressly advocate for a clearly identified political candidate; communications made within 60 days of a general election, or within 30 days of a primary election, that clearly identify a candidate or political party; and communications expenditures that must be reported to the Federal Election Commission. Candidate-related political activity also includes any contribution that is recognized under campaign finance law as a reportable contribution and grants to section 527 political organizations and other tax-exempt organizations that conduct candidate-related political activities. The regs provide that a grantor may rely on a written certification from a grantee stating that it does not engage in, and will not use grant funds for, candidate-related political activity.

Other candidate-related political activities identified in the proposed regs include voter registration drives and "get out the vote" drives; distribution of material prepared by or on behalf of a candidate or by a section 527 political organization; preparation or distribution of voter guides that refer to candidates or political parties; and events held within 60 days of a general election, or within 30 days of a primary election, at which a candidate appears as part of the program. The regs are proposed to apply on the date that final regs are published in the Federal Register.

Treasury and the IRS have received requests for guidance on the meaning of "primarily" as used in the current rules under section 501(c)(4). Before deciding how to proceed, Treasury and the IRS have requested comments on what portion of an organization's activities must promote social welfare for an organization to qualify under section 501(c)(4) and whether more limits should be imposed on any or all activities that do not further social welfare. Comments are also requested on how to measure the activities of organizations seeking to qualify as section 501(c)(4) social welfare organizations for these purposes.

The proposed regs don't address the definition of political campaign intervention under section 501(c)(3), the definition of exempt function activity under section 527, or the application of section 527(f). Comments are requested on whether standards similar to those in the proposed regs should be adopted to define the political activities that do not further the tax-exempt purposes of other tax-exempt organizations and to promote consistent definitions across the tax-exempt sector.

Guidance for Tax-Exempt Social Welfare Organizations on

Candidate-Related Political Activities

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-134417-13]

RIN 1545-BL81

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations that provide guidance to tax-exempt social welfare organizations on political activities related to candidates that will not be considered to promote social welfare. These regulations will affect tax-exempt social welfare organizations and organizations seeking such status. This document requests comments from the public regarding these proposed regulations. This document also requests comments from the public regarding the standard under current regulations that considers a tax-exempt social welfare organization to be operated exclusively for the promotion of social welfare if it is "primarily" engaged in activities that promote the common good and general welfare of the people of the community, including how this standard should be measured and whether this standard should be changed.

DATES: Written or electronic comments and requests for a public hearing must be received by February 27, 2014.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-134417-13), Room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-134417-13), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at http://www.regulations.gov (IRS REG-134417-13).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Amy F. Giuliano at (202) 317-5800; concerning submission of comments and requests for a public hearing, Oluwafunmilayo Taylor at (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by January 27, 2014.

Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced; and

How the burden of complying with the proposed collection of information may be minimized, including through forms of information technology.

The collection of information in these proposed regulations is in § 1.501(c)(4)-1(a)(2)(iii)(D), which provides a special rule for contributions by an organization described in section 501(c)(4) of the Internal Revenue Code (Code) to an organization described in section 501(c). Generally, a contribution by a section 501(c)(4) organization to a section 501(c) organization that engages in candidate-related political activity will be considered candidate-related political activity by the section 501(c)(4) organization. The special rule in § 1.501(c)(4)-1(a)(2)(iii)(D) provides that a contribution to a section 501(c) organization will not be treated as a contribution to an organization engaged in candidate-related political activity if the contributor organization obtains a written representation from an authorized officer of the recipient organization stating that the recipient organization does not engage in any such activity and the contribution is subject to a written restriction that it not be used for candidate-related political activity. This special provision would not apply if the contributor organization knows or has reason to know that the representation is inaccurate or unreliable. The expected recordkeepers are section 501(c)(4) organizations that choose to contribute to, and to seek a written representation from, a section 501(c) organization.

Estimated number of recordkeepers: 2,000.

Estimated average annual burden hours per recordkeeper: 2 hours.

Estimated total annual recordkeeping burden: 4,000 hours.

A particular section 501(c)(4) organization may require more or less time, depending on the number of contributions for which a representation is sought.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

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 return information are confidential, as required by section 6103.

Background

Section 501(c)(4) of the Code provides a Federal income tax exemption, in part, for "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare." This exemption dates back to the enactment of the federal income tax in 1913. See Tariff Act of 1913, 38 Stat. 114 (1913). The statutory provision was largely unchanged until 1996, when section 501(c)(4) was amended to prohibit inurement of an organization's net earnings to private shareholders or individuals.

Prior to 1924, the accompanying Treasury regulations did not elaborate on the meaning of "promotion of social welfare." See Regulations 33 (Rev.), art. 67 (1918). Treasury regulations promulgated in 1924 explained that civic leagues qualifying for exemption under section 231(8) of the Revenue Act of 1924, the predecessor to section 501(c)(4) of the 1986 Code, are "those not organized for profit but operated exclusively for purposes beneficial to the community as a whole," and generally include "organizations engaged in promoting the welfare of mankind, other than organizations comprehended within [section 231(6) of the Revenue Act of 1924, the predecessor to section 501(c)(3) of the 1986 Code]." See Regulations 65, art. 519 (1924). The regulations remained substantially the same until 1959.

The current regulations under section 501(c)(4) were proposed and finalized in 1959. They provide that "[a]n organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community." Treas. Reg. § 1.501(c)(4)-1(a)(2)(i). An organization "embraced" within section 501(c)(4) is one that is "operated primarily for the purpose of bringing about civic betterments and social improvements." Id. The regulations further provide that "[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii). This language is similar to language that appears in section 501(c)(3) requiring section 501(c)(3) organizations not to "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office" ("political campaign intervention"). However, unlike the absolute prohibition that applies to charitable organizations described in section 501(c)(3), an organization that primarily engages in activities that promote social welfare will be considered under the current regulations to be operating exclusively for the promotion of social welfare, and may qualify for tax-exempt status under section 501(c)(4), even though it engages in some political campaign intervention.

The section 501(c)(4) regulations have not been amended since 1959, although Congress took steps in the intervening years to address further the relationship of political campaign activities to tax-exempt status. In particular, section 527, which governs the tax treatment of political organizations, was enacted in 1975 and provides generally that amounts received as contributions and other funds raised for political purposes (section 527 exempt function income) are not subject to tax. Section 527(e)(1) defines a "political organization" as "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." Section 527(f) also imposes a tax on exempt organizations described in section 501(c), including section 501(c)(4) social welfare organizations, that make an expenditure furthering a section 527 exempt function. The tax is imposed on the lesser of the organization's net investment income or section 527 exempt function expenditures. Section 527(e)(2) defines "exempt function" as "the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors" (referred to in this document as "section 527 exempt function").1

Unlike the section 501(c)(3) standard of political campaign intervention, and the similar standard currently applied under section 501(c)(4), both of which focus solely on candidates for elective public office, a section 527 exempt function encompasses activities related to a broader range of officials, including those who are appointed or nominated, such as executive branch officials and certain judges. Thus, while there is currently significant overlap in the activities that constitute political campaign intervention under sections 501(c)(3) and 501(c)(4) and those that further a section 527 exempt function, the concepts are not synonymous.

Over the years, the IRS has stated that whether an organization is engaged in political campaign intervention depends upon all of the facts and circumstances of each case. See Rev. Rul. 78-248 (1978-1 CB 154) (illustrating application of the facts and circumstances analysis to voter education activities conducted by section 501(c)(3) organizations); Rev. Rul. 80-282 (1980-2 CB 178) (amplifying Rev. Rul. 78-248 regarding the timing and distribution of voter education materials); Rev. Rul. 86-95 (1986-2 CB 73) (holding a public forum for the purpose of educating and informing the voters, which provides fair and impartial treatment of candidates, and which does not promote or advance one candidate over another, does not constitute political campaign intervention under section 501(c)(3)). More recently, the IRS released Rev. Rul. 2007-41 (2007-1 CB 1421), providing 21 examples illustrating facts and circumstances to be considered in determining whether a section 501(c)(3) organization's activities (including voter education, voter registration, and get-out-the-vote drives; individual activity by organization leaders; candidate appearances; business activities; and Web sites) result in political campaign intervention. The IRS generally applies the same facts and circumstances analysis under section 501(c)(4). See Rev. Rul. 81-95 (1981-1 CB 332) (citing revenue rulings under section 501(c)(3) for examples of what constitutes participation or intervention in political campaigns for purposes of section 501(c)(4)).

Similarly, Rev. Rul. 2004-6 (2004-1 CB 328) provides six examples illustrating facts and circumstances to be considered in determining whether a section 501(c) organization (such as a section 501(c)(4) social welfare organization) that engages in public policy advocacy has expended funds for a section 527 exempt function. The analysis reflected in these revenue rulings for determining whether an organization has engaged in political campaign intervention, or has expended funds for a section 527 exempt function, is fact-intensive.

Recently, increased attention has been focused on potential political campaign intervention by section 501(c)(4) organizations. A recent IRS report relating to IRS review of applications for tax-exempt status states that "[o]ne of the significant challenges with the 501(c)(4) [application] review process has been the lack of a clear and concise definition of 'political campaign intervention.'" Internal Revenue Service, "Charting a Path Forward at the IRS: Initial Assessment and Plan of Action" at 20 (June 24, 2013). In addition, "[t]he distinction between campaign intervention and social welfare activity, and the measurement of the organization's social welfare activities relative to its total activities, have created considerable confusion for both the public and the IRS in making appropriate section 501(c)(4) determinations." Id. at 28. The Treasury Department and the IRS recognize that both the public and the IRS would benefit from clearer definitions of these concepts.

Explanation of Provisions

1. Overview

The Treasury Department and the IRS recognize that more definitive rules with respect to political activities related to candidates — rather than the existing, fact-intensive analysis — would be helpful in applying the rules regarding qualification for tax-exempt status under section 501(c)(4). Although more definitive rules might fail to capture (or might sweep in) activities that would (or would not) be captured under the IRS' traditional facts and circumstances approach, adopting rules with sharper distinctions in this area would provide greater certainty and reduce the need for detailed factual analysis in determining whether an organization is described in section 501(c)(4). Accordingly, the Treasury Department and the IRS propose to amend Treas. Reg. § 1.501(c)(4)-1(a)(2) to identify specific political activities that would be considered candidate-related political activities that do not promote social welfare.

To distinguish the proposed rules under section 501(c)(4) from the section 501(c)(3) standard and the similar standard currently applied under section 501(c)(4), the proposed regulations would

amend Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) to delete the current reference to "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office," which is similar to language in the section 501(c)(3) statute and regulations. Instead the proposed regulations would revise Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) to state that "[t]he promotion of social welfare does not include direct or indirect candidate-related political activity." As explained in more detail in section 2 of this preamble, the proposed rules draw upon existing definitions of political campaign activity, both in the Code and in federal election law, to define candidate-related political activity that would not be considered to promote social welfare. The proposed rules draw in particular from certain statutory provisions of section 527, which specifically deals with political organizations and taxes section 501(c) organizations, including section 501(c)(4) organizations, on certain types of political campaign activities. Recognizing that it may be beneficial to have a more uniform set of rules relating to political campaign activity for tax-exempt organizations, the Treasury Department and the IRS request comments in subparagraphs a through c of this section of the preamble regarding whether the same or a similar approach should be adopted in addressing political campaign activities of other section 501(c) organizations, as well as whether the regulations under section 527 should be revised to adopt the same or a similar approach in defining section 527 exempt function activity.

a. Interaction with section 501(c)(3)

These proposed regulations do not address the definition of political campaign intervention under section 501(c)(3). The Treasury Department and the IRS recognize that, because such intervention is absolutely prohibited under section 501(c)(3), a more nuanced consideration of the totality of facts and circumstances may be appropriate in that context. The Treasury Department and the IRS request comments on the advisability of adopting an approach to defining political campaign intervention under section 501(c)(3) similar to the approach set forth in these regulations, either in lieu of the facts and circumstances approach reflected in Rev. Rul. 2007-41 or in addition to that approach (for example, by creating a clearly defined presumption or safe harbor). The Treasury Department and the IRS also request comments on whether any modifications or exceptions would be needed in the section 501(c)(3) context and, if so, how to ensure that any such modifications or exceptions are clearly defined and administrable. Any such change would be introduced in the form of proposed regulations to allow an additional opportunity for public comment.

b. Interaction with section 527

As noted in the "Background" section of this preamble, a section 501(c)(4) organization is subject to tax under section 527(f) if it makes expenditures for a section 527 exempt function. Consistent with section 527, the proposed regulations provide that "candidate-related political activity" for purposes of section 501(c)(4) includes activities relating to selection, nomination, election, or appointment of individuals to serve as public officials, officers in a political organization, or Presidential or Vice Presidential electors. These proposed regulations do not, however, address the definition of "exempt function" activity under section 527 or the application of section 527(f). The Treasury Department and the IRS request comments on the advisability of adopting rules that are the same as or similar to these proposed regulations for purposes of defining section 527 exempt function activity in lieu of the facts and circumstances approach reflected in Rev. Rul. 2004-6. Any such change would be introduced in the form of proposed regulations to allow an additional opportunity for public comment.

c. Interaction with sections 501(c)(5) and 501(c)(6)

The proposed regulations define candidate-related political activity for social welfare organizations described in section 501(c)(4). The Treasury Department and the IRS are considering whether to

amend the current regulations under sections 501(c)(5) and 501(c)(6) to provide that exempt purposes under those regulations (which include "the betterment of the conditions of those engaged in [labor, agricultural, or horticultural] pursuits" in the case of a section 501(c)(5) organization and promoting a "common business interest" in the case of a section 501(c)(6) organization) do not include candidate-related political activity as defined in these proposed regulations. The Treasury Department and the IRS request comments on the advisability of adopting this approach in defining activities that do not further exempt purposes under sections 501(c)(5) and 501(c)(6). Any such change would be introduced in the form of proposed regulations to allow an additional opportunity for public comment.

d. Additional guidance on the meaning of "operated exclusively for the promotion of social welfare"

The Treasury Department and the IRS have received requests for guidance on the meaning of "primarily" as used in the current regulations under section 501(c)(4). The current regulations provide, in part, that an organization is operated exclusively for the promotion of social welfare within the meaning of section 501(c)(4) if it is "primarily engaged" in promoting in some way the common good and general welfare of the people of the community. Treas. Reg. § 1.501(c)(4)-1(a)(2)(i). As part of the same 1959 Treasury decision promulgating the current section 501(c)(4) regulations, regulations under section 501(c)(3) were adopted containing similar language: "[a]n organization will be regarded as 'operated exclusively' for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3)." Treas. Reg. § 1.501(c)(3)-1(c)(1). Unlike the section 501(c)(4) regulations, however, the section 501(c)(3) regulations also provide that "[a]n organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose." Id.

Some have questioned the use of the "primarily" standard in the section 501(c)(4) regulations and suggested that this standard should be changed. The Treasury Department and the IRS are considering whether the current section 501(c)(4) regulations should be modified in this regard and, if the "primarily" standard is retained, whether the standard should be defined with more precision or revised to mirror the standard under the section 501(c)(3) regulations. Given the potential impact on organizations currently recognized as described in section 501(c)(4) of any change in the "primarily" standard, the Treasury Department and the IRS wish to receive comments from a broad range of organizations before deciding how to proceed. Accordingly, the Treasury Department and the IRS invite comments from the public on what proportion of an organization's activities must promote social welfare for an organization to qualify under section 501(c)(4) and whether additional limits should be imposed on any or all activities that do not further social welfare. The Treasury Department and the IRS also request comments on how to measure the activities of organizations seeking to qualify as section 501(c)(4) social welfare organizations for these purposes.

2. Definition of Candidate-Related Political Activity

These proposed regulations provide guidance on which activities will be considered candidate-related political activity for purposes of the regulations under section 501(c)(4). These proposed regulations would replace the language in the existing final regulation under section 501(c)(4) — "participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office" — with a new term — "candidate-related political activity" — to differentiate the proposed section 501(c)(4) rule from the standard employed under section 501(c)(3) (and currently employed under section 501(c)(4)). The proposed rule is intended to help organizations and the IRS more readily identify activities that constitute candidate-related political activity and, therefore, do not promote social welfare within the meaning of section 501(c)(4). These proposed regulations do not otherwise define the promotion of social welfare under section 501(c)(4). The Treasury

Department and the IRS note that the fact that an activity is not candidate-related political activity under these proposed regulations does not mean that the activity promotes social welfare. Whether such an activity promotes social welfare is an independent determination.

In defining candidate-related political activity for purposes of section 501(c)(4), these proposed regulations draw key concepts from the federal election campaign laws, with appropriate modifications reflecting the purpose of these regulations to define which organizations may receive the benefits of section 501(c)(4) tax-exempt status and to promote tax compliance (as opposed to campaign finance regulation). In addition, the concepts drawn from the federal election campaign laws have been modified to reflect that section 501(c)(4) organizations may be involved in activities related to local or state elections (in addition to federal elections), as well as the broader scope of the proposed definition of candidate (which is not limited to candidates for federal elective office).

The proposed regulations provide that candidate-related political activity includes activities that the IRS has traditionally considered to be political campaign activity per se, such as contributions to candidates and communications that expressly advocate for the election or defeat of a candidate. The proposed regulations also would treat as candidate-related political activity certain activities that, because they occur close in time to an election or are election-related, have a greater potential to affect the outcome of an election. Currently, such activities are subject to a facts and circumstances analysis before a determination can be made as to whether the activity furthers social welfare within the meaning of section 501(c)(4). Under the approach in these proposed regulations, such activities instead would be subject to a more definitive rule. In addition, consistent with the goal of providing greater clarity, the proposed regulations would identify certain specific activities as candidate-related political activity. The Treasury Department and the IRS acknowledge that the approach taken in these proposed regulations, while clearer, may be both more restrictive and more permissive than the current approach, but believe the proposed approach is justified by the need to provide greater certainty to section 501(c)(4) organizations regarding their activities and reduce the need for fact-intensive determinations.

The Treasury Department and the IRS note that a particular activity may fit within one or more categories of candidate-related political activity described in subsections b through e of this section 2 of the preamble; the categories are not mutually exclusive. For example, the category of express advocacy communications may overlap with the category of certain communications close in time to an election.

a. Definition of “candidate”

These proposed regulations provide that, consistent with the scope of section 527, “candidate” means an individual who identifies himself or is proposed by another for selection, nomination, election, or appointment to any public office or office in a political organization, or to be a Presidential or Vice-Presidential elector, whether or not the individual is ultimately selected, nominated, elected, or appointed. In addition, the proposed regulations clarify that for these purposes the term “candidate” also includes any officeholder who is the subject of a recall election. The Treasury Department and the IRS note that defining “candidate-related political activity” in these proposed regulations to include activities related to candidates for a broader range of offices (such as activities relating to the appointment or confirmation of executive branch officials and judicial nominees) is a change from the historical application in the section 501(c)(4) context of the section 501(c)(3) standard of political campaign intervention, which focuses on candidates for elective public office only. See Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii). These proposed regulations instead would apply a definition that reflects the broader scope of section 527 and that is already applied to a section 501(c)(4) organization engaged in section 527 exempt function activity through section 527(f).

b. Express advocacy communications

These proposed regulations provide that candidate-related political activity includes communications that expressly advocate for or against a candidate. These proposed regulations draw from Federal Election Commission rules in defining "expressly advocate," but expand the concept to include communications expressing a view on the selection, nomination, or appointment of individuals, or on the election or defeat of one or more candidates or of candidates of a political party. These proposed regulations make clear that all communications — including written, printed, electronic (including Internet), video, and oral communications — that express a view, whether for or against, on a clearly identified candidate (or on candidates of a political party) would constitute candidate-related political activity. A candidate can be "clearly identified" in a communication by name, photograph, or reference (such as "the incumbent" or a reference to a particular issue or characteristic distinguishing the candidate from others). The proposed regulations also provide that candidate-related political activity includes any express advocacy communication the expenditures for which an organization reports to the Federal Election Commission under the Federal Election Campaign Act as an independent expenditure.

c. Public communications close in time to an election

Under current guidance, the timing of a communication about a candidate that is made shortly before an election is a factor tending to indicate a greater risk of political campaign intervention or section 527 exempt function activity. In the interest of greater clarity, these proposed regulations would move away from the facts and circumstances approach that the IRS has traditionally applied in analyzing certain activities conducted close in time to an election. These proposed regulations draw from provisions of federal election campaign laws that treat certain communications that are close in time to an election and that refer to a clearly identified candidate as electioneering communications, but make certain modifications. The proposed regulations expand the types of candidates and communications that are covered to reflect the types of activities an organization might conduct related to local and state, as well as federal, contests, including any election or ballot measure to recall an individual who holds state or local elective public office. In addition, the expansion of the types of communications covered in the proposed regulations reflects the fact that an organization's tax exempt status is determined based on all of its activities, even low cost and volunteer activities, not just its large expenditures.

Under the proposed definition, any public communication that is made within 60 days before a general election or 30 days before a primary election and that clearly identifies a candidate for public office (or, in the case of a general election, refers to a political party represented in that election) would be considered candidate-related political activity. These timeframes are the same as those appearing in the Federal Election Campaign Act definition of electioneering communications. The definition of "election," including what would be treated as a primary or a general election, is consistent with section 527(j) and the federal election campaign laws.

A communication is "public" if it is made using certain mass media (specifically, by broadcast, in a newspaper, or on the Internet), constitutes paid advertising, or reaches or is intended to reach at least 500 people (including mass mailings or telephone banks). The Treasury Department and the IRS intend that content previously posted by an organization on its Web site that clearly identifies a candidate and remains on the Web site during the specified pre-election period would be treated as candidate-related political activity.

The proposed regulations also provide that candidate-related political activity includes any communication the expenditures for which an organization reports to the Federal Election Commission under the Federal Election Campaign Act, including electioneering communications.

The approach taken in the proposed definition of candidate-related political activity would avoid the need to consider potential mitigating or aggravating circumstances in particular cases (such as whether an issue-oriented communication is "neutral" or "biased" with respect to a candidate). Thus, this definition would apply without regard to whether a public communication is intended to influence the election or some other, non-electoral action (such as a vote on pending legislation) and without regard to whether such communication was part of a series of similar communications. Moreover, a public communication made outside the 60-day or 30-day period would not be candidate-related political activity if it does not fall within the ambit of express advocacy communications or another specific provision of the definition. The Treasury Department and the IRS request comments on whether the length of the period should be longer (or shorter) and whether there are particular communications that (regardless of timing) should be excluded from the definition because they can be presumed to neither influence nor constitute an attempt to influence the outcome of an election. Any comments should specifically address how the proposed exclusion is consistent with the goal of providing clear rules that avoid fact-intensive determinations.

The Treasury Department and the IRS also note that this rule regarding public communications close in time to an election would not apply to public communications identifying a candidate for a state or federal appointive office that are made within a specified number of days before a scheduled appointment, confirmation hearing or vote, or other selection event. The Treasury Department and the IRS request comments on whether a similar rule should apply with respect to communications within a specified period of time before such a scheduled appointment, confirmation hearing or vote, or other selection event.

d. Contributions to a candidate, political organization, or any section 501(c) entity engaged in candidate-related political activity

The proposed definition of candidate-related political activity would include contributions of money or anything of value to or the solicitation of contributions on behalf of (1) any person if such contribution is recognized under applicable federal, state, or local campaign finance law as a reportable contribution; (2) any political party, political committee, or other section 527 organization; or (3) any organization described in section 501(c) that engages in candidate-related political activity within the meaning of this proposed rule. This definition of contribution is similar to the definition of contribution that applies for purposes of section 527. The Treasury Department and the IRS intend that the term "anything of value" would include both in-kind donations and other support (for example, volunteer hours and free or discounted rentals of facilities or mailing lists). The Treasury Department and the IRS request comments on whether other transfers, such as indirect contributions described in section 276 to political parties or political candidates, should be treated as candidate-related political activity.

The Treasury Department and the IRS recognize that a section 501(c)(4) organization making a contribution may not know whether a recipient section 501(c) organization engages in candidate-related political activity. The proposed regulations provide that, for purposes of this definition, a recipient organization would not be treated as a section 501(c) organization engaged in candidate-related political activity if the contributor organization obtains a written representation from an authorized officer of the recipient organization stating that the recipient organization does not engage in any such activity and the contribution is subject to a written restriction that it not be used for candidate-related political activity. This special provision would apply only if the contributor organization does not know or have reason to know that the representation is inaccurate or unreliable.

e. Election-related activities

The proposed definition of candidate-related political activity would include certain specified election-related activities, including the conduct of voter registration and get-out-the-vote drives, distribution of material prepared by or on behalf of a candidate or section 527 organization, and preparation or distribution of a voter guide and accompanying material that refers to a candidate or a political party. In addition, an organization that hosts an event on its premises or conducts an event off-site within 30 days of a primary election or 60 days of a general election at which one or more candidates in such election appear as part of the program (whether or not such appearance was previously scheduled) would be engaged in candidate-related political activity under the proposed definition.

The Treasury Department and the IRS acknowledge that under the facts and circumstances analysis currently used for section 501(c)(4) organizations as well as for section 501(c)(3) organizations, these election-related activities may not be considered political campaign intervention if conducted in a non-partisan and unbiased manner. However, these determinations are highly fact-intensive. The Treasury Department and the IRS request comments on whether any particular activities conducted by section 501(c)(4) organizations should be excepted from the definition of candidate-related political activity as voter education activity and, if so, a description of how the proposed exception will both ensure that excepted activities are conducted in a non-partisan and unbiased manner and avoid a fact-intensive analysis.

f. Attribution to a section 501(c)(4) organization of certain activities and communications

These proposed regulations provide that activities conducted by an organization include, but are not limited to, (1) activities paid for by the organization or conducted by the organization's officers, directors, or employees acting in that capacity, or by volunteers acting under the organization's direction or supervision; (2) communications made (whether or not such communications were previously scheduled) as part of the program at an official function of the organization or in an official publication of the organization; and (3) other communications (such as television advertisements) the creation or distribution of which is paid for by the organization. These proposed regulations also provide that an organization's Web site is an official publication of the organization, so that material posted by the organization on its Web site may constitute candidate-related political activity. The proposed regulations do not specifically address material posted by third parties on an organization's Web site. The Treasury Department and the IRS request comments on whether, and under what circumstances, material posted by a third party on an interactive part of the organization's Web site should be attributed to the organization for purposes of this rule. In addition, the Treasury Department and the IRS have stated in guidance under section 501(c)(3) regarding political campaign intervention that when a charitable organization chooses to establish a link to another Web site, the organization is responsible for the consequences of establishing and maintaining that link, even if it does not have control over the content of the linked site. See Rev. Rul. 2007-41. The Treasury Department and the IRS request comments on whether the consequences of establishing and maintaining a link to another Web site should be the same or different for purposes of the proposed definition of candidate-related political activity.

Proposed Effective/Applicability Date

These regulations are proposed to be effective the date of publication of the Treasury decision adopting these rules as final regulations in the Federal Register. For proposed date of applicability, see § 1.501(c)(4)-1(c).

Statement of Availability for IRS Documents

For copies of recently issued Revenue Procedures, Revenue Rulings, Notices, and other guidance

published in the Internal Revenue Bulletin or Cumulative Bulletin, please visit the IRS Web site at http://www.irs.gov or the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that only a minimal burden would be imposed by the rule, if adopted. Under the proposal, if a section 501(c)(4) organization chooses to contribute to a section 501(c) organization and wants assurance that the contribution will not be treated as candidate-related political activity, it may seek a written representation that the recipient does not engage in candidate-related political activity within the meaning of these regulations. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and the IRS generally request comments on all aspects of the proposed rules. In particular, the Treasury Department and the IRS request comments on whether there are other specific activities that should be included in, or excepted from, the definition of candidate-related political activity for purposes of section 501(c)(4). Such comments should address how the proposed addition or exception is consistent with the goals of providing more definitive rules and reducing the need for fact-intensive analysis of the activity. All comments submitted by the public will be made available for public inspection and copying at www.regulations.gov or upon request.

A public hearing will be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the Federal Register.

Drafting Information

The principal author of these regulations is Amy F. Giuliano, Office of Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1 — INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.501(c)(4)-1 is proposed to be amended by revising the first sentence of paragraph (a)(2)(ii) and adding paragraphs (a)(2)(iii) and (c) to read as follows:

§ 1.501(c)(4)-1 Civic organizations and local associations of employees.

(a) * * *

(2) * * *

(ii) * * * The promotion of social welfare does not include direct or indirect candidate-related political activity, as defined in paragraph (a)(2)(iii) of this section. * * *

(iii) Definition of candidate-related political activity — (A) In general. For purposes of this section, candidate-related political activity means:

(1) Any communication (as defined in paragraph (a)(2)(iii)(B)(3) of this section) expressing a view on, whether for or against, the selection, nomination, election, or appointment of one or more clearly identified candidates or of candidates of a political party that —

(i) Contains words that expressly advocate, such as “vote,” “oppose,” “support,” “elect,” “defeat,” or “reject;” or

(ii) Is susceptible of no reasonable interpretation other than a call for or against the selection, nomination, election, or appointment of one or more candidates or of candidates of a political party;

(2) Any public communication (defined in paragraph (a)(2)(iii)(B)(5) of this section) within 30 days of a primary election or 60 days of a general election that refers to one or more clearly identified candidates in that election or, in the case of a general election, refers to one or more political parties represented in that election;

(3) Any communication the expenditures for which are reported to the Federal Election Commission, including independent expenditures and electioneering communications;

(4) A contribution (including a gift, grant, subscription, loan, advance, or deposit) of money or anything of value to or the solicitation of contributions on behalf of —

(i) Any person, if the transfer is recognized under applicable federal, state, or local campaign finance law as a reportable contribution to a candidate for elective office;

(ii) Any section 527 organization; or

(iii) Any organization described in section 501(c) that engages in candidate-related political activity within the meaning of this paragraph (a)(2)(iii) (see special rule in paragraph (a)(2)(iii)(D) of this section);

(5) Conduct of a voter registration drive or “get-out-the-vote” drive;

(6) Distribution of any material prepared by or on behalf of a candidate or by a section 527 organization including, without limitation, written materials, and audio and video recordings;

(7) Preparation or distribution of a voter guide that refers to one or more clearly identified candidates or, in the case of a general election, to one or more political parties (including material accompanying the voter guide); or

(8) Hosting or conducting an event within 30 days of a primary election or 60 days of a general election at which one or more candidates in such election appear as part of the program.

(B) Related definitions. The following terms are defined for purposes of this paragraph (a)(2)(iii) only:

(1) "Candidate" means an individual who publicly offers himself, or is proposed by another, for selection, nomination, election, or appointment to any federal, state, or local public office or office in a political organization, or to be a Presidential or Vice-Presidential elector, whether or not such individual is ultimately selected, nominated, elected, or appointed. Any officeholder who is the subject of a recall election shall be treated as a candidate in the recall election.

(2) "Clearly identified" means the name of the candidate involved appears, a photograph or drawing of the candidate appears, or the identity of the candidate is apparent by reference, such as by use of the candidate's recorded voice or of terms such as "the Mayor," "your Congressman," "the incumbent," "the Democratic nominee," or "the Republican candidate for County Supervisor." In addition, a candidate may be "clearly identified" by reference to an issue or characteristic used to distinguish the candidate from other candidates.

(3) "Communication" means any communication by whatever means, including written, printed, electronic (including Internet), video, or oral communications.

(4) "Election" means a general, special, primary, or runoff election for federal, state, or local office; a convention or caucus of a political party that has authority to nominate a candidate for federal, state or local office; a primary election held for the selection of delegates to a national nominating convention of a political party; or a primary election held for the expression of a preference for the nomination of individuals for election to the office of President. A special election or a runoff election is treated as a primary election if held to nominate a candidate. A convention or caucus of a political party that has authority to nominate a candidate is also treated as a primary election. A special election or a runoff election is treated as a general election if held to elect a candidate. Any election or ballot measure to recall an individual who holds state or local elective public office is also treated as a general election.

(5) "Public communication" means any communication (as defined in paragraph (a)(2)(iii)(B)(3) of this section) —

(i) By broadcast, cable, or satellite;

(ii) On an Internet Web site;

(iii) In a newspaper, magazine, or other periodical;

(iv) In the form of paid advertising; or

(v) That otherwise reaches, or is intended to reach, more than 500 persons.

(6) "Section 527 organization" means an organization described in section 527(e)(1) (including a separate segregated fund described in section 527(f)(3)), whether or not the organization has filed notice under section 527(i).

(C) Attribution. For purposes of this section, activities conducted by an organization include activities paid for by the organization or conducted by an officer, director, or employee acting in that capacity or by volunteers acting under the organization's direction or supervision. Communications made by an organization include communications the creation or distribution of which is paid for by the organization or that are made in an official publication of the organization (including statements or material posted by the organization on its Web site), as part of the program at an official function of the organization, by an officer or director acting in that capacity, or by an employee, volunteer, or other representative authorized to communicate on behalf of the organization and acting in that capacity.

(D) Special rule regarding contributions to section 501(c) organizations. For purposes of paragraph (a)(2)(iii)(A)(4) of this section, a contribution to an organization described in section 501(c) will not be treated as a contribution to an organization engaged in candidate-related political activity if —

(1) The contributor organization obtains a written representation from an authorized officer of the recipient organization stating that the recipient organization does not engage in such activity (and the contributor organization does not know or have reason to know that the representation is inaccurate or unreliable); and

(2) The contribution is subject to a written restriction that it not be used for candidate-related political activity within the meaning of this paragraph (a)(2)(iii).

(c) Effective/applicability date. Paragraphs (a)(2)(ii) and (iii) of this section apply on and after the date of publication of the Treasury decision adopting these rules as final regulations in the Federal Register.

John Dalrymple

Deputy Commissioner for Services

and Enforcement.

FOOTNOTE

1 In 2000 and 2002, section 527 was amended to require political organizations (with some exceptions) to file a notice with the IRS when first organized and to periodically disclose publicly certain information regarding their expenditures and contributions. See sections 527(i) and 527(j).

Citations: REG-134417-13

Moody's Industry Outlook: 2014 Outlook – US Not-for-Profit Hospitals.

Description Comprehensive analysis and data on the current and expected economic conditions and ratings drivers for a given sector in the coming 12-18 months.

Purchase the report at:

https://www.moodys.com/MdcAccessDeniedCh.aspx?lang=en&cy=global&Source=https%3a%2f%2fwww.moodys.com%2fresearchdocumentcontentpage.aspx%3fdocid%3dPBM_PBM160569

Bond Insurers Charging Less to Take on Risk.

Bond insurers Assured Guaranty and Build America Mutual are getting less compensation for risk as compressed credit spreads and competition force the businesses to cut insurance prices.

Assured reported a U.S. public finance risk-adjusted pricing ratio, a risk-versus-return measure of an insurer's portfolio in which a higher score is considered stronger, of 3.55% in the first three quarters of 2013, down from 4.46% in 2012, Standard & Poor's said in a Nov. 20 report. Build America, which ramped up its business in the beginning of the year, reported RAP of 3.46% for the same period.

The implied premium rate for bond insurance is 20% lower in 2013 than in 2012, with an average of 40 basis points in the second quarter of 2013, compared with the 60 basis point average insurance obtained in previous years. Persistent low pricing ratios could lead to ratings cuts, analyst Marc Cohen said in the S&P report.

"In a perfect world with only two players you'd think they have the market power to exercise their abilities to extract the best premiums," Cohen said in an interview. "However, the current market dynamics are hindering the bond insurers' profitability. With those market dynamics there's a heightened level of competition among those two players."

Build America's launch in July 2012 ended Assured's post-financial crisis luxury of being the only active insurer. The financial guaranty market began to split, with Assured responsible for 59% of insured bonds as of September 30. The percentage of bonds with insurance fell to 3.53% in the third quarter, from 3.71% in the second quarter, according to data from Reuters.

Issuers are shying away from insurance as interest rates remain low and make guarantees less economically valuable, Cohen said. Instead, insurance has largely been present to provide liquidity and access to the market for smaller issuers.

"When spreads are wider, insurers are able to extract a significant portion of that interest savings, so when credit spreads and muni yields are as tight as they have been, there's less money on the table to extract from their premiums," Cohen said.

The difference in yield between single-A and triple-B 10-year municipal bonds, the section on the curve where insurers do most of their business, fell from 85 basis points in November 2012 to 61 points in September. The spread between AAA GO 30-year yields and BBB bonds feel from 131 basis points a year ago to 114 in September. Since September, those spreads have either fluctuated or risen.

Analysts expect theFederal Reserve to begin tapering its quantitative easing program in the near future, which would increase yields and spreads, and encourage issuers to look to insurers for savings on new debt, Cohen said. Assured expects rising interest rates to boost demand for guarantees.

"We've already seen the positive effects of rising rates during the summertime when rates were up," Bill Hogan, director of public finance at Assured, said in an interview. "Higher rates helped us then and we expect them to go a little bit higher next year, which will be beneficial to both penetration and pricing."

As part of its rating methodology for financial guarantors, S&P places transactions into four risk categories, which determine the capital charge associated with backing a specific deal. Insurers are

required to reserve a percent of the average annual debt service associated with the deal against the risk. In 2011, S&P increased that percentage, with deals in category four – charter schools, health care or private schools — requiring the largest capital charge.

Assured's gross per period weighted capital charge is 16%, compared with BAM's 11.4%. Insuring deals in the category four area has weakened Assured's pricing ratio, Hogan said, even though those transactions make up just $200 million in par amount.

"It's unfortunate that the high capital charges in Category 4 limit our ability to underwrite sound enterprise credits," Hogan said. Not including category four transactions, Assured's RAP in the first three months of the year satisfies S&P's requirements, Hogan said.

Build America does not wrap debt in higher risk categories,

"Given the current spread environment, we are satisfied with our progress to date and look forward to continuing to serve our core market of essential public purpose municipal issuers," Sean McCarthy, chief executive officer of BAM, said in an emailed statement.

S&P's scrutiny into the insurers may reflect a more general concern for the industry, Mikhail Foux, a municipal strategist at Citigroup Global Markets. Foux believes insurers will likely see an uptick in market penetration but said rating agencies may be reconsidering how they look at insurers that have exposure to debt in distressed areas.

"They may be concerned about what could happen with stress in the sector and looking at how they separate high quality business from the rest," Foux said.

The insurers' pricing ratios are falling short of S&P's expectations, the rating agency said in the report. S&P looks for insurers to remain in the 4% to 6% risk-adjusted pricing range, and remaining below 4% could lead to ratings downgrades.

Hogan expects the ratios to rise before year-end with large low-capital charge deals on the table.

BY OLIVER RENICK

NOV 25, 2013 4:53pm ET

Illinois Legislative Leaders Try to Sell Pension Agreement.

Illinois legislative leaders are trying to persuade lawmakers to embrace a solution for the nation's worst-funded U.S. public pension system as unions representing hundreds of thousands of workers and retirees push against the proposal.

The holiday weekend of lobbying is the prelude to the legislature's Dec. 3 return, when the Democrat-dominated General Assembly will consider the plan designed to save $160 billion over 30 years and restore stability to the retirement system. Within an hour of the tentative deal's announcement, labor unions mobilized against it.

"If their new plan is in line with what's been reported from earlier discussions, then it's an unfair, unconstitutional scheme that undermines retirement security," We Are One Illinois, a coalition of unions, said in a statement.

Illinois's five pension systems had 40 percent of the assets needed to cover obligations in fiscal 2011, the lowest ratio among states, data compiled by Bloomberg show. That has led to repeated credit downgrades for the lowest-rated U.S. state.

The proposal would reduce by one percentage point the amount employees contribute from their paychecks, according to a memo released today by House Speaker Michael Madigan's office. The bulk of the savings would come from reductions in annual cost-of-living payments.

Benefits Delayed

Payments would be calculated against a sum equal to the number of years an employee worked, times $1,000, the memo said. The retirement age for workers younger than 45 would be raised, requiring employees to work as many as five years longer before receiving benefits. Employees could also choose a 401(k)-style retirement plan.

If the state didn't make annual pension contributions to the funds, the retirement systems would be allowed to go to the Illinois Supreme Court "to compel the state to make the required pension payment," the memo said.

The proposal, agreed to by Democratic and Republican leaders, follows months of discussions by a special legislative panel appointed to develop a compromise.

"I asked members to draft a plan that eliminated the unfunded pension debt and fully stabilized the systems, and this plan meets that standard," Democratic Governor Pat Quinn said in a statement. "We have more work to do. I look forward to working with the leaders and members of the General Assembly over the coming days to get this job done."

Repeated Attempts

Resolving Illinois's pension shortfall has proven a challenge. Lawmakers have failed at least five times in the last 15 months to restructure the plans covering 761,000 employees and retirees. Despite the backing of legislative leaders, approval by a majority of both houses is not assured.

"The Senate president will be debriefing members of his caucus in the coming days in hopes of garnering support," said Ronald Holmes, a spokesman for Senate President John Cullerton.

Illinois has the lowest credit standing among U.S. states from the three biggest rating companies, at four steps above junk. The firms have repeatedly cited the pension shortfall as the basis for the reductions.

By Tim Jones – Nov 29, 2013 11:47 AM PT

San Jose Pension Crush Spurs Bid to Ease California Pacts.

If Chuck Reed were a private employer and saw his pension costs triple in 10 years, he could cut future benefits as allowed under a federal law known as the Employee Retirement Income Security Act.

Reed, though, is mayor of San Jose, California, and the law doesn't cover the public employees he oversees. Their pensions are treated as a contract between the government and worker. While cities

are allowed to make changes for new hires, union representatives say that future benefits promised to existing workers can't be modified.

The result is that San Jose, the home of Silicon Valley giants Cisco Systems Inc. (CSCO) and EBay Inc. (EBAY), spent almost one third of its general fund on pensions last year, the highest among the 25 most populous U.S. cities, according to Morningstar Inc. (MORN) Reed, a 65-year-old Democrat, is leading a statewide voter initiative to allow changes in future benefits for existing employees as unions fight to preserve the current rules.

"The statewide measure allows us to begin to deal with the cost of skyrocketing pension and retiree health-care costs," Reed said in an interview. "If you look at what we've done so far, it doesn't solve the problem."

San Jose, a city of 983,000 that is California's third-largest, has been forced to make deep cuts in basic services as its retirement costs soared to $245 million in 2012 from $73 million in 2002. The city's pension and retiree health-care liability is almost $3 billion, according to Reed, who was first elected in 2006.

Changes Approved

San Jose voters last year approved retirement changes requiring new employees to pay 50 percent of the plan's total cost, or about twice as much as current employees. Workers already on the city's payroll could keep their existing plans by increasing their contributions or keep their costs steady by choosing a plan with more modest benefits.

Unions including the San Jose Police Officers' Association and the San Jose Retired Employees Association sued to block the change. The case is pending.

Reed's ballot initiative would amend the California constitution to give local governments the power to negotiate changes to existing employees' future pension or retiree health care, while protecting benefits they've already earned.

"What they're trying to do is overturn decades of case law, Supreme Court decisions and change the California constitution to allow public employers to either change, cut or eliminate public employees' pensions in the middle of their career," said Dave Low, executive director of the California School Employees Association and chairman of Californians for Retirement Security, a coalition of public employees and retirees.

"It's a vested right," Low said.

Rhode Island

Rhode Island enacted pension changes in 2011 that will delay retirement for state employees and offer them 401(k)-type savings plans that don't provide guaranteed benefits. Union leaders sued to prevent the measure from taking effect.

"In talking with other mayors around the state, everybody would benefit from having clear authority to be able to negotiate changes for future benefits for work yet to be performed for current employees," Reed said of his ballot measure.

Mayors Pat Morris of bankrupt San Bernardino, Tom Tait of Anaheim and Bill Kampe of Pacific Grove are backing the plan. Santa Ana Mayor Miguel Pulido dropped out as a formal supporter and was replaced by Vallejo Vice Mayor Stephanie Gomes. Opponents include Oakland Mayor Jean Quan

and San Francisco Board of Supervisors President David Chiu.

'Threatens' Teachers

Also assailing the plan are the California Public Employees' Retirement System, the largest U.S. public pension, and the California State Teachers' Retirement System, the second-biggest U.S. public pension contending with a $70 billion unfunded liability.

The proposal "threatens the retirement security of existing and future educators, who have provided many years of service to California's students," Jack Ehnes, the teacher pension's chief executive officer, said in a statement.

Reed said cities can continue to cut services and raise taxes, make employees pay more, cut benefit payments to retirees or cut benefits for current employees.

"None of those is fair, so it is better to talk about changing expectations of future accruals for future work," Reed said.

California municipalities have limited ability to boost revenue. They can't impose higher sales taxes without going to voters, and the state caps real-estate levies at 1 percent of a property's most-recent sales price. The collapse of the housing market eroded tax dollars for many cities in the wake of the recession.

'Not Sustainable'

"It's not sustainable for cities to attempt to provide an appropriate level of health, safety and welfare services and have a significant portion of their general fund go for employment and pension costs," Karol Denniston, a partner specializing in municipal restructuring at the San Francisco office of Schiff Hardin LLP, said in an interview.

Among potential obstacles to Reed's plan is California Attorney General Kamala Harris. Unions were her second-largest source of campaign contributions when she won her office in 2010, according to data compiled by the National Institute on Money in State Politics, a nonpartisan group based in Helena, Montana.

Harris is responsible for writing the title and summary of the initiative before it's circulated for signatures to qualify for the ballot. Most voters never read more than the title and summary of the text, according to the Denver-based National Conference of State Legislatures.

'Pro-Citizen'

"You have to hope for an attorney general who is pro-citizen and impartial the way an attorney general should be, and they should not be worried about who funds their campaign," said David Crane, a public policy lecturer at Stanford University near Palo Alto and a former special adviser to former Republican Governor Arnold Schwarzenegger.

Harris hasn't taken a position on any initiative, Nick Pacilio, a spokesman for her, said by e-mail. Governor Jerry Brown, a Democrat, doesn't comment on ballot measures, spokesman Evan Westrup said.

Reed said he anticipates unions will try to block signature gathering. The measure needs more than 807,000 petition signers to qualify for the ballot. Low, of Californians for Retirement Security, said he expects to discourage signature-takers.

“We generally try to keep voters informed,” Low said. “Where the signature gatherers are out there, we would probably want to at least have an opportunity to clarify for the voters what they’re signing.”

By Alison Vekshin – Nov 28, 2013 9:00 PM PT

GASB Resolves Transition Issue in Pension Standards.

Norwalk, CT, November 25, 2013—The Governmental Accounting Standards Board (GASB) today issued a Statement regarding the transition provisions of GASB’s new pension standards for state and local governments. GASB Statement No. 71, Pension Transition for Contributions Made Subsequent to the Measurement Date—an amendment of GASB Statement No. 68, eliminates a potential source of understatement of restated beginning net position and expense in a government’s first year of implementing GASB Statement No. 68, Accounting and Financial Reporting for Pensions.

To correct this potential understatement, Statement 71 requires a state or local government, when transitioning to the new pension standards, to recognize a beginning deferred outflow of resources for its pension contributions made during the time between the measurement date of the beginning net pension liability and the beginning of the initial fiscal year of implementation. This amount will be recognized regardless of whether it is practical to determine the beginning amounts of all other deferred outflows of resources and deferred inflows of resources related to pensions.

The provisions are effective simultaneously with the provisions of Statement 68, which is required to be applied in fiscal years beginning after June 15, 2014.

Statements 68 and 71 are available on the GASB website, www.gasb.org.

WSJ: Illinois Pension Fix Faces Political Test.

CHICAGO—Top lawmakers in Illinois reached a long-sought agreement to fix the nation’s most broken state public-employee retirement system, but the deal faces likely resistance from some legislators and unions who fear it will mean deep cuts to pension benefits.

Democratic and Republican leaders in the Illinois legislature announced the agreement on Wednesday and are expected to release details Friday. They said the plan would save an estimated $160 billion by reducing cost-of-living increases for retirees, raising the retirement age for younger workers and capping the salary amount used to calculate pension payments. That would close the large gap between promised benefits and current assets to pay for them over the next 30 years, they said.

In coming days, legislative leaders and Gov. Pat Quinn, a Democrat, will try to sell the plan to rank-and-file members of the House and Senate, many of whom have rejected proposed changes to the retirement system over the past two years. Votes are expected Tuesday.

The governor has staked much of his tenure on righting the troubled retirement system, making passage of an overhaul plan particularly important as he prepares to run for re-election next year.

He is seen as vulnerable in his bid for a second term, with a crowded field of Republicans vying to challenge him. A poll conducted by Public Policy Polling earlier this month showed 34% of those surveyed approved of Mr. Quinn's job performance.

The agreement also is expected to provide a template for Chicago Mayor Rahm Emanuel to follow for his city, which for years has paid far less into its retirement system than needed to keep it solvent. City payments to local pension funds are set to more than double to nearly $1.1 billion starting in 2015. Mr. Emanuel has warned that if changes aren't made, the city will face a combination of property-tax increases and cuts in services, equating the scheduled increase to the cost of having 4,300 police officers on the street.

"Illinois's pension crisis will not truly be solved until relief is brought to Chicago and all of the other local governments across our state that now stand on the brink of a fiscal cliff," said Mr. Emanuel, who would face re-election in 2015.

While other states from Wyoming to Rhode Island have been paring back retirement benefits in recent years, Illinois lawmakers have remained deadlocked over how to address a pension-system shortfall that has ballooned to nearly $100 billion. The result: Illinois has the lowest credit rating among U.S. states, and the rating for Chicago is among the lowest for major U.S. cities.

To date, unions have successfully argued that government workers shouldn't be punished for decades of mismanagement by the state, which underfunded the retirement system. But union leaders have seen support erode as concern over the state's finances grows and their sway in a statehouse dominated by Democrats ebbs. "This has been an epic pension battle," said Michael Carrigan, president of the Illinois AFL-CIO. "We are marshaling our resources."

Dire fiscal problems in such places as Detroit and Puerto Rico have left lenders increasingly leery of Illinois and its largest city. While Illinois and Chicago remain in a considerably stronger financial position than those places, analysts say both Illinois and Chicago are considered distressed. Appetite for such debt has become weaker and interest costs have risen.

Howard Cure, director of municipal research at Evercore Wealth Management LLC, said Illinois finance officials have become more aggressive in marketing their bonds and have been reminding investors the state constitution puts debtholders first in line for payments. Illinois's 10-year bonds trade at a premium that is more than triple California's, but well below Puerto Rico's, according to Thomson Reuters Municipal Market Data.

Mr. Cure said if Illinois can pass an overhaul that delivers significant retirement-system savings, it could begin to win back investors. "It's a pretty diverse state. It's not as if Illinois went through what Michigan went through," he said, referring to the near-collapse of the auto industry during the recessionand Detroit's recent efforts to refinance its debt through bankruptcy.

But failure to pass an overhaul plan could have an equally damaging effect, with the higher premiums attached to Illinois debt becoming commonplace rather than a temporary exception, said Duane McAllister, a portfolio manager at BMO Global Asset Management.

"It's not Detroit, and it's not Puerto Rico. Unfortunately, it gets thrown into the same trading basket," said Mr. McAllister, referring to Detroit's bankruptcy filing and a selloff in the island's bonds amid concerns about a wide budget deficit there. He added that as an owner of Illinois debt, he is guardedly optimistic about the latest agreement.

The agreement is the first time top leaders in the state's House and Senate have backed the same

plan. Senate President John Cullerton, a Democrat, pushed for a proposal earlier this year, backed by unions, that would have given employees choices over benefit cuts and found savings through retirement health care. But House Speaker Michael Madigan, also a Democrat, opposed it, saying it didn't deliver enough savings.

Now, union leaders are gearing up to fight—first at the capitol and then in court if necessary. They are encouraging members to call their legislators and visit their offices in the coming days in what they have dubbed a pension emergency. If the bill passes, labor leaders expect to sue the state, arguing benefits promised to employees and retirees are protected under the state constitution. The challenge has long been discussed by unions, with the state likely to argue that certain benefits aren't protected, particularly in light of the state's fiscal problems.

"You would have a line at the courthouse door," said Anders Lindall, a spokesman for American Federation of State, County and Municipal Employees in Illinois. "Every teacher, every nurse, every caregiver, every public employee and retiree would have standing to sue."

By MARK PETERS and AL YOON CONNECT

Updated Nov. 28, 2013 6:29 p.m. ET

GFOA Awards for Excellence in Government Finance.

The GFOA's Awards for Excellence in Government Finance recognize innovative programs – contributions to the practice of government finance that exemplify outstanding financial management. The awards stress practical, documented work that offers leadership to the profession and promotes improved public finance. Entries may be submitted for consideration in any of the following categories:

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Eight criteria are examined when considering an application for the award: local significance and value, technical significance, transferability, documentation, the cost/benefit analysis, efficiency, originality, and durability. Membership in the GFOA is not required to apply for an award; however, nonmembers and students must be sponsored by an active GFOA member.

Please read the FAQs for complete information about the Awards for Excellence program:

http://www.gfoa.org/index.php?option=com_content&task=view&id=1417

If you have additional questions, send an e-mail to Awards for Excellence:

http://www.gfoa.org/index.php?option=com_contact&task=view&contact_id=84&Itemid=3

Applications for the 2014 Awards for Excellence in Government Finance program are available here:

http://www.gfoa.org/downloads/GFOAAwardsforExcellenceApplication2014.pdf

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NaCo: Road to Resilience: Stormwater Planning.

Wednesday, December 4, 2013 2:00 PM – 3:15 PM EST

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Missouri Brings New Case Against Moberly Bond Underwriter.

CHICAGO — The Missouri Secretary of State filed a civil enforcement action against Morgan Keegan & Co. Inc. accusing the firm of securities fraud in its role as underwriter of $39 million of defaulted bonds issued by a Missouri city.

The action is the latest attack on Morgan Keegan's performance as underwriter of the bonds issued with an appropriation backing from the city of Moberly to finance a sucralose artificial sweetener plant by Mamtek US Inc., a subsidiary of a Chinese firm. The company abandoned the half-built plant several years ago and the city defaulted on the bonds.

Andrew Hartnett, securities commissioner in Secretary of State Jason Kander's office, seeks in the filing full restitution for Missouri bondholders and a $15 million civil penalty from the firm. It also asks that civil penalties be imposed on 10 individually named defendants who are charged with various counts of state securities violations tied to their work on the bond sale.

The complaint, filed last week, alleges that the defendants failed in their fiduciary duty to "satisfy basic due diligence standards" on the project, its developers and their companies and claims "which would have revealed to Moberly and Missouri investors that Mamtek's promises were false."

The civil enforcement action marks an escalation of Kander's effort to penalize Morgan Keegan. In April, the office issued a cease-and-desist order in a less punitive administrative action seeking full restitution. The new action seeks much stiffer civil penalties and fines, adds new defendants, and provides more documents and communications on Morgan Keegan's marketing of the bonds.

Morgan Keegan has denied any wrongdoing or responsibility for investor losses, citing the city's backing on the bonds. The firm filed a complaint in the state courts seeking to dismiss Kander's administrative action, arguing there's no factual evidence to warrant it and challenging the

commissioner's authority to impose any civil fines or order restitution under state securities laws.

The new case is a civil enforcement action. It was filed on Nov. 21 in Boone County Circuit Court where the largest single state bondholder is located. In addition to the company, the complaint targets William Kevin Thompson, Richard Temple Murray, Kevin Lee Edwards, Robert Baird, Elizabeth Gail Tyler, Chloe Baker Plunk, Chip Peebles, Kevin Giddis, Casey O'Brien, and Kevin Potter. Morgan Keegan became a subsidiary of Raymond James Financial Inc. in April 2012.

Giddis is president of fixed income capital markets at the firm and the others were bankers, traders, underwriters, or sales professionals. It appears from the filing that all are being represented by Morgan Keegan's attorneys at Stinson Morrison Hecker LLP.

The complaint accuses the defendants of defrauding their clients by misrepresenting the facts about the offerings, including falsely stating that Moberly had promised to pay for the bonds; and omitting material facts, including that the defendants had not thoroughly investigated Mamtek, the only entity who investors could expect to pay for the bonds.

"Some of the defendants' acts, practices, and courses of business included providing false information to those defendants who were selling the bonds to Missouri investors which in turn operated as a fraud on those investors," the filing alleges.

In a statement the firm again firmly denied responsibility for the losses suffered by Missouri taxpayers. It noted the project's review by local and state officials months before it was hired, the city's backing, and ratings that supported the bonds.

"The city of Moberly failed to honor its moral obligation to appropriate funds, and passed a resolution changing the credit structure of the documents after default by Mamtek, over a year after the bonds were issued," the statement read. The firm also noted that criminal charges are pending against Mamtek's former president.

The new action seeks $6.7 million in restitution for Missouri-based investors, and asks that Morgan Keegan pay $15 million in civil penalties and cover the division's investigation and prosecution costs. Additional penalties are being sought of between $100,000 and $800,000 from the other named defendants.

The commissioner also asks that Morgan Keegan be blocked from underwriting any further bond issues — beyond those they currently have been hired to manage — until the firm hires an independent consultant to review its due diligence policies and compliance. The consultant would also be charged with making recommendations to ensure the firm meets industry best practices.

The civil enforcement filing marks the latest development in a tale that has drawn the attention of state lawmakers and local, state, and federal regulators, and resulted in a series of bondholder lawsuits that have raised questions over how the project won borrowing assistance and state financial incentives.

The Moberly Industrial Development Authority sold bonds backed by a city appropriation pledge to help finance the sucralose plant in 2010. The firm in August 2011 defaulted on a payment to Moberly needed for debt service and the city informed trustee UMB Bank that it wouldn't honor its pledge to repay the debt. Mamtek then abandoned the factory.

The bonds had carried an A rating from Standard & Poor's based upon the city's pledge. Moberly lost its investment-grade rating from Standard & Poor's after it declined to make good on its pledge. The sucralose plant bonds are rated D. The trustee auctioned off the assets for about $2 million last

year.

Local and state prosecutors and federal regulators have filed a mix of civil and criminal complaints alleging theft, fraud and securities violations against Mamtek's former head, Bruce Cole, who had told city and state officials the company had operational facilities in China, which it did not.

The trustee and other creditors forced the company into involuntary bankruptcy. Various bondholder lawsuits are also pending against Morgan Keegan. State lawmakers held hearings on the project last year as it had been in line to receive $17.6 million in state subsidies.

In another recent development involving a lawsuit led by a large bondholder, Columbia, Mo.-based Shelter Life Insurance Co., the city settled with bondholders for $95,000. Shelter filed a lawsuit in Cole County Circuit Court accusing Morgan Keegan of securities fraud. It did not name the city but Morgan Keegan moved to bring the city into the lawsuit. The judge then dismissed the city from the case, but the firm filed what's known as a writ of prohibition with the Missouri Supreme Court challenging the lower court's decision.

Moberly decided the best course of action was to settle with bondholders given the lengthy challenge that could have ensued as Morgan Keegan sought to bring the city back into the litigation. The bondholder lawsuit had been set for a December trial date but it was put on hold pending the outcome of Morgan Keegan's challenge.

BY YVETTE SHIELDS

NOV 26, 2013 7:31am ET

Detroit Lighting Decision Put Off Due to Possible Attorney Conflict.

DETROIT (Reuters) – The judge overseeing Detroit's bankruptcy case on Wednesday postponed deciding whether the city can redirect utility tax revenue to help fix its broken street lights, citing a potential conflict of interest among attorneys representing the city's Public Lighting Authority.

Law firm Miller Canfield represents the lighting authority, but also represents Detroit in other matters in the city's bankruptcy proceedings.

U.S. Bankruptcy Judge Steven Rhodes asked attorneys from all parties involved to submit briefs by December 4 to address the potential conflict of interest and whether Miller Canfield should be disqualified from representing the Public Lighting Authority. He said he will subsequently issue a written ruling.

The potential conflict came to light when attorney Jonathan Green, a lawyer for Miller Canfield who represented the lighting authority in proceedings before Judge Rhodes on Wednesday morning, introduced himself in court.

"It was most unfortunate that this issue came to the court's attention in the way that it did because it's going to result in an unnecessary delay," Rhodes said.

Green said Miller Canfield was not representing the city in this particular transaction.

Detroit wants to use $12.5 million in utility tax revenue to back $153 million in bonds to be issued by

the Detroit Public Lighting Authority to finance upgrades to the public lighting system in the city. The Public Lighting Authority also proposes a short-term $60 million loan to precede the sale of the bonds, which would be issued through a state agency.

About 40 percent of all the street lights in Detroit do not work, and Detroit Emergency Manager Kevyn Orr has said one of his priorities is to improve public services in the city.

Attorneys for the bond insurers and banks objecting to the transaction asked Rhodes to allow them to collect more information on the potential transaction before he made a decision. William Arnault, who represents bond insurer Syncora Guarantee Inc., asked for a two-week discovery period, noting that the objectors were "in the dark" about the details of the proposed deal.

"Of course the dark you're in does not compare to the dark that the citizens of Detroit are in day in and day out," Rhodes responded.

Vincent Marriott, representing Detroit creditors Hypothekenbank Frankfurt AG, Hypothekenbank Frankfurt International S.A. and Erste Europäische Pfandbrief-und Kommunalkreditbank Aktiengesellschaft in Luxemburg S.A, asked Rhodes to put off the lighting financing issue until the city submits a plan to the court to readjust its debt.

He said the city should not spend money in bits and pieces and should instead address its infrastructure improvements at once in its plan of adjustment.

"It's a mistake, and it will not be in the long-term interests of the city," Marriott said.

But Rhodes responded by asking what will become of the "hundreds of thousands of people who are going to be victims of crime as we wait?"

NYC Foam Food Container Ban Plan Gets Hearing.

A potential ban on plastic foam food containers in a city that thrives on takeout proved a piping-hot topic among lawmakers Monday, as they debated the material's pros, cons and prospects for recycling.

An environmental bane to some, a food-service staple to others, the familiar foam to-go cups, plates and cartons already are prohibited in San Francisco and dozens of other U.S. cities and could be on their way out in New York.

The City Council is weighing competing proposals, including a measure that would outlaw the containers after a year's inquiry to see whether the tons of containers could be effectively recycled instead — a possibility ban backers and opponents vehemently dispute. The city's plastics recycler says it's not workable right now.

"This is actually a rush into the future — for the protection of the Earth, for our environment, for people who work in this industry," Lewis Fidler told fellow members of the City Council's sanitation committee during an often pointed hearing that spanned more than six hours.

But Councilwoman Diana Reyna said the measure would "unduly burden small businesses by increasing inventory costs," and customers ultimately could pay the price.

There’s no date yet for a council vote, but the hearing marked an effort to move the issue forward before the year ends. Environmentally minded Mayor Michael Bloomberg, who proposed banning the containers in February and backs the council proposal, leaves office at the end of the year. Mayor-elect Bill de Blasio said Monday he also supports it.

Street vendors and some eateries prize lightweight, heat-keeping containers made from expanded polystyrene foam. While people often call it Styrofoam, that brand isn’t used in food packaging, manufacturer Dow Chemical Co. says.

But the containers take a long time to break down in landfills, and stray pieces of foam complicate the city’s efforts to recycle food waste, Deputy Mayor Caswell Holloway said Monday. About 23,000 tons of plastic foam are thrown out per year in New York, where the city annually spends about $310 million burying more than 3 million tons of trash, he said.

City plastics recycling contractor Sims Municipal Recycling can’t currently process and market plastic foam, according to general manager Thomas Outerbridge. But Michigan-based manufacturer Dart Container Corp. has been floating a plan to buy the material from Sims and ship it to Indiana to be washed and recycled into a form that can be used to make photo frames.

“If it can be recycled, sure, let’s recycle it,” but city officials believe that’s unlikely, Holloway said, calling a ban “the most cost-effective and rational way to deal with this.”

Holloway said officials found replacements would average only 2 cents more per cup or carton.

But the change would make a big difference to Louis Maldonado, who owns two restaurants called Tacos Morelos in Queens.

He spends about $1,600 every two weeks to order a total of 2,500 foam cups and plates. He said his inquiries found plastic replacements would cost more than twice as much.

“It’s going to hurt my business really badly,” likely requiring cutting workers’ hours or laying one off, he said.

Many New York restaurateurs already eschew the foam. Holloway said the city’s biggest plastic-foam cup users, McDonald’s and Dunkin’ Donuts, have told officials they’re working toward an alternative.

Dunkin’ Brands spokeswoman Michelle King said in a statement that the company hoped to have a replacement within three years. McDonald’s representatives didn’t immediately respond to an inquiry about the matter.

Bloomberg’s 12-year tenure has featured environmental initiatives ranging from planting 1 million trees to expanding recycling this spring to include all rigid plastics.

Detroit Judge Delays Lighting Proposal Over Law Firm.

Detroit’s bankruptcy judge put off ruling on a proposal to spend as much as $12.5 million annually on street lighting until a law firm explains why it represents both the city and a public lighting district the city created.

U.S. Bankruptcy Court Judge Steven Rhodes initially appeared set to overrule objections to the proposal, telling creditors at a hearing today “the dark you’re in doesn’t compare to the dark” faced by residents.

When he learned that law firm Miller, Canfield, Paddock & Stone PLC represented both Detroit and the Public Lighting Authority, a separate legal entity, Rhodes put the proposal on hold. He said that having one firm on both sides of the transaction gave the appearance of a conflict of interest, even though Detroit set up the lighting authority and would be funding it with city taxes.

“It is most unfortunate that this issue came to the court in the way that it did,” Rhodes said. He asked the city and objectors to file briefs about the law firm’s work by Dec. 4.

Thousands of streetlights in Detroit don’t work, creating a public safety hazard, officials have said. The city is seeking court permission to divert $12.5 million in taxes to the Public Lighting Authority, which would use the money to repay what it intends to borrow so it can add streetlights, according to court papers.

The authority would borrow about $60 million in the form of a bridge loan and issue as much as $153 million in bonds with the help of the state of Michigan.

Creditor Opposition

Creditors including Syncora Guarantee Inc. opposed the lighting proposal, saying they didn’t have enough information.

Marc N. Swanson, a Miller Canfield lawyer, didn’t immediately return a call seeking comment on today’s hearing.

Detroit filed for bankruptcy in July saying decades of economic decline had left it without enough money to pay creditors owed $18 billion and still provide basic services to about 685,000 residents. Rhodes set a hearing for Dec. 3 to announce whether Detroit is eligible to remain under bankruptcy court protection.

The case is City of Detroit, 13-bk-53846, U.S. Bankruptcy Court, Eastern District of Michigan (Detroit).

By Steven Church & Steven Raphael – Nov 27, 2013 11:29 AM PT

Solar Data Trove Cutting Power Use in Threat to Utilities.

Andrew Greenfield checks his home’s solar power output against consumption through his computer and mobile phone dozens of times each day. The International Business Machines Corp. storage engineer enjoys trying to match the power he consumes to heat his pool in Arizona with what he produces during the day from the panels on his roof.

Greenfield has paid nothing for power from his local utility since the system was installed by SolarCity Corp. (SCTY) a year ago. At parties and family gatherings he proudly shares his savings data with anyone who’s interested.

He’s your utility’s worst nightmare, and there are now hundreds of thousands of homeowners and

small businesses like him as Silicon Valley entrepreneurs transform monthly ratepayers into smart consumers.

“I travel a lot, and don’t always remember to turn off my AC or the pool heater,” Greenfield said. “Now I can just do it on my cellphone.”

The same rooftop solar providers that are threatening utility revenues are more than just occupying customer roofs. They’re inside the home, monitoring usage trends and adapting the systems to meet both homeowners’ needs and their own bottom lines.

Data Collectors

SolarCity, Sunrun Inc., SunPower Corp. (SPWR) and Locus Energy LLC are amassing billions of points of data in smart home systems that consumers love and that baffle utilities, many of which have no incentive to help consumers manage their power usage more efficiently.

A Nov. 21 Harris Interactive (HPOL) poll of 2,022 U.S. adults commissioned by Sunrun found that 74 percent have an interest in using technology in their home to track personal data and use energy more efficiently.

“I’ve had solar on my roof for five years, but my utility still doesn’t even know when my power goes out,” said Julia Hamm, president of the Solar Electric Power Association, a Washington-based industry group of utility members. “The information is there, but they aren’t using it. This is something that utilities need to adapt to.”

Government Prod

The lack of visibility into homes shows how utilities have consigned themselves to one-way relationships with ratepayers in their monopoly service areas. Their efforts to develop smart grids have largely failed to energize consumers despite a $4.5 billion government stimulus package in 2009.

While utilities have installed millions of smart meters in homes, they haven’t made use of the data to engage consumers the same way solar providers have, said Neil Strother, a smart-grid analyst at Navigant Consulting Inc. (NCI)

“Utilities are more focused on cutting their own costs than in helping consumers become more efficient,” he said. “They aren’t motivated to reduce demand.”

The U.S. Department of Energy is more confident that its cash will start to shift the way utilities work with data, said Patricia Hoffman, assistant secretary of electricity delivery and energy reliability. The money went to help fund 15.7 million smart meters as well as more than 1,000 sensors on the electric grid.

‘Will Learn’

“Utilities will learn to use this information,” Hoffman said in a Nov. 27 interview. “It enables demand management, better integrates clean energy and optimizes the grid.”

The solar systems, meanwhile, collect real-time data on hundreds of thousands of homes and businesses across the country that utilities could use to more efficiently and reliably manage their power grids.

“We have an algorithm that tracks the clouds designed by a Ph.D. from Stanford,” said Adrian De Luca, vice president in charge of sales at Hoboken, New Jersey-based Locus Energy, which monitors more than 25,000 solar systems in the U.S. and Canada.

Desirable Data

“We can tell from across the country whether performance isn’t up to specifications for whatever reasons,” De Luca said. “The utilities should want this data.”

SolarCity, which monitors about 50,000 solar systems, is working to share its data with California’s grid operator and utilities, said Chief Operating Officer Peter Rive.

“We’re deploying smart meters from day one of installation and run simulations to determine the most efficient ways to reduce the customer’s bill,” Rive said. “We’re eager to share this information.”

Nat Kreamer, chief executive officer of Clean Power Finance Inc., said some utilities don’t see the potential benefits of using smart meters to engage with consumers to improve their service or reduce their utility bills.

“I asked an executive at one top 10 utility what he was hoping to get from smart meters, and he basically said just to eliminate the meter readers,” Kraemer said. “They left a bunch of value on the table.”

By Christopher Martin – Nov 28, 2013 4:00 PM PT

- IRS LTR: Nonprofit’s Income Is Exempt as Exercise of Essential Government Function.
- NABL Says IRS Ruling Having Chilling Effect on Bonds.
- IRS LTR: Lease Arrangement in Bond-Financed Project Doesn’t Give Rise to Security Interest.
- MSRB Provides Education for Issuers on Disclosure of Bond Ballot Campaign Contributions.
- SIFMA: US Municipal Bond Credit Report, 2013 Q3.
- L.A. Bars Broker-Dealers in FA Bid Process, FirstSouthwest Protests.
- *Todd Creek Village Metropolitan District v. Valley Bank & Trust Company* – Court holds that the provision of the Colorado Constitution requiring that local government authorities receive voter approval before they may issue general obligation debt does not require that the municipal district seeking voter approval of such debt must identify the specific collateral that will be pledged to secure the debt; worth your time to read through this one.
- *Gesler v. Worthington Income Tax Bd. of Appeals* – Supreme Court of Ohio holds that state statute containing definition of net profit for purposes of municipal income tax did not invalidate city ordinance excluding federal Schedule C income from net profit subject to municipal tax.
- *Pennsylvania Waste Industries Ass’n v. Monroe County Municipal Waste Management Authority* – Court holds that municipal waste disposal authority was not authorized to set the “tipping fee” at landfills in which it did not have a meaningful ownership or operational interest, but was authorized to charge for its administrative services, including debt service.
- *Michigan Co-Tenancy Laboratory/Trinity Health v. Michigan Pittsfield Charter Tp.* – Appeals court affirms tax tribunal’s determination that lab equipment held by a group of non-profit hospitals that entered into an arrangement whereby they each possessed, as tenants in common, an undivided

interest in the equipment, was exempt from taxation by township.

- "As plaintiff crested the hill upon his arrival at the site with his second haul of the day, the brakes of his tri-axle dump truck ceased functioning, causing it to barrel past the paving operation and continue down the hill at a high rate of speed. According to plaintiff, he had to swerve to avoid oncoming civilian traffic as well as construction vehicles and, when it became apparent that he could no longer control the vehicle, he kicked the door open and jumped from the truck, which then ran off the road, through a guardrail and over an embankment." What's latin for, "the hilarity speaks for itself"?

CONTRACTS - CALIFORNIA

Mountain Cascade Inc v. City and County of San Francisco

United States District Court, N.D. California - November 18, 2013 - Not Reported in F.Supp.2d - 2013 WL 6069010

MCI, a general engineering contractor, entered into a contract with San Francisco, acting through the General Manager of the San Francisco Public Utilities Commission ("SFPUC"), for construction work known as Bay Division Pipeline No. 5 Reliability Upgrade, Contract No. WD–2542 (the "Contract"). The project involved the installation of nine miles of 60″ welded, mortar-lined and coated steel pipe (the "Project:) through East Palo Alto, Menlo Park, San Mateo County, and Redwood City. The total awarded contract amount was $52,183,400.

The contract contained a provision that MCI agreed "to perform the Work in good and workmanlike manner to the satisfaction of the GENERAL MANAGER [of SFPUC], … and to otherwise fulfill all of CONTRACTOR's obligations under the Contract Documents, as and when required under the Contract Documents to the satisfaction of the GENERAL MANAGER."

On or around January 21, 2011, San Francisco informed MCI that certain welds did not conform with the plans, specifications, and approved submittals for the Project. As of that date, San Francisco and the Project's inspectors had accepted four miles of the completed pipeline. On or around January 26, 2011, San Francisco ordered MCI to stop welding operations effective January 27, 2011, based on deficiencies in the welds. On or around May 13, 2011, San Francisco notified MCI that it rejected all interior and exterior welds on the Project placed prior to January 26, 2011 until they were inspected for compliance with Contract requirements. San Francisco had a contractual duty to inspect the welds before allowing MCI to cover and backfill them, and MCI alleges that San Francisco represented that the welds were accepted and that MCI could cover the welds and backfill the area, even though San Francisco knew that the welds were unacceptable and/or that it would require MCI to uncover the welds.

Ultimately, San Francisco required MCI to remove and replace 628 interior and 94 exterior pipe joint welds, even though MCI submitted expert opinions that repair of the welds was appropriate. MCI alleges that San Francisco's order of removal and replacement of the welds was contrary to the requirements of the specifications, the Contract, code, and applicable welding industry standards. MCI further alleges that San Francisco's acts and omissions caused substantial delay in the completion of the Project.

MCI filed its complaint in state court alleging seven causes of action. San Francisco removed the case to federal court. MCI filed an amended complaint, alleging causes of action for 1) breach of contract; 2) violation of the Equal Protection Clause of the United States Constitution; and 3) breach of the implied warranty of correctness of project plans and specifications.

San Francisco moved to dismiss MCI's Equal Protection claim on the grounds that such a claim is not cognizable as a matter of law.

MCI's second cause of action alleges a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, based upon a class-of-one theory. MCI asserts that San Francisco treated it differently from other similarly-situated contractors on other projects and that San Francisco's actions were "arbitrary, capricious, intentional and/or reckless." Specifically, MCI claims that San Francisco used different inspection standards for MCI's work than for the work of other contractors and subcontractors; rejected MCI's welds but did not reject similar welds by other contractors on other projects on the Pipeline; required MCI to remove and replace welds, rather than repair them, while allowing other contractors to repair allegedly deficient welds; selectively enforced specifications; and materially and unilaterally changed the contract terms, scope of work, and schedules in bad faith.

San Francisco argues that a class-of-one equal protection claim by a government contractor is not cognizable as a matter of law.

The court concluded that the exercise of discretionary decision-making that Engquist and Douglas Asphalt held is immune from a constitutional challenge, applies to government-contractor relationships for the same reason that it applies to government-employee relationships. See Douglas Asphalt, 541 F.3d at 1274 ("decisions involving government contractors require broad discretion that may rest 'on a wide array of factors that are difficult to articulate and quantify.'" (quoting Engquist, 553 U.S. at 604)). Accordingly, MCI's class-of-one equal protection claim was dismissed with prejudice.

As the court granted San Francisco's motion to dismiss the sole federal claim over which it had original jurisdiction with prejudice, the court declined to exercise supplemental jurisdiction over MCI's remaining state law claims. Accordingly, the case was remanded to state court.

SCHOOLS - CALIFORNIA

Cuff v. Grossmont Union High School District

Court of Appeal, Fourth District, California., Division 1, California - November 18, 2013 - Cal.Rptr.3d - 13 Cal. Daily Op. Serv. 12, 559

Mother of two public high school students brought action against school counselor and school district for invasion of privacy after school counselor's provided a copy of her mandatory report of suspected child abuse by mother to the suspected victims' father.

The Court of Appeal held that:

- Child Abuse and Neglect Reporting Act (CANRA) did not immunize counselor's alleged act of giving child abuse report to the suspected victims' father;
- Statute authorizing release of pupil records in an emergency did not immunize counselor's alleged act of giving child abuse report to the suspected victims' father; and
- Immunity statute for public employees' exercises of discretion did not immunize counselor's alleged act of giving child abuse report to the suspected victims' father.

FINANCE - COLORADO

Todd Creek Village Metropolitan District v. Valley Bank & Trust Company

Colorado Court of Appeals, Div. VI - November 21, 2013 - P.3d - 2013 COA 154

At issue in this appeal was whether the plaintiff, Todd Creek Village Metropolitan District (the special district), had the constitutional and statutory authority to enter into loans and security agreements with the defendant, Valley Bank & Trust Company (the bank), and to pledge the district's assets as collateral.

In 2004, the special district executed and delivered to the bank a $1.4 million line-of-credit promissory note with a one-year maturity date (the loan). The loan was secured by a deed of trust that encumbered real property owned by the special district, including two reservoirs, one well site, and four easements.

In late 2011, the parties were unable to agree to the terms of an extension. The special district filed an action seeking a declaratory judgment that the loans were invalid and did not need to be repaid because they violated the special district's service plan and the requirements of Colo. Const. art. XI, section 6. The district court agreed and granted the special district's request for declaratory judgment.

The appeals court identified two issues to be addressed: (1) whether Article XI, section 6(1) of the Colorado Constitution requires that a municipal district seeking voter approval of a general obligation debt must identify the specific collateral that will be pledged to secure the debt; and (2) the extent to which a special district's financing arrangements must be provided for in the special district's service plan.

As to the first issue, the appeals court disagreed with the special district's contention that section 6 requires the district to identify to voters the particular assets it intended to pledge to secure the loan along with the general obligation debt, and therefore, the pledges made by the special district of public assets to collateralize the loan were invalid.

As to the second issue, the appeals court agreed with the bank's contention that the district court erred in ruling that the loan to the special district was invalid based on the special district's service plan. The district court concluded that there was a conflict between the special district's statutory authority to enter into loans and the special district's service plan, which prohibited the issuance of general obligation debt. The appeals court concluded that the service plan did not prohibit the issuance of general obligation debt and that the loan by the bank did not constitute a material modification of the special district's service plan.

In summary, we conclude (1) the 1996 election approved general obligation bonds and 'other obligations' and the special district complied with the voter-approval mandate of Colo. Const. art. XI, section 6; (2) the Special District Act grants special districts the authority to 'borrow money and incur indebtedness [and] acquire, dispose of, and encumber real and personal property,' §§ 32–1–1001(1)(e)–(f); (3) the special district's service plan does not prohibit the issuance of general obligation debt; (4) the Special District Act only requires that a special district conform to a service plan 'so far as practicable,' § 32–1–207(1); (5) only material modifications to the service plan had to be approved by the board of county commissioners; (6) there was no material modification of the district's service plan, and it was therefore unnecessary for the service plan to restate that the special district would be incurring general obligation debt. See generally Wick v. Pueblo W. Metro. Dist., 789 P.2d 457, 458 (Colo.App.1989)."

LIABILITY - GEORGIA

Dennis v. City of Atlanta

Court of Appeals of Georgia - November 13, 2013 - S.E.2d - 2013 WL 5995553

Homeowner's guardian, who executed a release in connection with the settlement of a prior lawsuit against city arising out of sewer backups and storm water drainage problems, brought subsequent lawsuit against city arising out of the same problems. The trial court granted city's motion to dismiss. Guardian appealed.

The Court of Appeals held that:

- Release applied to future unknown claims of the releasors involving the same issues, including those asserted in guardian's subsequent lawsuit;
- Trial court was not required to convert city's motion to dismiss into a motion for summary judgment; and
- Release did not violate public policy.

Plain and unequivocal language of the release released city from "any and all actions, … whatsoever, … known or unknown, foreseen or unforeseen" arising out of the allegations brought or that could have been brought in the original lawsuit.

IMMUNITY - GEORGIA

City of Atlanta v. Mitcham

Court of Appeals of Georgia - November 20, 2013 - S.E.2d - 2013 WL 6085247

Diabetic inmate in city's custody brought negligence action against city and city's police chief, alleging that defendants' negligent failure to monitor and regulate inmate's insulin levels resulted in permanent injuries. Defendants filed motion to dismiss on grounds of governmental immunity. The trial court denied motion. Defendants appealed.

The Court of Appeals held that provision of medical services to inmates confined in city's custody was ministerial rather than governmental function, and thus, defendants were not entitled to governmental immunity.

City's duty to furnish inmates necessary medical care and to bear the costs of such care was imposed by statute, and inmate had fundamental right to medical care, such that the provision of such care was not discretionary.

INVERSE CONDEMNATION - GEORGIA

Daniel v. Fulton County

Court of Appeals of Georgia - November 19, 2013 - S.E.2d - 2013 WL 6068498

Karen Daniel filed a complaint for damages against Fulton County, asserting a claim of inverse condemnation. The trial court dismissed the complaint on the ground that Daniel had filed for bankruptcy without disclosing the claim and was therefore precluded from pursuing it by the doctrine of judicial estoppel. Daniel appealed.

The Court of Appeals held that trial court's failure to consider whether property owner would have gained unfair advantage or imposed unfair detriment if not estopped required remand.

The crux of the trial court's order was its determination that the lack of evidence that property owner had taken steps to reopen the bankruptcy mandated application of the doctrine of judicial estoppel to bar her claim.

WHISTLEBLOWER STATUTE - GEORGIA

Colon v. Fulton County

Supreme Court of Georgia - November 18, 2013 - S.E.2d - 2013 WL 6050390

County employees brought separate actions against county under whistleblower statute, alleging that they suffered adverse employment actions after they reported to county supervisors the manner in which various county personnel were violating laws, rules, and regulations, and were fraudulently wasting and abusing county funds and public money, and that employees refused to participate in cover-up of fraud.

The Supreme Court of Georgia held that:

- Whistleblower statute set forth a specific waiver of the County's sovereign immunity and the extent of such waiver, even though the statute did not expressly state that sovereign immunity was waived, and
- Reach of whistleblower statute was not limited to causes of action for alleged retaliation only inasmuch as the employee's complaints were related to state programs.

Reach of whistleblower statute was not limited to causes of action for alleged retaliation when the employee's complaints were related to state programs or operations under the public employer's jurisdiction. There was nothing in the plain language of statute to suggest that retaliation claims were somehow limited by a public employer's ability to receive and investigate complaints or information relating to possible fraud, waste, and abuse in state programs.

LIABILITY - GEORGIA

Myers v. Board of Regents of University System of Georgia

Court of Appeals of Georgia - November 13, 2013 - S.E.2d - 2013 WL 5994928

Visitor who injured her ankle when she tripped on edge of pothole in college campus parking lot brought negligence action against the Board of Regents of the University System of Georgia, based on allegedly unsafe condition of parking lot. The trial court granted Board's motion to dismiss for lack of subject matter jurisdiction, based on plaintiff's failure to provide sufficient ante litem notice to Board. Plaintiff appealed.

The Court of Appeals reversed, holding that plaintiff sufficiently identified the "amount of loss claimed" against Board of Regents so as to comply with requirements of ante litem notice statute.

Even though visitor did not include dollar amount of claimed loss, her notice stated that she had fractured her left ankle by stepping in pothole and that the amount of her loss was yet to be determined since she was still incurring medical bills and did not know the full extent of her injury,

which provided the Board adequate notice of alleged nature, location, and cause of visitor's injuries.

PUBLIC RECORDS - MAINE

MaineToday Media, Inc. v. State

Supreme Judicial Court of Maine - November 14, 2013 - A.3d - 2013 ME 100

Newspaper petitioned for review of state's denial of request to inspect and copy Enhanced 911 call transcripts regarding altercation that resulted in homicide investigation. Following a trial de novo, the Superior Court upheld the denial. Newspaper appealed.

The Supreme Judicial Court of Maine held that as matter of first impression, state failed to establish reasonable possibility that disclosure of transcripts in question would interfere with law enforcement proceedings, as asserted basis under Criminal History Record Information Act (CHRIA) for keeping transcripts confidential in response to newspaper's FOAA request. Participant in altercation had already been subject of an initiating criminal complaint when newspaper first made request, and state did not identify any particular investigation yet to be completed in the matter or how it could be affected by availability of transcripts.

Confidentiality pursuant to the CHRIA is afforded only if the record that the government seeks to shield (1) contains intelligence or investigative information; (2) was prepared by or at the direction of, or is kept in the custody of, a criminal justice agency; and (3) would, if disclosed, create a reasonable possibility of one or more of the harms detailed in the statute.

Bureau of Consolidated Emergency Communications is not a "criminal justice agency," within meaning of provision of CHRIA placing limitations on dissemination of intelligence and investigative information in reports or records prepared at the direction of or kept in the custody of a criminal justice agency. Although the bureau's product is used for criminal justice purposes on a daily basis, the bureau manages the telecommunications necessary for the provision of emergency services.

The Court declined to adopt a blanket rule that any Enhanced 911 transcripts that related to active homicide investigations or prosecutions were exempted under CHRIA from disclosure pursuant to a FOAA request.

TAX - MARYLAND

Townsend Baltimore Garage, LLC v. Supervisor of Assessments of Baltimore City

Court of Special Appeals of Maryland - November 19, 2013 - A.3d - 2013 WL 6081708

Sublessees of land owned by state university appealed decision of Tax Court, determining that improvements constructed on the land were not exempt from real property taxes.

The Court of Special Appeals held that improvements were exempt from real estate taxation and not subject to taxation under statute providing for taxation of property leased by state to a lessee with the privilege to use the property in connection with a business that is conducted for profit, even though university had leased the land to for-profit entities in order to obtain financing for construction of the improvements, offices, laboratory, and parking garage. Although entities were treated under the leases as owners of the improvements for certain purposes, the improvements

were leased back to the university and used for university purposes.

TAX - MICHIGAN

Michigan Co-Tenancy Laboratory/Trinity Health v. Michigan Pittsfield Charter Tp.

Court of Appeals of Michigan - November 14, 2013 - Not Reported in N.W.2d - 2013 WL 6037120

The Michigan Co–Tenancy Laboratory (MCL) is a group of non-profit hospitals that entered into an arrangement whereby they each possessed, as tenants in common, an undivided interest in laboratory equipment.

Township assessed the personal property at the laboratory facility as taxable. Petitioners filed an appeal with the Michigan Tax Tribunal contending that the personal property of the laboratory was exempt from was exempt from ad valorem taxation pursuant to MCL 211.9(1)(a) (personal property of charitable institutions incorporated under the laws of this state) and MCL 211.7o (real or personal property owned and occupied by a nonprofit charitable institution).

Township moved the Tribunal for Summary Disposition on the grounds that the property was not exempt under the relevant statutes because MCL was not incorporated, and further that the property was not located on real property "owned and occupied by a nonprofit trust and used for hospital or public health purposes."

The Tribunal concluded that petitioners had proven by a preponderance of the evidence that the subject property qualified for a property tax exemption under MCL 211.91(1)(a) and MCL 211.7o and the Court of Appeals affirmed.

LIABILITY - NEW JERSEY

Marshall v. Keansburg Borough

United States District Court, D. New Jersey - November 20, 2013 - Slip Copy - 2013 WL 6095475

Plaintiff Richard Marshall Jr. brought an action against Defendants Keansburg Borough, Detective Bryan King, Sergeant Wayne Davis, Detective Jillian Kohler, Chief of Police Raymond O'Hare, and Deputy Chief of Police Michael Pigott. Plaintiff alleges various 42 U.S.C. § 1983 violations and a violation of the New Jersey Civil Rights Act stemming from an altercation between Defendants King, Davis, and Koehler and Plaintiff wherein the Defendant Officers used allegedly excessive force against Plaintiff. He also alleges common law claims for assault and battery, intentional infliction of emotional distress, and negligence.

On December 18, 2010, Plaintiff Richard Marshall Jr. was standing on the sidewalk on Beachway Avenue in Keansburg, New Jersey, when he was approached by three uniformed Keansburg Borough Police Officers, Defendants King, Davis, and Kohler (together, the "Defendant Officers:). As the Defendant Officers approached, Plaintiff's cellular phone started to ring. Defendant King told Plaintiff not to "fucking answer that phone." Plaintiff proceeded to answer the phone, at which point Plaintiff alleges that Defendants King and Davis grabbed Plaintiff from both sides of his arm and threw him face first against their unmarked police vehicle. As Defendant King grabbed Plaintiff, he

screamed, “I fucking told you not to answer your phone.” Defendants King and David allegedly proceeded to kick out Plaintiff’s legs, tackle him to the ground, and knee Plaintiff in his ribs and back. Defendant King then allegedly used his forearm to choke Plaintiff, at which point Plaintiff stated, “I can’t breathe; why are you doing this?” Defendant Kohler, who had observed the entire incident, then sprayed Plaintiff in the face with OC spray, while Plaintiff was handcuffed and on the ground.

As a result of this incident, Plaintiff was charged with resisting arrest in violation of N.J.S.A. 2C:29–2(a)(1) as to all three police officers. On February 2, 2012, Plaintiff appeared before the Honorable Michael Pugliese, J.M.C., relative to the charges brought against him. As a result of this proceeding, Plaintiff pled guilty to a violation of Keansburg Municipal Ordinance 3–17.4 for “disorderly conduct” and paid fines. Accordingly, the charges for resisting arrest were dismissed.

On December 13, 2012, Plaintiff commenced this action. He alleges: (1) Defendants King, Davis, and Kohler used excessive force against him in violation of § 1983; (2) Defendants King, David, and Kohler failed to intervene in the unjustified assault and arrest of Plaintiff in violation of § 1983; (3) Defendant Davis is liable as a supervisor under § 1983; (4) Defendants Borough of Keansburg Police Department, O’Hare, and Pigott are liable to him under § 1983 because an official policy, practice, or custom caused Plaintiff’s injuries; (5) prospective injunctive relief against the Defendants is warranted; (6) Defendants King, Davis, and Kohler used excessive force against Plaintiff in violation of N.J.S.A. 10:6–1 (“The New Jersey Civil Rights Act” or “NJCRA”); (7) Defendants King, Davis, and Kohler committed an assault and battery on Plaintiff; (8) Defendants King, Davis, and Kohler acted in such a way that Plaintiff sustained severe emotional distress; and (9) Defendants King, Davis, and Kohler acted negligently towards the Plaintiff.

The Defendants moved to dismiss Plaintiff’s Complaint in its entirety. Defendants argue that Count One should be dismissed because Plaintiff’s § 1983 claim for excessive force is barred by Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). Alternatively, they argue that Count One should be dismissed Defendants King, Davis, and Kohler are entitled to qualified immunity and are therefore barred from liability. Finally, they argue that Plaintiff is estopped from asserting a § 1983 excessive force claim in Count One because of the guilty plea he entered in the underlying criminal lawsuit. Defendants contend that because Count One is deficient and must be dismissed, Plaintiff’s remaining § 1983 claims (Counts Two through Five) must fail as well. Defendants allege that Count Six of the Complaint, the alleged violation of the New Jersey Civil Rights Act, should be dismissed for the same reasons as Plaintiff’s § 1983 claims. Defendants contend that the additional state law claims (Counts Seven through Nine) should be dismissed because, like Counts Two through Five, they are predicated on the use of excessive force against the Plaintiff.

Defendants further allege that any claims against Defendants O’Hare and Pigott must fail because Plaintiff’s claims against them are based upon a theory of respondeat superior. Defendants also argue any claims against Defendant O’Hare should be dismissed because he was not the Chief of Police on the date of the incident. Defendants further contend that any claims against Defendants O’Hare and Pigott are barred because they were not identified on a Notice of Tort Claim by the Plaintiff. Finally, Defendants allege that there can be no claim for punitive damages against Keansburg Borough under either § 1983 or under the New Jersey Civil Rights Act.

The court concluded that Plaintiff had sufficiently stated a claim as to virtually each of his allegations and declined to dismiss. Time to settle, fellas.

PUBLIC RECORDS - NEW JERSEY

Paff v. Community Education Centers, Inc.

Superior Court of New Jersey, Appellate Division - November 21, 2013 - A.3d - 2013 WL 6096513

Education and Health Centers of America, Inc. (EHCA) is a non-profit entity that contracts with state and local governments to provide substance abuse treatment and education services to inmates preparing for release from incarceration. CEC is a privately held for-profit entity that provides treatment and education services aimed at changing addictive and criminal behaviors. In 1996, CEC entered into an agreement with EHCA to provide services and staff for EHCA's contracts in New Jersey.

Plaintiff submitted a request to EHCA and CEC seeking access to certain records pursuant to the Open Public Records Act (OPRA). Plaintiff asserted that EHCA and CEC are "public agencies" under OPRA and are therefore subject to its requirements.

CEC denied plaintiff's requests. CEC informed plaintiff that it was not a "public entity" under OPRA and not subject to OPRA's requirements.

Plaintiff filed a complaint against CEC in the Law Division, claiming that CEC is a "public agency" under OPRA. Plaintiff sought an order requiring CEC to appoint a custodian of records, adopt an OPRA document-request form, and grant access to the attorney billing and personnel records he had requested.

The trial court determined that CEC did not qualify as a "public agency" under OPRA. CEC is an independent corporation that provides services in New Jersey pursuant to its contract with EHCA. CEC was not created, nor is it controlled, by any governmental entity. The appeals court affirmed.

TAX - NEW YORK

Village of Lowville v. County of Lewis

Supreme Court, Appellate Division, Fourth Department, New York - November 15, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07581

Village brought action against county requesting specific performance of a tax exemption agreement.

The Supreme Court dismissed the complaint. Village appealed.

The Supreme Court, Appellate Division, held that county board's adoption of resolution phasing out all tax exemptions for municipal water and sewage treatment facilities constituted a "legislative change" within meaning of agreement, which provided that "legislative change" would modify obligations of the parties to comply with such change. County board was legislative body that exercised county's power through local law or resolution duly adopted by board.

LIABILITY - NEW YORK

Ferreira v. Cellco Partnership

Supreme Court, Appellate Division, Second Department, New York - November 20, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07706

Owners of homes located near a commercial facility brought action against village and facility owner, seeking to recover damages for injuries allegedly sustained by exposure to noise, smoke, and odor emanating from the facility, and alleging that village was negligent in failing to enforce building codes.

The Supreme Court, Appellate Division, held that:

- Village did not have special relationship with owners giving rise to a duty to exercise care for their benefit;
- Village did not voluntarily assume a duty to protect owners; and
- Owners did not detrimentally rely on village's alleged promise to address the situation.

In the absence of some special relationship creating a duty to exercise care for the benefit of particular individuals, liability may not be imposed on a municipality for failure to enforce a statute or regulation.

A special relationship creating a duty on the part of a municipality to exercise care for the benefit of particular individuals can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when the municipality voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known blatant and dangerous safety violation.

LIABILITY - NEW YORK

Freeman v. City of New York

Supreme Court, Appellate Division, Second Department, New York - November 20, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07707

Daughter of woman who died during snowstorm after ambulance services failed to arrive brought wrongful death action against city, alleging negligent failure to provide emergency services and negligence failure to prepare and respond to snowstorm.

The Supreme Court, Appellate Division, held that:

- Allegations were insufficient to establish existence of a "special relationship" between decedent and city, as required to state negligence claims against city, and
- Trial court should have denied motion for leave to amend pleadings.

As a general rule, a municipality may not be held liable to a person injured by the breach of a duty owed to the general public, such as a duty to provide police protection, fire protection or ambulance services, unless there is a "special relationship" between the municipality and the claimant.

To establish the existence of a "special relationship" between a municipality and a claimant, as would impose a specific duty upon the municipality to act on behalf of the claimant, the claimant must establish the following factors: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the

part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.

LICENSING - NEW YORK

Marsala v. City of Long Beach

Supreme Court, Appellate Division, Second Department, New York - November 20, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07737

Taxi license applicants commenced hybrid proceeding under Article 78, seeking review of city's determinations denying their applications to renew their licenses, and action to recover damages for violation of their constitutional rights under color of state law.

The Supreme Court, Appellate Division, held that city's denial of applications to renew applicants' municipal taxi licenses did not implicate a protected property interest, as would support applicants' claim that city violated their due process rights, since city retained discretion to grant or deny the applications.

LIABILITY - NEW YORK

Duffina v. County of Essex

Supreme Court, Appellate Division, Third Department, New York - November 14, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07531

Truck driver employed by subcontractor brought action against county, seeking to recover damages for injuries he sustained while delivering asphalt to county roadway project. County commenced third-party action seeking contractual indemnification from asphalt supplier. The Supreme Court denied county's motion for summary judgment on complaint, and granted supplier summary judgment on county's indemnification claim. County appealed.

The Supreme Court, Appellate Division, held that:

- Driver's notice of claim sufficiently apprised county of his claims;
- County was not negligent with respect to manner in which it conducted road paving operations; but
- Fact issue existed as to whether alleged negligence of county in permitting public traffic on road, while construction was ongoing, was substantial factor in causing or exacerbating driver's injuries;
- Industrial Code provision governing brakes could be basis for county liability under Labor Law; and
- County was entitled to contractual indemnification from supplier.

LIABILITY - NEW YORK

Alladice v. City of New York

Supreme Court, Appellate Division, First Department, New York - November 14, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07557

Plaintiff filed motion for leave to file an untimely notice of claim against city and city transit authority, relating to plaintiff's alleged fall at subway platform. The Supreme Court denied the motion. Plaintiff appealed.

The Supreme Court, Appellate Division, held that:

- City, as out-of-possession landlord, did not have responsibility for allegedly hazardous condition, and
- Plaintiff did not show city transit authority's actual knowledge of essential facts.

LIABILITY - NEW YORK

Denermark v. 2857 West 8th Street Associates

Supreme Court, Appellate Division, Second Department, New York - November 13, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07444

Pedestrian brought action against building owner and lessee to recover for injuries sustained when she overstepped single step, causing her to trip and fall onto adjacent sidewalk. The Supreme Court, Kings County, Ash, J., entered summary judgment in defendants' favor, and pedestrian appealed.

The Supreme Court, Appellate Division, held that:

- Pedestrian adequately identified condition that caused accident;
- Fact issues remained as to whether door leaf violated city administrative code, and whether there was causal connection between violation and pedestrian's fall;
- Fact issues remained as to whether owner retained sufficient control over premises to impose liability; and
- Owner's retention of right to repair did not relieve tenant of its obligation to keep premises reasonably safe.

BONDS - LITIGATION - NORTH CAROLINA

U.S. v. Murphy

United States District Court, W.D. North Carolina, Charlotte Division - October 16, 2013 - Slip Copy - 2013 WL 5636710

Defendant was charged with participating in a bid-rigging scheme to control and manipulate the bidding process for municipal bond proceeds.

A three count bill of indictment was entered charging defendant with 1) conspiracy to commit wire fraud and to defraud the United States in violation of 18 U.S.C. § 371; 2) a substantive wire fraud charge in violation of 18 U.S.C. § 1343; and 3) conspiracy to make false entries in bank records in violation of 18 U.S.C. § 371.

Before the indictment was entered, the government and defendant entered into two separate tolling agreements. Under these agreements, the period covered by the tolling agreements would be excluded from calculating time "for the purpose of any statute of limitation" for certain charges. The parties agree that these agreements together tolled the statutes for a total of two years and eleven days.

Defendant then moved to dismiss the indictment on the grounds that the charges were time-barred.

With respect to Counts I and II, the wire fraud charges, the issue was whether the applicable statute of limitations is the ten year period by 18 U.S.C. § 3293(2). This provision extends the statute of limitations from five years to ten "if the offense affects a financial institution." The indictment alleged that a financial institution was affected in that Bank of America, one of the co-conspirators and defendant's employer from 1998 to 2002, was made "susceptible to substantial risk of loss" as a result of the scheme and, in fact, the bank agreed to pay federal and state agencies over $137 million in settlements "as compensation for the losses incurred by those agencies and victims." Defendant contended that this allegation is insufficient to bring the charges under the ten year statute and requested that the court dismiss these charges as time barred. The court agreed with the government's interpretation and denied defendant's motion as to Counts I and II.

Defendant contended that Count III of the Indictment was time barred because the charges contained in this count were not included in the two tolling agreements. The court agreed with the government that the tolling agreements did apply to Count III.

FIRST AMENDMENT - OHIO

Freshwater v. Mt. Vernon City School Dist. Bd. of Edn.

Supreme Court of Ohio - November 19, 2013 - N.E.2d - 2013 -Ohio- 5000

Public school teacher sought review of the city school board's decision to terminate him after he refused to obey school district's order that he stop displaying the Bible on his desk.

The Supreme Court of Ohio held that:

- "good and just cause" supporting termination of a public teacher's contract includes "insubordination";
- Teacher's religiously-motivated display of his personal Bible on his desk did not violate the Establishment Clause;
- School district's order that teacher remove his Bible from display on his desk infringed on teacher's rights under the Free Exercise Clause;
- Teacher's disobedience of school district's invalid order did not constitute "insubordination" supporting termination; but
- Teacher's disobedience of orders requiring removal of religious materials displayed by teacher in classroom for reasons other than the exercise of his religion constituted "insubordination" supporting termination.

Teachers do not abandon their First Amendment rights, including the right to freely exercise their religion, when they enter their classrooms.

Public school teacher's religiously-motivated display of his personal Bible on his desk did not violate the Establishment Clause of the First Amendment. Teacher did not use the Bible while teaching, Bible's inconspicuous presence on teacher's desk did not convey a message that the school district endorsed or promoted Christianity, teachers' desks were considered personal space at school and teachers often kept private items there, teacher did not prominently stage or draw attention to his Bible, and school district had the power to correct any misperceptions that it was endorsing teacher's beliefs.

City school district's order, that teacher remove from classroom conspicuously-displayed Bible,

Christian-themed book, and poster depicting governmental officials in prayer, did not violate teacher's rights under the Free Exercise Clause, but rather constituted a valid order, willful disobedience of which constituted "insubordination" supporting teacher's termination. Unlike the presence of a personal Bible on teacher's desk, teacher's display of additional items was not a part of his exercise of his religion, but rather, was undertaken to make a point once a controversy had erupted regarding the presence of the Bible and the teacher's teaching of creationism and intelligent design in science class.

TAX - OHIO

Gesler v. Worthington Income Tax Bd. of Appeals

Supreme Court of Ohio - November 19, 2013 - N.E.2d - 2013 WL 6067978

Taxpayers appealed decision of city, denying request for refund of municipal income tax. The Board of Tax Appeals (BTA) affirmed the city decision, and taxpayers appealed.

The Supreme Court of Ohio held that state statute containing definition of net profit for purposes of municipal income tax did not invalidate city ordinance excluding federal Schedule C income from net profit subject to municipal tax.

Under home rule amendment and provision of state constitution allowing General Assembly to limit the power of municipalities to levy taxes, General Assembly could limit city's power to tax but could not command city to impose a tax. Thus, statute containing definition of net profit for purposes of municipal income tax did not invalidate city ordinance defining net profit, for purposes of municipal income tax, as excluding amounts required to be reported on Schedule C of federal income tax return, even though statute defined net profit as including Schedule C income.

TAX - PENNSYLVANIA

Roethlein v. Portnoff Law Associates, Ltd.

Supreme Court of Pennsylvania - November 20, 2013 - A.3d - 2013 WL 6096757

Delinquent taxpayer brought class action against law firm and attorney, who acted as private tax collector for various municipalities and school districts, for unjust enrichment and violation of Pennsylvania Loan Interest and Protection Law (Act 6). The Court of Common Pleas entered judgment in favor of taxpayers for approximately $1.06 million, and attorney fees for approximately $1.27 million. Defendants appealed, and ordered an accounting.

The Supreme Court held that:

- Act 6 did not provide taxpayers with a cause of action to challenge costs imposed for collection of delinquent taxes, and
- Administrative cost fees of $35 incurred by the municipalities in their effort to collect delinquent taxes were recoverable from taxpayers.

Loan Interest and Protection Law, which was also known as Act 6, applied only to claims involving the loan or use of money, and, thus, did not provide taxpayers with a cause of action to challenge costs imposed for the collection of delinquent taxes or to seek damages and attorney fees for improperly-imposed costs. Legislature intended law to apply only to claims involving the loan or use

of money, and title and the language of preamble clearly contemplated an act applying to claims arising from the loan or use of money.

Administrative cost fees of $35 incurred by municipalities in their effort to collect delinquent taxes were recoverable from taxpayers pursuant to statute that stated that municipality could recover charges, expenses, and fees incurred in the collection of delinquent taxes, including, under certain circumstances, charges, expenses, and fees of third-party tax collectors retained by the municipality.

MUNICIPAL WASTE DISPOSAL - PENNSYLVANIA

Pennsylvania Waste Industries Ass'n v. Monroe County Municipal Waste Management Authority

Commonwealth Court of Pennsylvania - November 21, 2013 - A.3d - 2013 WL 6116099

“In this appeal of interest to counties and municipal authorities statewide, we are asked whether a municipal authority tasked with planning and implementing municipal waste disposal for Monroe County may set the “tipping fees” at private landfills. These fees cover disposal costs in the landfills as well as administrative costs and costs of other aspects of the county-wide waste disposal plan.”

The Pennsylvania Waste Industries Association (Appellant) is a trade association of private landfill owners and operators and waste haulers doing business in Pennsylvania. In August 2012, Appellant commenced an action for declaratory judgment against the Monroe County Municipal Waste Management Authority. It challenged the Authority’s power to set the “tipping fee” for waste disposal at privately owned facilities and to include in the “tipping fee” the costs of its Integrated Waste Management System and debt service. It argued setting the “tipping fee and including a non-disposal component was ultra vires the Authority and related solid waste laws. Appellant also challenged the Authority’s current administrative fee on the same grounds.

Appellant raised two principle arguments. First, it contended that the Authority’s “tipping fee,” as proposed in the RFP, was ultra vires the Authority’s enabling legislation. In other words, the Authority was not empowered under either the Authorities Act or Act 101 to set “tipping fees” at facilities it does not own or operate.

Second, Appellant asserted that the Authority’s “tipping fee,” as proposed in the RFP, was preempted by Act 101 and related solid waste laws. Allowing municipalities to impose their own local fees undermines a uniform system of standardized fees, applications and grants.

After a lengthy analysis, the court held that the Authority was not authorized by the first clause of Section 5607(d)(9) of the Authorities Act to set the “tipping fee” at landfills in which it does not have a meaningful ownership or operational interest. However, the Authority was authorized by the second clause of Section 5607(d)(9) of the Authorities Act to charge for its administrative services, including debt service.

Further, Act 101 preempts local fees covering recycling programs. However, Act 101 does not preempt other local fees which are otherwise permitted by statute and which are not inconsistent with Act 101’s provisions and purposes.

IMMUNITY - TEXAS

Pegasus School of Liberal Arts & Sciences v. Ball-Lowder

Court of Appeals of Texas, Dallas - November 18, 2013 - Not Reported in S.W.3d - 2013 WL 6063834

Pegasus is a private nonprofit corporation that operates an open-enrollment charter school in Dallas under a charter contract with the State of Texas. Teacher at Pegasus was fired after she complained about allegedly illegal activity there, first to school officials, and then to the State Auditor's Office, the Dallas Fire Department, the Texas Charter School Association, the Dallas County District Attorney, and the Texas Education Agency. She brought suit for wrongful discharge under the Texas Whistleblower Protection Act, alleging in her petition that she was "terminated in retaliation for reporting a violation of law to an appropriate law enforcement authority."

Pegasus filed a plea to the jurisdiction, asserting that teacher's claims must be dismissed because the Whistleblower Protection Act is not applicable to a Texas open-enrollment charter school. Ball–Lowder contended in her response to the plea to the jurisdiction that Ohnesorge was wrongly decided and was overruled by the supreme court's decision in C2 Construction II. She argued that under C2 Construction II, open-enrollment charter schools are subject to the Whistleblower Protection Act.

The Court of Appeals concluded that its reasoning in Ohnesorge was not consistent with C2 Construction II or III, and that the Whistleblower Protection Act applies to an open-enrollment charter school. Therefore, it affirmed the trial court's order denying the plea to the jurisdiction of Pegasus.

CODE ENFORCEMENT - TEXAS

State v. Cooper

Court of Criminal Appeals of Texas - November 20, 2013 - S.W.3d - 2013 WL 6081452

Defendant was found guilty, in the Plano Municipal Court, of two violations of city's property maintenance code, and was fined $300 and $200, respectively. Defendant appealed.

After grant of review, the Court of Criminal Appeals, held that charging instrument was insufficient to state offense against defendant for alleged violation of maintenance code.

Municipal code of ordinances contained requirement that persons be given notice that they are in violation of the code before such persons can be charged, and charging instrument failed to allege that defendant was given notice before being charged.

SIFMA: US Municipal Bond Credit Report, 2013 Q3.

The municipal bond credit report is a quarterly report on the trends and statistics of U.S. municipal bond market, both taxable and tax-exempt. Issuance volumes, outstanding, credit spreads, highlights and commentary are included.

Summary

According to Thomson Reuters, long-term municipal issuance volume, including taxable and tax-

exempt issuance, totaled $68.0 billion in the third quarter of 2013, a decline of 21.3 percent from the prior quarter ($88.6 billion) and a decline of 18.7 percent year-over-year (y-o-y). Year to date, issuance was $238.0 billion, 15.4 percent below the 10-year average of $281.4 billion of issuance in the first nine months of the year.

Tax-exempt issuance totaled $60.2 billion in 3Q'13, a decline of 18.6 percent and 11.3 percent q-o-q and y-o-y, respectively. Year to date, tax-exempt issuance totaled $202.3 billion. Taxable issuance totaled $5.5 billion, a decline of 56.1 percent and 48.6 percent q-o-q and y-o-y, respectively; year to date taxable issuance totaled $28.8 billion. AMT issuance was $2.2 billion, an increase of 7.5 percent from 2Q'13 but a decline of 54.9 percent y-o-y; year-to-date, AMT issuance totaled $6.8 billion.

By use of proceeds, general purpose led issuance totals in 3Q'13 ($14.2 billion), followed by higher education ($9.6 billion), and primary and secondary education ($8.7 billion).

Refunding volumes as a percentage of issuance dropped precipitously in the third quarter following a spike in interest rates at the end of the second quarter, falling to 42.7 percent of issuance compared to 2Q'13 (57.3 percent) and year-to-date (55.2 percent).

Download the full report:

http://www.sifma.org/WorkArea/DownloadAsset.aspx?id=8589946222

Report: The Detroit Bankruptcy.

The City of Detroit's bankruptcy was driven by a severe decline in revenues (and, importantly, not an increase in obligations to fund pensions). Depopulation and long-term unemployment caused Detroit's property and income tax revenues to plummet. The state of Michigan exacerbated the problems by slashing revenue it shared with the city. The city's overall expenses have declined over the last five years, although its financial expenses have increased. In addition, Wall Street sold risky financial instruments to the city, which now threaten the resolution of this crisis. To return Detroit to long-term fiscal health, the city must increase revenue and extract itself from the financial transactions that threaten to drain its budget even further.

The Shortfall

Detroit's emergency manager, Kevyn Orr, asserts that the city is bankrupt because it has $18 billion in long-term debt. However, that figure is irrelevant to analysis of Detroit's insolvency and bankruptcy filing, highly inflated and, in large part, simply inaccurate. In reality, the city needs to address its cash flow shortfall, which the emergency manager pegs at only $198 million, although that number too may be inflated because it is based on extraordinarily aggressive assumptions of the contributions the city needs to make to its pension funds.

Cash flow crisis.

In a corporate bankruptcy, the judge takes stock of a company's total assets and liabilities because the company can be liquidated and all its assets sold to pay down its debts. However, municipal bankruptcies are inherently different because they do not contemplate the liquidation of a city. Municipal bankruptcies are about cash flow—a city's ability to match revenue against expenses so that it can pay its bills. Under Chapter 9 of the United States Bankruptcy Code, a municipality is eligible to file bankruptcy when it is unable to pay its debts as they come due.

This means that Detroit is bankrupt not because of its outstanding debt, but because it is no longer bringing in enough revenue to cover its immediate expenses. According to the city's bankruptcy filing, the emergency manager projects a $198 million annual cash flow shortfall for fiscal year (FY) 2014 (though, as explained below, the portion of this amount that is related to pension fund contributions is an estimate that requires deeper analysis). To get out of bankruptcy, the city needs to address this annual shortfall—whether it is $198 million or a smaller number—not its total outstanding long-term debt.

Total outstanding debt.

Not only is the $18 billion outstanding debt figure irrelevant to Detroit's bankruptcy, it is also misleading and inflated. There are several reasons, including the following examples:

The emergency manager includes $5.8 billion of the Water and Sewerage Department's debt as a liability of the city, even though the Water and Sewerage Department serves more than 3 million people all across southeastern Michigan, an area far larger than just the city of Detroit, which has just 714,000 residents. This debt is not a liability of the city's general fund; and, even if it were, only a fraction of it would allocable to the city.

The emergency manager's assertion that the city's pension funds have a $3.5 billion shortfall is an estimate, very different from the certain liability of a financial debt, based on calculations that use extreme assumptions that depart from most cities' and states' general practice.

To pinpoint the causes of Detroit's bankruptcy, it is necessary to identify the reasons for the city's cash flow shortfall, which are best understood through an analysis of the city's revenue and expenses.

Revenue

Detroit has been in a state of decline for several decades. The city's population has fallen from a high mark of nearly 2 million residents in 1950 to just 714,000 in 2010. This long-term decline has also taken a toll on the city's revenue base, causing both property and income tax revenues to shrink as homeowners and jobs have left the city. Altogether, Detroit's revenues have decreased by more than 20 percent since FY 2008, declining by $257.7 million.

Tax revenue.

Because of the Great Recession, this gradual decline in revenue became a massive leak. Detroit was hit particularly hard by both the foreclosure and unemployment crises. The number of employed Detroit residents fell by 53 percent from 2000 through 2012, but half of that decline occurred in a single year, 2008, as the recession took hold.

During the recession, property values declined substantially, eating into the city's property tax base. The recession has cut deeply into key property and income tax revenue and fee revenue from utilities owned and operated by the city.

State revenue sharing.

The state of Michigan has exacerbated Detroit's revenue crisis by slashing $67 million in state revenue sharing with the city. About $24 million dollars of these cuts were due to revenues shared pursuant to the Michigan State Constitution, allocated among cities and towns based on population. Detroit's allocation was reduced because of population loss in the 2010 census. However, the remaining $42.8 million (64 percent of the total state cuts) were due to statutory revenue sharing

and were at the discretion of the state Legislature. By cutting revenue sharing with the city, the state effectively reduced its own budget challenges on the backs of the taxpayers of Detroit (and other cities). These cuts account for nearly a third of the city's revenue losses between FY 2011 and FY 2013, coming on the heels of the revenue losses from the Great Recession and tipping the city into the cash flow crisis that it is now experiencing. Furthermore, the Legislature placed strict limits on the city's ability to raise revenue itself to offset these losses.

Corporate subsidies.

The city has provided significant tax subsidies to a large number of enterprises as incentives to engage in development projects in downtown Detroit. In some years, the city handed out as much as $20 million to private interests. To the extent that the development would have occurred without these tax subsidies, or with less subsidies, the program was a burden on city revenues at a time when it was particularly damaging. In any event, the subsidies that have not yet been received should be treated as obligations of the city, in the same category as debt service and funding of future employee benefits, subject to readjustment to help resolve the cash flow crisis to the extent revenue is not increased to cover the demands on cash.

Expenses

Contrary to widely held belief, Detroit does not have a spending problem. Since the onset of the Great Recession, the city's total expenses have actually decreased by $356.3 million, driven by a 38 percent reduction ($419.1 million in absolute terms) in operating expenses, although its financial expenses have gone up.

Operating expenses.

Between FY 2008 and FY 2013, the city drastically cut operating expenses by $419.1 million. This was accomplished in large part by laying off more than 2,350 workers, cutting worker pay, and reducing future healthcare and future benefit accruals for workers. The city reduced salary expenses by 30 percent between FY 2008 and FY 2013. Total operating expenses have been reduced by nearly 38 percent during that same time.

Legacy expenses.

The city's "legacy expenses" increased by $62.8 million between FY 2008 and FY 2013. These legacy expenses include the city's debt service and financial expenses as well estimates of its future liability for healthcare and pension benefits it pays to retirees. A close look at the city's legacy expenses reveals that this $62.8 million increase was driven heavily by the city's complex financial deals, not retiree benefits.

The city's financial expenses increased by $38.5 million between FY 2008 and FY 2013, accounting for more than 60 percent of the total increase in legacy expenses.

The city's pension contribution expenses remained relatively flat, rising only $2 million during this time. The city's contribution might have been larger if it had had more money, but increases in the actual contributions it did make did not contribute materially to the cash flow crisis.

The city's healthcare contribution expenses increased by $24.3 million. This constitutes an increase of 3.25 percent, per year, which is less than the nationwide annual increase in healthcare costs of 4 percent.

The city's pension contributions in particular did not play a role in pushing it into bankruptcy

because they did not contribute materially to the increase in the city's legacy expenses that added to the cash flow shortfall. While the city's healthcare contributions did increase, this was largely because of rising healthcare costs nationally, not because the city's benefits were too generous. In fact, a comparative analysis of Detroit's retiree benefits shows that its pension and healthcare benefits are in line with those of other comparable cities.

Financial deals.

Detroit's financial expenses have increased significantly, and that is a direct result of the complex financial deals Wall Street banks urged on the city over the last several years, even though its precarious cash flow position meant these deals posed a great threat to the city. The biggest contributing factor to the increase in Detroit's legacy expenses is a series of complex deals it entered into in 2005 and 2006 to assume $1.6 billion in debt. Instead of issuing plain vanilla general obligation bonds, the city financed the debt using certificates of participation (COPs), which is a financial structure that municipalities often use to get around debt restrictions. Eight hundred million dollars of these COPs carried a variable interest rate, which the city synthetically converted to a fixed rate using interest rate swaps.

These swaps carried hidden risks, and these risks increased after the Federal Reserve drove down interest rates to near zero in response to the financial crisis. The deals included provisions that would allow the banks to terminate the swaps under specified conditions and collect termination payments, which would entitle the banks to immediate payment of all projected future value of the swaps to the bank counterparties. Such conditions included a credit rating downgrade of the city to a level below "investment grade," appointment of an emergency manager to run the city and failure of the city to make timely payments. Projected future value balloons in low, short-term rate conditions. This is because the difference between the fixed swap payments made by the city and the floating swap payments projected to be paid by the banks increases. Because all of these events have occurred, the banks are now demanding upwards of $250-350 million in swap termination payments.

These swap deals were particularly ill-suited for a city like Detroit, which had been hovering on the edge of a credit rating downgrade for years. Because the risk of a credit downgrade below "investment grade" was so great, the likelihood of a termination was imprudently high. The banks and insurance companies were in a far better position to understand the magnitude of these risks and they had at least an ethical duty to forbear from providing the swaps under such precarious circumstances. The law recognizes special duties that sophisticated financial institutions owe to special entities like cities in providing complex financial products. A strong case can be made that the banks that sold these swaps may have breached their ethical, and possibly legal, obligations to the city in executing these deals.

Conclusion

Detroit's bankruptcy is, at its core, a cash flow problem caused by its inability to bring in enough revenue to pay its bills. While emergency manager Kevyn Orr has focused on cutting retiree benefits and reducing the city's long-term liabilities to address the crisis, an analysis of the city's finances reveals that his efforts are inappropriate and, in important ways, not rooted in fact. Detroit's bankruptcy was primarily caused by a severe decline in revenue and exacerbated by complicated Wall Street deals that put its ability to pay its expenses at greater risk. To address the city's cash flow shortfall and get it out of bankruptcy, the emergency manager should focus on increasing revenue and extricating the city from these toxic financial deals. Here are some recommendations for doing that:

The emergency manager, ideally in collaboration with the state, needs to increase revenue by $198 million annually to bridge Detroit's budget gap until structural programs can be put in place and the city can benefit from increased general economic improvement. This includes enlisting state involvement on an emergency basis and restoring discretionary state revenue sharing to pre-crisis levels. The shortfall amount can be reduced as FY 2014 proceeds by factors such as improved collection of unpaid taxes (which has yielded modest results to date).

The emergency manager should drop his proposal to move city workers to a defined contribution pension plan and abrogate vested pension benefits. The city's pension fund contributions did not cause the crisis. Reducing benefits runs counter to the long-term goal of structurally improving city services. Moreover, converting to a defined contribution plan at just the moment when new active employees will be added as services are improved (a goal of the emergency manager) would adversely affect the financial dynamics of the pension fund for existing retirees and other beneficiaries who have already vested under the defined benefit system. Over time, the new active employees will rebalance a fund that is currently top-heavy with retirees and will improve the long-term investment horizon of the plan, to the benefit of city cash flow.

The emergency manager should drop any plans to privatize or otherwise monetize the Water and Sewerage Department, since the asserted benefits of such a plan are not likely to be realized and, even if they were, would have no net effect on the current cash flow crisis. The sale price of the system or components represents an investment by a buyer that must be repaid by system revenues, the same as bonds issued against those revenues. If the sale price is applied to retire existing bonds, the effects balance out. If they are not used to retire bonds, it is just like issuing new debt, which presumably the system could do without selling off parts of itself. The plan calls for an annual payment to the city, but this payment is from user fee revenues net of operational expenses and debt service (and return on equity investment if true privatization is used), a financial structure that is parallel to the current system.

The emergency manager's plan to pay the swap termination fees outside of the bankruptcy process should be abandoned. The bank counterparties should be made to bear the consequences of the original swap transaction, and they should be pushed to forego their projected profit (the measure of the termination payment), given the large profits they have already earned as a result of the unusually low interest rates that resulted from the financial crash. The emergency manager should also press for prorated rebates on the premiums for insurance on the swaps. And, if necessary, the state should be enlisted to guarantee the city's swaps to avoid payment of termination fees. The termination fees will become smaller as interest rates rise over time, which they are likely to do.

The emergency manager should negotiate directly with the holders of the pension financing certificates of participation, apart from other unsecured creditors. The circumstances of the COPs issue are unique. Unless these circumstances are shown to have benign explanations that are not currently available generally to the public, the leverage that the emergency manager has over this negotiation is high.

The emergency manager should reclaim tax subsidies and other expenditures to incentivize investment in the downtown area. These tax subsidies should be treated similarly to the city's other financial obligations. The residents of Detroit have already suffered as a result of the crisis, as have the public employees. The recipients of tax expenditures should share in the sacrifice as well.

Once Detroit gets through this immediate crisis, the city's elected officials, hopefully working collaboratively with the state Legislature and the governor, can turn their attention to post-crisis, structural programs that would grow the city's tax base and allow it to return to prosperity over time.

Download the full report:

http://www.demos.org/sites/default/files/publications/Detroit_Bankruptcy-Demos.pdf

Wallace Turbeville

MSRB Provides Education for Issuers on Disclosure of Bond Ballot Campaign Contributions.

The Municipal Securities Rulemaking Board (MSRB) has prepared a new educational resource to assist state and local governments in understanding the information that will be made public regarding municipal securities dealers' contributions to bond ballot campaigns and any resulting municipal securities underwriting business. The MSRB began requiring additional disclosures in July 2013 to promote greater transparency surrounding dealers' involvement in bond ballot campaigns, which secure voter approval for taxpayer-funded public projects.

http://msrb.org/msrb1/pdfs/Public-Disclosure-of-Bond-Ballot-Campaign-Contributions.pdf

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WSJ: SEC Weighs Altering Rule on Private Deals.

Individuals With Financial Training Could Buy Into Nonpublic Stock, Bond Offers Without Meeting Income Threshold

Securities regulators are weighing whether to allow financially sophisticated investors with only moderate wealth to buy significant stakes in startups, as part of a review of 30-year-old rules that could ease constraints on investing in private companies.

Currently, only individuals who meet certain wealth or income standards are allowed to invest in private stock and bond offerings that are issued outside the public markets by companies.

But the Securities and Exchange Commission disclosed in a letter to lawmakers that it may alter standards for "accredited investors," which could allow individuals who don't meet the income threshold to invest in such deals if they have specialized training in finance, economics or accounting.

"Holding a particular license or degree may provide an individual with the knowledge and sophistication necessary to qualify as an accredited investor," SEC Chairman Mary Jo White wrote Friday in a letter to Reps. Patrick McHenry (R., N.C.) and Scott Garrett (R., N.J).

Lawmakers seeking the change say it would help fuel demand for private shares of technology firms and other startups. They argue existing constraints have shut out many financially sophisticated investors from some of the fastest-growing market sectors, since shares in private companies are generally available only to investors whose individual net worth is at least $1 million—excluding their primary residence—or who make at least $200,000 annually.

The SEC is expected to update those thresholds as early as next summer, when it is required by law to report to Congress on the issue.

The existing thresholds, which stem from the 1980s and weren't pegged to inflation, are widely viewed as outdated. The agency sought comment earlier this year on whether the existing net worth and annual income criteria are the best ways to measure financial sophistication, as part of a larger rule proposal. SEC officials also have discussed the idea of determining sophistication based on the amount of money an individual has invested, rather than on their income or wealth levels.

The review comes as the SEC has advanced rules, required by last year's Jumpstart Our Business Startups Act, that aim to make it easier for startups and hedge funds to advertise private offerings, as long as they only sell the investments to accredited investors. About 8.5 million U.S. households currently qualify, though only a small portion of those households participate.

The agency also last month proposed rules allowing startups to raise as much as $1 million using online "crowdfunding" techniques to sell small shares to lots of ordinary investors. The agency is expected to complete those rules next year.

Broadening the standards would likely increase the pool of eligible investors, encouraging more firms to raise money privately at a time when the market for such offerings already eclipses that of public offerings. Last year, companies raised more than $900 billion in private placements, nearly four times the amount raised through public stock offerings, according to a report released by the SEC this summer. The private placements were sold to just 234,000 investors.

Messrs. McHenry and Garrett say the SEC must modernize the accredited-investor criteria in a manner that doesn't reduce the pool of qualifying investors by simply raising the existing income and wealth thresholds. Last month, they asked the SEC to broaden the standards to include those who work as certified public accountants, financial analysts and licensed securities traders.

"It's time the SEC abolished its biased policy of shutting out everyday Americans from investment opportunities exclusively reserved for the top three percent," Mr. McHenry said in a statement Monday. "A modern fix that offers all Americans merit-based access to the benefits of being an accredited investor will level the investment playing field and expand access to capital for aspiring entrepreneurs."

In her letter Friday, Ms. White told Messrs. McHenry and Garrett that SEC staff have begun a "comprehensive review" of the accredited definitions, and that staff would consider and evaluate "alternative criteria" as part of that review. She acknowledged broadening the criteria the way they envision could boost liquidity for private offerings while also increasing "the extent of the expert review of the issuances."

Ms. White cautioned that some argue criteria should factor a person's ability to absorb the potential loss of an investment, and therefore favor standards based on net worth and income. She added it is possible many of the individuals who might qualify based on their professional credentials already meet the existing income and wealth thresholds.

Investor advocates agree the criteria are outmoded. Barbara Roper, director of investor protection at the Consumer Federation of America, said the existing thresholds are "inadequate."

"We're looking at ways to improve that definition," including ways to account for financial sophistication, she said.

By ANDREW ACKERMAN

U.S. Court Questions ex-GE Bankers' Bid-Rigging Convictions.

NEW YORK (Reuters) – A U.S. appeals court on Tuesday questioned the convictions of three former banking executives at a unit of General Electric Co for being involved in a conspiracy to rig bids for contracts to invest municipal bond proceeds.

A three-judge panel for the 2nd U.S. Circuit Court of Appeals in New York appeared open at times to arguments by lawyers for the executives that the indictments were filed too late and that the convictions should be thrown out.

As part of a broad investigation into the $3.7 trillion municipal bond market, the government had accused the three GE Capital bankers of conspiring with brokers to submit artificially low bids for municipal finance contracts.

Following a three-week trial that ended in May 2012, a federal jury in Manhattan found Dominick Carollo, Steven Goldberg and Peter Grimm guilty of conspiracy to commit wire fraud and to defraud the United States.

The case began after a grand jury indicted the three men on July 27, 2010. Lawyers for the defendants argued that because the contracts at issue were awarded before July 27, 2005, the alleged conspiracies fell outside the five-year statute of limitations.

The government claims the conspiracy continued when the defendants' employers paid artificially low interest rates to municipalities on their bond proceeds.

Judges on the 2nd Circuit panel on Tuesday peppered the government's lawyer with questions over how long such payments could be considered as falling within the statute of limitations.

"Is it definite or indefinite?" asked Judge Dennis Jacobs.

Judge Chester Straub also questioned how the conspiracy could be considered ongoing when the co-conspirators were in no position to withdraw from it.

"There is nothing to withdraw from," he said. "Everything has been accomplished other than the flow of money."

ECONOMIC BENEFITS

James Fredericks of the U.S. Justice Department's Antitrust Division said economic benefits continued to flow to General Electric, which was named a co-conspirator in the case.

"If the economic benefits stop accruing, the conspiracy is over," Fredericks said.

Fredericks said that a ruling for the defendants could hamstring the government in other corporate fraud cases.

Lawyers for the defendants also faced tough questions from the panel. Straub voiced concern over the economic benefits that accrued as a result of obtaining the investment contracts.

Howard Heiss of O'Melveny & Myers, an attorney for Grimm, told the appeals court that the interest payments, which are still being made today, were not acts in furtherance of the conspiracy, but the result of the conspiracy. The government's interpretation "makes no sense," he said.

“It means that this conspiracy is ongoing today despite the fact that (the defendants) are in jail,” he said.

The government’s probe into the manipulation of the municipal bond market has led to guilty pleas or convictions of 19 individuals, the government said in July. It has also ensnared such major financial institutions as JPMorgan Chase & Co and Bank of America Corp, which agreed to pay millions in fines to resolve their roles.

Last October, Goldberg was given a four-year prison term, while Grimm and Carollo were each sentenced to three years.

The case is U.S. v. Peter Grimm, et al, 2nd U.S. Circuit Court of Appeals, Nos. 12-4310, 12-4365, 12-4371.

(Reporting by Andrew Longstreth; Editing by Howard Goller and Leslie Adler)

MSRB Restates Rule G-29 Interpretive Notice.

The Municipal Securities Rulemaking Board (MSRB) today issued a restated interpretive notice to MSRB Rule G-29, on the availability of MSRB rules. As the MSRB has transitioned to using primarily digital communications, the MSRB will no longer be printing and distributing its Rule Book on an annual basis. The MSRB will continue to maintain the “Rules” section of its website, at msrb.org, which contains the current version of every MSRB rule, as well as any related interpretive guidance and resources, and details of any upcoming rule changes. The restated Rule G-29 interpretive notice continues to provide that dealers may make the MSRB’s rules available to customers by a number of other means, including providing access to the MSRB’s website, using printed versions or software products produced by other companies.

To ensure that the digital availability of MSRB rules meets the needs of municipal securities dealers and municipal advisors, the MSRB will provide beginning January 2, 2014, a link on its website to a comprehensive PDF format of the Rule Book that will be updated on a quarterly basis with any new MSRB rules and amendments that have become effective. The PDF version of the Rule Book allows municipal market participants to search the entire library of MSRB rules for particular keywords, and print a full version of MSRB rules effective as of the publication date. However, msrb.org contains the most frequently updated version of MSRB rules, and should be consulted for the current status of all rules.

Read the full notice at:

http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G-29.aspx?tab=2

NAIPFA to SEC: MA Rule Won't Hurt Issuers.

The National Association of Independent Public Finance Advisors has sent an open letter to Securities and Exchange Commission chairman Mary Jo White insisting the municipal advisor rule the SEC adopted in September will not restrict the flow of information between issuers and other parties to a bond deal.

IRS LTR: Lease Arrangement in Bond-Financed Project Doesn't Give Rise to Security Interest.

The IRS ruled that a lease arrangement under which bonds are issued by an authority that acquires, constructs, and maintains facilities on behalf of a state which then leases the buildings does not give rise to a security interest in the facilities within the meaning of reg. section 1.141-4(d)(4).

Citations: LTR 201346002

Index Number: 141.00-00, 141.01-00, 141.01-02

Release Date: 11/15/2013

Date: August 14, 2013

Refer Reply To: CC:FIP:B5 – PLR-113154-13

Dear * * *

This letter is in response to your request for a ruling that the lease arrangement described herein will not cause the Bonds to meet the private security or payment test under section 141(b)(2) of the Internal Revenue Code.

FACTS AND REPRESENTATIONS

You make the following factual representations. Authority was created by the Act as a body corporate, separate from the State. Authority acquires, constructs, and maintains facilities on behalf of the State and is the primary issuer of debt to finance the acquisition and construction of buildings for various State purposes. Typically, Authority holds legal title to the buildings and the State leases the building pursuant to long term operating leases. Authority uses the lease payments from the State to pay debt service on the lease revenue bonds issued for acquisition or construction of buildings.

Authority issued the Bonds to finance construction and/or renovation of various buildings, including the Facility. Authority holds legal title to the Facility and the State leases the Facility pursuant to a multi-year operating lease (the “Lease”). The debt service on the Bonds is payable from, and secured by, the State’s payments on the Lease (the “Lease Payments”) along with the rentals with respect to various other facilities financed with proceeds of Authority’s bonds issued under the same indenture (the “Parity Bonds”). The State is obligated to pay all costs of operating and maintaining the Facility. The only payments from nongovernmental persons with respect to the Facility are payments that do not exceed direct operating costs of the Facility attributable to use by such persons.

The Bondholders do not have a mortgage on or other security agreement creating a security interest in the Facility under State law. The remedies available to the Bondholders upon nonpayment of debt service are obtaining a money judgment against the State for unpaid Lease Payments or other rentals and filing suit to compel Authority or the State to perform in accordance with the terms of the leases, Act, or related indenture by means of an action in the nature of mandamus.

Pursuant to the Lease, the State may cease Lease Payments only if the Facility becomes untenantable for reasons other than those caused by the State. In the indenture for the Bonds, Authority has covenanted not to sell, lease, mortgage, or otherwise dispose of the Facility, other

than the Lease, so long as the Parity Bonds are outstanding, with the following exceptions. Authority can do so (1) in a manner it determines is in the best interest of the bondholders if the Lease is terminated, (2) if the rental for the part of the Facility retained is not less than the rental just prior to such action, (3) at the end of the Lease term, or (4) if Authority has sufficient funds to pay the remaining Lease Payments when due.

The State intends to enter into management contracts with nongovernmental persons for performance of certain substantial services at the Facility (the "Management Contracts"). Authority represents that the terms of the Management Contracts will cause the Bonds to satisfy the private business use test of section 141(b)(1).

LAW

Section 103(a) provides generally that gross income does not include interest on any state or local bond. Section 103(b)(1) provides that this exclusion does not apply to any private activity bond unless it is a qualified bond under section 141. Under section 141(a), a bond is a private activity bond if either the private business use test under section 141(b)(1) and the private security or payment test under section 141(b)(2) are satisfied, or the private loan financing test under section 141(c) is satisfied.

Section 141(b)(2) provides, in part, that the private security or payment test is satisfied if the payment of the principal of, or the interest on, more than 10 percent of the proceeds of such issue is (under the terms of such issue or any underlying arrangement) directly or indirectly (A) secured by any interest in property used or to be used for a private business use, or payments in respect of such property, or (B) to be derived from payments (whether or not to the issuer) in respect of property, or borrowed money, used or to be used for a private business use.

Section 1.141-4(a)(1) of the Income Tax Regulations provides that the private security or payment test relates to the nature of the security for, and the source of, the payment of debt service on an issue. The private payment portion of the test takes into account the payment of the debt service on the issue that is directly or indirectly to be derived from payments (whether or not to the issuer or any related party) in respect of property, or borrowed money, used or to be used for a private business use. The private security portion of the test takes into account the payment of the debt service on the issue that is directly or indirectly secured by any interest in property used or to be used for a private business use or payments in respect of property used or to be used for a private business use.

Section 1.141-4(a)(3) provides that the security for, and payment of debt service on, an issue is determined from both the terms of the bond documents and on the basis of any underlying arrangement. An underlying arrangement may result from separate agreements between the parties or may be determined on the basis of all of the facts and circumstances surrounding the issuance of the bonds. For example, if the payment of debt service on an issue is secured by both a pledge of the full faith and credit of a state or local governmental unit and any interest in property used or to be used in private business use, the issue meets the private security or payment test.

Section 1.141-4(c)(2)(i)(A) provides that both direct and indirect payments made by any nongovernmental person that is treated as using proceeds of the issue are taken into account as private payments to the extent allocable to the proceeds used by that person. Payments are taken into account as private payments only to the extent that they are made for the period of time that proceeds are used for a private business use. Payments for a use of proceeds include payments (whether or not to the issuer) in respect of property financed (directly or indirectly) with those proceeds, even if not made by a private business user. Payments are not made in respect of financed

property if those payments are directly allocable to other property being directly used by the person making the payment and those payments represent fair market value compensation for that other use.

Section 1.141-4(c)(2)(i)(C) provides that payments by a person for a use of proceeds do not include the portion of any payment that is properly allocable to the payment of ordinary and necessary expenses (as defined under section 162) directly attributable to the operation and maintenance of the financed property used by that person. For this purpose, general overhead and administrative expenses are not directly attributable to those operations and maintenance.

Section 1.141-4(d)(4) provides that property used or to be used for a private business use and payments in respect of that property are treated as private security if any interest in that property or payments secures the payment of debt service on the bonds. For this purpose, the phrase "any interest in" is to be interpreted broadly and includes, for example, any right, claim, title, or legal share in property or payments.

Section 1.141-4(d)(5) provides that the payments taken into account as private security are payments in respect of property used or to be used for a private business use. Except as otherwise provided in this paragraph (d)(5) and paragraph (d)(6) of this section, the rules in paragraphs (c)(2)(i)(A) and (B) and (c)(2)(ii) of this section apply to determine the amount of payments treated as payments in respect of property used or to be used for a private business use. Thus, payments made by members of the general public for use of a facility used for a private business use (for example, a facility that is subject of a management contract that results in private business use) are taken into account as private security to the extent that they are made for the period of time that property is used by a private business user.

ANALYSIS

Authority represents that the terms of the Management Contract will cause the Bonds to satisfy the private business use test. Because the private use test is met, the Bonds will be private activity bonds if the private security or payment test is also met. Specifically, you ask whether the Lease and covenants related to the Facility will give rise to private security when Authority enters into the Management Contracts. Whether or not a particular arrangement rises to a security interest for purposes of section 1.141-4(d)(4) depends on the facts and circumstances associated with the arrangement.

The Lease Payments and the State's rental payments on other facilities financed by the Parity Bonds are security for the Bonds. These payments are not private payments as they are made by a governmental person. Accordingly, neither are they private security.

Authority represents that the Bondholders do not have a mortgage or other security agreement creating a security interest in the Facility under State law. However, because section 1.141-1(d)(4) provides that the phrase "any interest in property" is to be interpreted broadly, Authority is concerned that in its documents relating to the Facility and the Bonds, it has given the Bondholders rights in the Facility that might be within the meaning of that provision.

The Bondholders' remedies for nonpayment of debt service include obtaining a money judgment against the State or filing suit to compel performance under the Lease, Act, or indenture. Authority has covenanted that generally it will not sell, lease, mortgage, or otherwise dispose of the Facility other than the Lease, as long as the Parity Bonds are outstanding. These restrictions do not apply after the Lease is terminated or if the rentals or Authority's other monies are sufficient to cover the amounts of the Lease Payments. However, only Authority can initiate these actions, such as leasing

or selling the Facility for the benefit of the Bondholders after the Lease is terminated. The Bondholders cannot compel Authority to so act.

We conclude that the terms of the Lease and the covenants contained in the indenture merely provide some assurance to Bondholders that Authority will continue to make the Facility available to the State and that the State will continue to use the Facility and make Lease Payments until the Lease is ended or other monies are available to pay debt service on the Bonds. Until such time, neither the Bondholders nor any other parties (other than the State or Authority) will be granted rights in the Facility. Accordingly, the terms do not give rise to a security interest in the Facility within the meaning of section 1.141-4(d)(4).

CONCLUSION

Based solely on the facts described herein and representations made by Authority, we conclude that the Lease and related covenants will not cause the private security or payment test of section 141(b)(2) to be met.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any transaction or item discussed or referenced in this letter. Specifically, we express no opinion as to whether the interest paid on the Bonds is excludable from gross income.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with a Power of Attorney on file with this office, a copy of this letter is being sent to Authority's authorized representative.

The ruling contained in this letter is based upon information and representations submitted by Authority and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the materials submitted in support of the request for a ruling, it is subject to verification upon examination.

Sincerely,

Associate Chief Counsel

(Financial Institutions & Products)

By: Johanna Som de Cerff

Senior Technician Reviewer

Branch 5

NABL Says IRS Ruling Having Chilling Effect on Bonds.

The new position on political subdivisions that the Internal Revenue Service has taken in a bond-related tax dispute with a community development district in Florida has had a "chilling effect" on the issuance of such bonds and has hurt existing bond issues, bond lawyers are warning.

The National Association of Bond Lawyers made the warning in a letter sent to Treasury Department

and IRS officials on Nov. 21. Accompanying the letter was a four-page memorandum explaining NABL's opposition to the ruling and urging the agency and the Treasury Department to adopt new guidance containing a "safe harbor" for tax-exempt bond issuers.

The controversy is rooted in a 12-page technical advice memorandum dated May 9 that the IRS chief counsel's office sent the Village Center Community Development District. The TAM, which wasn't received by the CDD until June and wasn't widely released until Aug. 23, concluded the district's bonds were taxable because its board is, and will always be, controlled by private parties rather than publicly elected officials.

The CDD, a commercial development of about 167 acres of land in Lady Lake, Lake County, Fla. that provides security, fire, recreational golf and other services to residents of nearby districts, issued $472 million of bonds.

In its TAM, the IRS chief counsel stated: "We believe that an entity that is organized and operated in a manner intended to perpetuate private control, and to avoid indefinitely responsibility to a public electorate, cannot be a political subdivision of a state."

But NABL said in its letter that the TAM "is contrary to established legal authority."

"The TAM has had an immediate chilling effect on the issuance of tax-exempt bonds by such issuers throughout the country and has raised questions in the market about outstanding bonds of such issuers, which may result in a loss in value of those bonds for current holders," NABL said in the letter, which was signed by its president Allen Robertson.

NABL said that under the traditional legal analysis applied by the IRS, the courts and practitioners for many years, an entity is considered a political subdivision, with the right to issue tax-exempt bonds, if it is delegated the right to exercise substantial sovereign powers. These include the power to tax, the power of eminent domain and police power.

"A qualified issuer need not have all three powers but it must have more than an insubstantial amount of at least one of the sovereign powers," NABL said.

The TAM, which focuses on the Village Center CDD's responsibility to an electorate, calls into question whether districts with a limited number of property owners electors, or taxpayers may ever qualify as a political subdivision, the bond lawyers said.

The IRS supports its position in the TAM in part with IRS Revenue Ruling 83-131.

But NABL says the revenue ruling doesn't provide any support. The entities that were the subject of the revenue ruling were North Carolina electric and telephone membership corporations that provided utility services, NABL says. The revenue ruling notes that "the term political subdivision has been defined consistently for all federal tax purposes as denoting either a division of a state or local government that is a municipal corporation or …that has been delegated the right to exercise sovereign power," The IRS concludes in the revenue ruling that the corporations do not qualify as political subdivisions in part because they do not have sufficient sovereign power.

NABL says the IRS appears to be concerned that private entities that exercise sovereign power, like railroads and utilities, could issue tax-exempt bonds without any political oversight. But CDDs are not private entities because they are created by and subject to the rules of governments, the bond lawyers said.

NABL asks the tax regulators to create a safe harbor under which an issuer will be a political

subdivision if it meets three conditions. The first is that it is treated as a political subdivision under applicable state law. The second is that it has been delegated more than an insubstantial amount of the power of eminent domain, the power to tax or police power. The third is that, upon dissolution of the issuer, its assets are either distributed to, or directed by, a state or other political subdivision.

The memorandum and guidance was developed by an ad hoc task force made up of 12 NABL members. It was approved by the NABL board.

BY LYNN HUME

Updated 2013-2014 Priority Guidance Plan – Tax-Exempt Bonds.

The IRS and Treasury have released the first quarter update to the 2013-2014 priority guidance plan, noting the addition of five guidance projects.

The original 2013-2014 plan, released August 9, 2013, included 324 guidance projects identified as priorities for the July 2013-June 2014 plan year.

TAX-EXEMPT BONDS

1. Guidance on reallocations of New Clean Renewable Energy Bonds under § 54C.

2. Guidance on the definition of political subdivision under § 103 for purposes of the tax-exempt, tax credit, and direct pay bond provisions.

3. Guidance under § 141 relating to private activity bonds.

4. Guidance under § 142 to provide temporary relief after a declared disaster.

5. Notice amplifying the Oklahoma storm relief provided by Notice 2013-39 and Notice 2013-40 for purposes of §§ 42 and 142.

PUBLISHED 07/29/13 in IRB 2013-31 as NOT. 2013-47 (RELEASED 07/10/13).

6. Final regulations on public approval requirements for private activity bonds under § 147(f). Proposed regulations were published on September 9, 2008.

7. Regulations on arbitrage investment restrictions under § 148.

PUBLISHED 09/16/13 in FR as REG-148659-07 (NPRM).

8. Regulations on rebate overpayment under § 148.

PUBLISHED 09/16/13 in FR as REG-148812-11 (NPRM).

9. Regulations on bond reissuance under § 150. Notice 2008-41 was published on April 14, 2008 and was supplemented by Notice 2008-88 and Notice 2010-7.

Seminars From the 2013 Forums Available at IRS Nationwide Tax Forums Online.

The IRS reminds tax professionals that they can earn continuing professional education credits online through seminars filmed at the 2013 IRS Nationwide Tax Forums. The 14 self-study seminars are now available on the IRS Nationwide Tax Forums Online (NTFO) site. Self-study seminars provide information to students using interactive videos, PowerPoint slides and transcripts.

The 2013 NTFO seminars cover many topics of interest to tax professionals including the following subjects:

- tax law updates
- Treasury Circular No. 230 overview
- child-related tax benefits
- retirement plan loans and hardship distributions
- updates to the Form 706

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IRS LTR: Nonprofit's Income Is Exempt as Exercise of Essential Government Function.

The IRS ruled that the income of a corporation formed by a state political subdivision to operate and maintain public terminals and warehouses is derived from the exercise of an essential governmental function and is excludable from gross income under section 115(1).

Citations: LTR 201346006

Index Number: 115.00-00

Release Date: 11/15/2013

Date: August 2, 2013

Refer Reply To: CC:TEGE:EOEG:EO – PLR-117177-13

Dear * * *:

This letter responds to a letter from your authorized representative dated April 4, 2013, requesting a ruling that Company's income is excludable from gross income under Internal Revenue Code ("IRC") § 115. Company represents the facts as follows.

FACTS

Company was formed on Date 1, by Authority, a political subdivision of State, to operate Facilities as they then existed and have subsequently been expanded. Its articles provide that it is "to operate, maintain, develop and improve the public terminal and warehouse facilities of the ports of the [State]" and "to foster the development of the foreign commerce of the United States and the ports of the [State]." The members of Company's board of directors are selected by the Board of Authority, with the executive director of the Authority serving as a permanent member. Authority's Board has

the authority to remove and replace any member of Company's board of directors. Company's board of directors appoints all officers of Company.

Upon dissolution of Company all of its net assts shall be distributed to Authority. Company's articles further provide that no part of its net earning shall inure to the benefit of, or be distributable to its directors, officers, or other private persons.

Authority and Company are parties to a service agreement that provides that Company will manage, operate and conduct the business of the Facilities in accordance with the policies established by Authority's Board and the Statute. Pursuant to the agreement Authority has delegated to Company the authority to establish rates, charges, regulations, tariffs, practices and requirements concerning the use of the Facilities. However, Authority retains the right to review and revise all such rates and charges. Under the agreement all gross revenues collected by Company, less its expenses must be paid to Authority.

On Date 2, the Internal Revenue Service ("Service") issued Company a letter ruling concluding that Company's income is excludable from gross income under IRC § 115. Company's activities serve the good of the general public by having central management for state-owned facilities. On Date 3, the Service issued Company a subsequent letter ruling concluding that certain changes in Company's operations would not affect the ruling contained in the Date 2 letter.

Company plans to convert from a nonprofit, non-stock corporation to a limited liability company pursuant to the laws of State. Company will be treated as a corporation for federal tax purposes following the conversion. Authority will hold the sole membership in Company. The purpose of the conversion is to streamline, modernize and make more efficient the operations of both entities and to give more oversight and control of Company's activities to Authority.

After the conversion, Authority will continue to receive all net revenues attributable to Company's operations. Additionally, any liquidation proceeds upon a termination of Company would be distributed exclusively to Authority.

Company has two wholly-owned subsidiaries, Subsidiary 1 and Subsidiary 2. Subsidiary 1 owns X, which enables certain cargo to be transported to, from and between the public terminal and warehouse facilities of the ports of State. Subsidiary 2 has acted as manager of Subsidiary 1 and the operator of X. Both subsidiaries are limited liability companies and are disregarded entities for federal tax purposes. In connection with the proposed conversion, Subsidiary 2 will merge into Subsidiary 1 and Subsidiary 1 will take over the duties of Subsidiary 2 to manage and operate X.

LAW AND ANALYSIS

IRC § 115(1) provides that gross income does not include income derived from any public utility or the exercise of any essential governmental function and accruing to a state or any political subdivision thereof.

Rev. Rul. 77-261, 1977-2 C.B. 45, holds that income generated by an investment fund that is established by a state to hold revenues in excess of the amounts needed to meet current expenses is excludable from gross income under IRC § 115(1), because such investment constitutes an essential governmental function. The ruling explains that the statutory exclusion is intended to extend not to the income of a state or municipality resulting from its own participation in activities, but rather to the income of an entity engaged in the operation of a public utility or the performance of some governmental function that accrues to either a state or political subdivision of a state. The ruling points out that it may be assumed that Congress did not desire in any way to restrict a state's

participation in enterprises that might be useful in carrying out projects that are desirable from the standpoint of a state government and that are within the ambit of a sovereign to conduct.

Rev. Rul. 90-74, 1990-2 C.B. 34, holds that the income of an organization formed, funded, and operated by political subdivisions to pool various risks (e.g., casualty, public liability, workers' compensation, and employees' health) is excludable from gross income under IRC § 115(1) because the organization is performing an essential governmental function. In Rev. Rul. 90-74, private interests neither materially participate in the organization nor benefit more than incidentally from the organization.

Company operates, maintains, develops and improves the public terminal and warehouse facilities of the ports of State. That function constitutes the performance of an essential governmental function within the meaning of IRC § 115(1). See Rev. Rul. 77-261 and Rev. Rul. 90-74.

In addition, all the net revenue of Company accrues to Authority. No private interests participate in or benefit from the operation of Company, other than incidentally or as providers of goods or services. Company dedicates its assets and income exclusively for the benefit of Authority. See Rev. Rul. 90-74.

All of Company's assets that remain upon dissolution of Company (after providing for all outstanding obligations) will be distributed to Authority, which is a political subdivision of the State. See Rev. Rul. 90-74.

Based on the information and representations submitted on behalf of Company, we conclude that:

The income of Company will derive from the exercise of an essential governmental function and will accrue to a state or a political subdivision thereof. Company's income will be excludable from gross income under IRC § 115(1) upon Company's conversion under State law to a single-member limited liability company that is treated as a corporation for federal income tax purposes.

No opinion is expressed concerning the Federal tax consequences under any IRC provision other than the one specifically cited above.

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.

This ruling is directed only to the taxpayer requesting it. IRC § 6110(k)(3) 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.

A copy of this letter must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

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,

Kenneth M. Griffin

Chief, EO Branch

(Tax Exempt & Government Entities)

Final Exempt Hospital Regs May Result in Extensive Reporting Changes.

Substantial changes to Form 990 Schedule H, “Hospitals,” are possible once the section 501(r) charitable hospital regulations are finalized, an IRS official said November 22.

Substantial changes to Form 990 Schedule H, “Hospitals,” are possible once the section 501(r) charitable hospital regulations are finalized, an IRS official said November 22.

Stephen Clarke, tax law specialist (rulings and agreements), IRS Tax-Exempt and Government Entities Division, outlined changes made to Form 990, “Return of Organization Exempt From Income Tax,” for tax year 2013, including the creation of a new part V, section C of Schedule H, which provides for narrative responses to check-box questions in part V, section B, on such things as community health needs assessments and discounted care.

Speaking during a breakout session at the Western Conference on Tax-Exempt Organizations in Los Angeles organized by Loyola Law School, Clarke said the Schedule H changes for tax year 2013 are similar in scope to those made for 2012.

“Once the 501(r) regulations are finalized, we’ll make more extensive changes to reflect those regulations,” he told Tax Analysts.

Because the guidance has been proposed and is not final, the IRS has held off on making some changes until those regulations are finalized, he said.

The hospital schedule isn’t the only one that will likely see regulation-driven changes, Clarke said. Schedule A, which section 501(c)(3) organizations use to indicate they are public charities and not private foundations, clarifies the requirements for functionally integrated and nonfunctionally integrated Type III supporting organizations, including transition rules for how those organizations meet the integral part test for the 2013 tax year, he said.

Temporary and proposed regs (REG-155929-06; 2013-11 IRB 650) released last year that interpreted the 2006 Pension Protection Act’s Type III supporting organization provisions provide guidance on how these organizations meet the integral part test for tax year 2014 and later years, he said.

“So you can expect to see on our 2014 Schedule A some significant revisions which we’re working hard on to reflect the implementing regs for the 2006 Pension Protection Act,” he said.

According to a February TE/GE memo regarding determination letters to Type III supporting organizations and general requirements, organizations seeking classification as a Type III supporting organization must satisfy the integral part test for either a functionally or nonfunctionally integrated supporting organization. There are three ways to satisfy the test, including being the parent of each supported organization, the memo says.

All forms, schedules, and instructions for Forms 990, and a list of changes to them, for the 2013 tax year should be posted online by early next year, Clarke said. Some are available online now, he said.

Donor-Advised Funds

Practitioners shouldn't expect new regulations on donor-advised funds anytime soon, Ruth Madrigal, attorney-adviser, Treasury Office of Tax Legislative Counsel, said during an afternoon session November 21. The project isn't one that can be simply fitted in between section 501(r) hospital regulations and supporting organization regulations or other large projects, she said.

"This is going to be a big project," she said. "It's a complicated project."

"We are finally to a point where I can think about beginning to sit down and talk about donor-advised fund guidance with the IRS," she added. "But it's still going to be a ways off."

Madrigal reminded conference attendees that donor-advised funds were only defined in the code in 2006. Speaking on her own behalf, she said there are good things about donor-advised funds generally. However, she said a few large sponsoring organizations with a lot at risk might be more compliant than a lot of little organizations, which in many cases are run by the donors themselves.

"I worry about small private foundations that have very low balances and don't want to spend the little that they have on administrative expenses, which is what lawyers and accountants are," she said.

by David van den Berg

Camp Says His Reform Bill Will Not Change Estate and Gift Taxes.

House Ways and Means Committee Chair Dave Camp, R-Mich., told reporters November 20 that he is not planning to make changes to estate and gift tax law in the comprehensive tax reform bill he is drafting.

Asked why not, Camp said, "I don't think that policy needs the reform that the rest of the code does, and we are doing international [reform], which '86 didn't do," referring to the Tax Reform Act of 1986.

Later, Camp added that he believes that the section of the code dealing with estate and gift taxes was settled at the beginning of the year. "It's not necessary to revisit it," he said.

Congress made major estate and gift tax provisions permanent as part of the American Taxpayer Relief Act of 2012 (P.L. 112-240) enacted January 2.

That act set the top rate on taxable estates over $1 million at 40 percent and maintained the inflation-indexed $5.12 million exemption amount and portability provisions that were enacted in the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010.

Camp's decision not to touch estate tax law may anger some Republicans, many of whom would like to see the estate tax repealed. Several House Republicans have introduced bills that would repeal or otherwise alter the estate tax. Ways and Means member Kevin Brady, R-Texas, introduced a bill (H.R. 2429) this year to repeal the estate tax and modify the gift tax. The bill has 170 cosponsors.

by Lindsey McPherson

Updated 2013-2014 Priority Guidance Plan Adds 5 Projects – Exempt Organizations.

The IRS and Treasury have released the first quarter update to the 2013-2014 priority guidance plan, noting the addition of five guidance projects.

The original 2013-2014 plan, released August 9, 2013, included 324 guidance projects identified as priorities for the July 2013-June 2014 plan year.

EXEMPT ORGANIZATIONS

1. Revenue Procedures updating grantor and contributor reliance criteria under §§ 170 and 509.

2. Revenue Procedure to update Revenue Procedure 2011-33 for EO Select Check.

3. Guidance under § 501(c)(4) relating to measurement of an organization's primary activity and whether it is operated primarily for the promotion of social welfare, including guidance relating to political campaign intervention.

4. Final regulations under §§ 501(r) and 6033 on additional requirements for charitable hospitals as added by § 9007 of the ACA. Proposed regulations were published on June 26, 2012 and April 5, 2013.

5. Additional guidance on § 509(a)(3) supporting organizations (SOs).

6. Guidance under § 4941 regarding a private foundation's investment in a partnership in which disqualified persons are also partners.

7. Final regulations under § 4944 on program-related investments. Proposed regulations were published on April 19, 2012.

8. Guidance regarding the new excise taxes on donor advised funds and fund management as added by § 1231 of the Pension Protection Act of 2006.

9. Regulations under §§ 6011 and 6071 regarding the return and filing requirements for the § 4959 excise tax for community health needs assessments failures by charitable hospitals as added by § 9007 of the ACA.

PUBLISHED 08/15/13 in FR as TD 9629 (FINAL and TEMP).

10. Guidance under § 6033 on returns of exempt organizations.

11. Final regulations under § 6104(c). Proposed regulations were published on March 15, 2011.

12. Final regulations under § 7611 relating to church tax inquiries and examinations. Proposed regulations were published on August 5, 2009.

Partnership's Deduction for Qualified Conservation Contribution Is Disallowed.

Citations: 61 York Acquisition LLC et al. v. Commissioner; T.C. Memo. 2013-266; No. 22910-12

The Tax Court disallowed a partnership's claimed charitable contribution deduction for its contribution of an easement to an organization, finding that the contribution failed to meet the exclusivity requirement since the restriction didn't preserve the entire exterior of the structure.

61 YORK ACQUISITION, LLC,

SIB PARTNERSHIP, LTD., TAX MATTERS PARTNER,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

UNITED STATES TAX COURT

Filed November 19, 2013

Kevin M. Flynn and Henry S. Lovejoy, for petitioner.

Michael Dean Wilder and Michael A. Sienkiewicz, for respondent.

MEMORANDUM OPINION

LARO, Judge: In 2006, 61 York Acquisition, LLC (partnership) contributed a historic preservation facade easement in a certified historic structure. In respect thereof, the partnership claimed a charitable contribution deduction of $10,730,000 on its 2006 partnership tax return. Respondent disallowed the [*2] deduction in full. Respondent further determined that the partnership was liable for a 40% accuracy-related penalty under section 6662(h)1 or, alternatively, for a 20% accuracy-related penalty under section 6662(a) and (b)(1), (2), or (3).

This case is presently before the Court on respondent's motion for partial summary judgment. At issue is whether the partnership's contribution is a "qualified conservation contribution" under section 170(h)(1) entitling the partnership to a charitable contribution deduction. We hold that it is not. Consequently, we will grant respondent's motion.

BACKGROUND

The following facts are not in dispute.

The partnership owns the entire interest in 332 Property, LLC, a Delaware limited liability company, which is treated as a disregarded entity for Federal income tax purposes. 332 Property, LLC, owns a partial interest in a property at 330-332 South Michigan Avenue in Chicago, Illinois (property). The property is in the Historic Michigan Boulevard District and is a Chicago landmark designation. On December 27, 2006, the National Park Service classified the property as a "certified historic

structure" for charitable contribution purposes.

[*3] Ownership of the property is divided into two parts: the "Office Property", which consists of the first 14 floors of the property, and the "Residential Property", which consists of residential condominium units on the top 6 floors of the property.

On January 3, 2000, the respective owners of the office property and the residential property entered into an "Amended and Restated Declaration of Covenants, Conditions, Restrictions and Easements" (amended declaration) which set forth the ownership rights and responsibilities of the respective owners.

Section 20.16 of the amended declaration provides that the owner of the office property owns the "Facade" and "reserves the right, in its sole and exclusive discretion, to [ ] grant an easement in or dedicate the Facade to or for the benefit of any private, city, county, state or federal historic preservation agency or trust." Section 1.1 of the amended declaration defines "Facade" as follows:

[t]he exterior wall of the Building facing Michigan Avenue and Van Buren Street from the street level up to the Roof * * * but excluding (i) the glass in the windows, window frames, window systems, joints and seals located in the Building; (ii) the Roof and the Roof structure, membrane, flashings and seals over the cornice; (iii) the window frames, flashings, systems, machinery and equipment and joints and seals located in the Condominium; (iv) the Garage entrance and exit doors and entrance and exit door systems and joints and seals; and (v) the structural support for the exterior wall of the Building. [Emphasis added.]

[*4] Section 5.1(I) of the amended declaration provides that the owner of the office property is responsible for "Maintenance of the Facade and maintenance of other portions of the facade of the Building". Finally, section 14.1 of the amended declaration provides that an owner who wishes to make an addition, improvement, or alteration that "materially alters the Facade of the Building" must obtain prior written consent of the other owner.

In 2004 the partnership, as the owner of 332 Property, LLC, acquired the office property but did not acquire the residential property. On December 18, 2006, the partnership granted a "Conservation Deed of Easement" (easement) in the property to the National Architectural Trust, Inc. (NAT). The easement terms require the grantor to obtain prior written consent from the NAT before making any change to the "Protected Facades", which include "the existing facades on the front, sides and rear of the Building and the measured height of the Building."

In its 2006 return, the partnership claimed a charitable contribution deduction of $10,730,000 with respect to the easement contribution. Attached to the 2006 return was Form 8283, Noncash Charitable Contributions, which included a declaration by an appraiser valuing the easement at $10,730,000.

On June 25, 2012, respondent issued the partnership a notice of final partnership administrative adjustment (FPAA) disallowing the charitable [*5] contribution deduction because the partnership did not establish that the requirements of section 170 (or the regulations thereunder) had been met nor establish that the value of the easement was $10,730,000. Respondent also determined, with respect to the noncash charitable contribution, that the partnership was liable for an accuracy-related penalty under section 6662(h) for a gross valuation misstatement or, in the alternative, that the partnership was liable for an accuracy-related penalty under section 6662(a) and (b)(1), (2) or (3) for negligence or disregard of rules or regulations, a substantial understatement of income tax, or a substantial valuation misstatement, respectively. SIB Partnership, Ltd., the tax matters partner, petitioned the Court in response to the FPAA. At the time of the filing of this petition, the

partnership's principal place of business was in New York.

DISCUSSION

I. Standard of Review

The Court may grant summary judgment upon all or any part of the legal issues in controversy where the record establishes that there is no genuine dispute as to any material fact and a decision may be rendered as a matter of law. Rule 121(a) and (b). The moving party bears the burden of proving that there is no genuine dispute as to any material fact, and factual inferences are drawn most [*6] favorably to the party opposing summary judgment. Fielder v. Commissioner, T.C. Memo. 2012-284, at *13; see also United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Dahlstrom v. Commissioner, 85 T.C. 812, 821 (1985). In responding to a motion for summary judgment, a nonmoving party such as petitioner must do more than merely allege or deny facts. Rule 121(d). The nonmoving party must "set forth specific facts showing that there is a genuine dispute for trial." Id. See generally Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

Respondent contends that there is no genuine dispute of material fact as to whether the easement at issue is a qualified conservation contribution under section 170(h). While petitioner's response attempts to place before the Court a factual dispute as to whether the terms of the easement and amended declaration collectively impose enforceable restrictions on the entire exterior of the property, petitioner has not submitted any affidavits, declarations, answers to interrogatories, deposition testimony, or any other acceptable evidence to show that there is a genuine dispute for trial. See Rule 121(d). On the basis of the record at hand, we conclude that this case is ripe for partial summary judgment.

[*7] II. Qualified Conservation Contribution Under Section 170(h)

Section 170(a)(1) generally allows a deduction for any charitable contribution made during the taxable year. In this context, a charitable contribution includes a gift of property to a charitable organization, made with charitable intent and without the receipt or expectation of receipt of adequate consideration. See Hernandez v. Commissioner, 490 U.S. 680, 690 (1989); United States v. Am. Bar Endowment, 477 U.S. 105, 116-118 (1986); see also sec. 1.170A-1(h)(1) and (2), Income Tax Regs. While section 170(f)(3) generally does not allow an individual to deduct a charitable contribution for a gift of property consisting of less than his or her entire interest in that property, an exception applies in the case of a "qualified conservation contribution". See sec. 170(f)(3)(B)(iii). A contribution of real property is a qualified conservation contribution if (1) the real property is a "qualified real property interest", (2) the contributee is a "qualified organization", and (3) the contribution is "exclusively for conservation purposes". Sec. 170(h)(1); see also sec. 1.170A-14(a), Income Tax Regs.

The parties do not dispute that the easement is a "qualified real property interest" under section 170(h)(2), nor do they dispute that the NAT is a "qualified organization" under section 170(h)(3). The parties' sole point of disagreement is [*8] whether the contribution is "exclusively for conservation purposes" under section 170(h)(4).

A contribution is made exclusively for conservation purposes if it meets the tests of section 170(h)(4) and (5).2 Section 170(h)(4)(A) provides that a contribution is for a conservation purpose if it preserves a historically important land area or a certified historic structure. Section 170(h)(4)(B) provides that a contribution that consists of a restriction with respect to the exterior of a certified historic structure shall not be considered to be exclusively for conservation purposes unless the interest: (1) includes a restriction which preserves the entire exterior of the building (including the

front, sides, rear, and height of the building); and (2) prohibits any change in the exterior of the building which is inconsistent with the historical character of the exterior.

To determine whether the conservation easement complies with the requirements for the conservation easement deduction under Federal tax law, we must look to State law to determine the effect of the easement. State law determines the nature of the property rights, and Federal law determines the appropriate tax treatment of those rights. Carpenter v. Commissioner, T.C. Memo. [*9] 2012-1, 103 T.C.M. (CCH) 1001, 1004 (2012); Estate of Lay v. Commissioner, T.C. Memo. 2011-208, 102 T.C.M. (CCH) 202, 208 (2011). Specifically, we must look to State law to determine whether the partnership granted the NAT a restrictive easement as to the entire exterior of the property.

Respondent argues that the partnership cannot grant a valid easement restricting the entire exterior of the building when the partnership does not own the entire exterior. Petitioner argues that, under Illinois law, ownership of the entire exterior is not required to grant an easement which imposes enforceable restrictions on the entire exterior of the building. Under Illinois State law, a person can grant only a right which he himself possesses. Munroe v. Brower Realty & Mgmt. Co., 565 N.E.2d 32, 36 (Ill. App. Ct. 1990); see also Fyffe v. Fyffe, 11 N.E.2d 857, 862 (Ill. App. Ct. 1937). We hold that the partnership did not assign a restrictive easement in the entire exterior of the property, as required by the plain meaning of section 170(h)(4)(B)(1), because the partnership only had rights to the Facade, as defined by the amended declaration.3

[*10] Petitioner argues that the partnership has an assignable right in the entire exterior because the partnership has an obligation under section 5.1(I) of the amended declaration to maintain the entire facade of the building. In essence, petitioner invites the Court to find a right in an obligation, but does not cite any Illinois caselaw in support of its proposition. We decline this invitation.

Petitioner next argues that section 14.1 of the amended declaration, which disallows certain alterations to the property without the prior written consent of the other property owner, gives the partnership an assignable right to the entire exterior of the property. However, the altering owner must obtain prior written consent from the other owner only if the alteration will materially alter the Facade of the property. The partnership does not have the right to restrict alterations to the two sides of the building not covered by the definition of Facade, nor the numerous excluded portions of the other two sides.4 The partnership cannot contribute a right it does not possess.5 Therefore, we hold that the partnership's [*11] contribution is not a "qualified conservation contribution" under section 170(h)(1) because it is not a restriction that preserves the entire exterior of a certified historic structure.

In reaching our holdings, we have considered all arguments made, and, to the extent not mentioned above, we conclude they are moot, irrelevant, or without merit.

To reflect the foregoing,

An appropriate order will be issued.

FOOTNOTES

1 Unless otherwise indicated, section references are to the Internal Revenue Code in effect for the year at issue, and Rule references are to the Tax Court Rules of Practice and Procedure.

2 Sec. 170(h)(5)(A) generally provides that a contribution of a qualified real property interest may be exclusively for conservation purposes only if it is protected in perpetuity.

3 Because we hold that the partnership did not have a right to the entire exterior of the property, we need not decide whether, under Illinois State law, an ownership right is required to grant a restrictive easement in the entire exterior of a building.

4 Because we hold that the partnership does not possess a right in the entire exterior of the property, we need not decide whether an alteration that is inconsistent with the historic character of the exterior is necessarily a materially alteration.

5 Because we hold that the partnership does not possess the right to restrict alterations to the entire exterior of the building, we need not decide whether this right "runs with the land".

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Jefferson County's Bankruptcy Left Few Winners as Debt Forgiven.

The impact of Jefferson County's bankruptcy will reverberate for decades in Alabama and in the $3.7 trillion U.S. municipal bond market.

Creditors, including JPMorgan Chase & Co. (JPM), agreed to forgive $1.4 billion of the county's $3 billion sewer bonds. Ratepayers, like Charles Hicks, a retired landscaper who lives on a fixed income in Birmingham, will see his sewer rate rise about 8 percent annually for the next four years and 3.5 percent annually thereafter, under a plan approved by a federal judge yesterday.

"There's a lot of pain going around — bondholders are taking large losses, but ratepayers are as well," said Matt Fabian, a managing director at Concord, Massachusetts-based Municipal Market Advisors.

For the next 40 years, residents and businesses that already have some of the highest sewer rates in the county will pay back more in principal and interest than they owed before the bankruptcy, according to an analysis by Jim White, a Birmingham-based financial adviser who did a financial analysis for residents challenging the bankruptcy plan. Until Detroit's July filing, Jefferson County was the nation's largest municipal bankruptcy.

The willingness of Alabama's most populous county to enter bankruptcy, along with the losses imposed on creditors, may make bondholders of other distressed municipalities more willing to to negotiate outside of court. Taxpayer groups will look at Jefferson County and see that bankruptcy won't wipe away their obligations, Fabian said.

Lawyer Fees

"It does take the thunder out of taxpayer groups who are looking to get into bankruptcy just to shed debt, because it shows that those taxpayers could also be put on the hook to contribute in the

future," Fabian said.

Since filing the $4.2 billion case in November 2011, the county has spent more than $24 million on attorneys and other advisers. Most of the payments went to the county's two main law firms.

Klee, Tuchin, Bogdanoff & Stern LLP in Los Angeles, which is led by Ken Klee, the lawyer who helped rewrite the U.S. Bankruptcy Code in the 1970s, collected $10.1 million in fees and was reimbursed about $204,000 for expenses. The second firm, Bradley Arant Boult Cummings LLP, which has offices in Birmingham, collected $8.2 million in fees and was reimbursed about $294,000 for expenses.

Enforcing Rates

Under an unusual provision in the exit plan approved by a federal judge yesterday, Jefferson County's commissioners' power to set and enforce rates will be limited until the $1.84 billion on bonds sold this week to pay creditors are paid off in 2053. The trustee for bondholders can ask the court to force sewer rate increases that may be needed to pay the debt.

The challenges facing the county's finances and its sewer system won't end with bankruptcy. Because the new bond issue pushes debt service payments into the future, rising 67 percent in 2024, the county is facing a projected $1.2 billion gap in money available to maintain the sewer system. A consulting firm that conducted a feasibility study for the county said it couldn't identify where the county would get money to pay for capital spending.

The rate increases pledged to pay debt service will impose a "high burden" on ratepayers, and would cause rates to "approach the limits of reasonableness," according to the Chicago-based consulting company, Galardi Rothstein Group.

Increasing Costs

Sewer rates will rise 7.9 percent each year for four years, starting in 2014, and by almost 3.5 percent annually through 2053. That's on top of a 329 percent increase from 1997 to 2008 after the county embarked on a capital program to comply with a U.S. Environmental Protection Agency decree to clean up discharges into the Cahaba River.

The cost of Jefferson County's sewer system ballooned to $3 billion as the county built treatment plants and laid pipe without a strategic plan and local officials accepted bribes from construction contractors and financial advisers seeking business with the county.

The sewer rate increases will disproportionately affect the poor. Seventy percent of the sewer system's users reside in the commission districts with poorest residents, according to County Commissioner George Bowman, who voted against the bankruptcy.

"This whole process had been fraudulent to the ratepayer," said Hicks, 67, who heckled Carrington after U.S. Bankruptcy Judge Thomas Bennett approved the plan.

Wealthy Benefit

Under Alabama law, sewer rates must be reasonable and nondiscriminatory. Ratepayers who objected to the county's plan are vowing to continue legal challenges.

Some residents in wealthy Birmingham suburbs, who have septic tanks and aren't connected to the sewer system, don't have to pay additional charges even though they get the indirect benefit of the

county having clean water.

Calvin Wood, president of the Birmingham Chapter of the Southern Christian Leadership Conference, said it was wrong that county officials didn't spread the pain of rate increases evenly.

"Unless you're going to put it across the board on everybody, you're still going to have a lot of trouble," Woods said. "All of us live in the county."

By Martin Z. Braun

L.A. Bars Broker-Dealers in FA Bid Process, FirstSouthwest Protests.

Los Angeles is seeking financial advisors for bonds issued in several categories, but underwriters need not apply, according to two recent requests for proposals issued by the city.

FirstSouthwest sent a seven-page letter to Los Angeles officials Friday protesting the language in two RFPs seeking financial advisors but excluding firms "that underwrite or otherwise trade in municipal bonds."

That language appears in the qualifications section of an RFP seeking a financial advisor to work on the city's general obligation bonds and wastewater system revenue bonds.

"We feel very strongly that the RFPs should be changed to allow bidding by all qualified firms," wrote Jack Addams, vice chairman of FirstSouthwest. "Because other qualified firms excluded under the current wording may wish to respond, we suggest the city extend the due dates if the RFP's are modified."

Addams said in his letter that FirstSouthwest would be responding to the RFP on Nov. 22, regardless of whether changes are made and that they would protest if their response is not considered.

The city doesn't seem likely to make changes in the middle of an RFP process in which the deadline for responses was Nov. 8; and the city anticipates making a decision on Dec. 2.

Natalie Brill, Los Angeles' debt manager, said she couldn't comment on the RFP process until after the final selection is announced Dec. 2.

The protest letter was sent to Brill; City Administrative Officer Miguel Santana; City Attorney Mike Feuer; and Paul Krekorian, chair of the City Council Budget & Finance Committee.

Los Angeles' debt management policy, adopted in 2005, deems it a conflict of interest for firms to do business with the city as both an underwriter and financial advisor.

"The city has a policy that the financial advisor must be independent and can't have an underwriting arm," said Jeremy Oberstein, a spokesman in Krekorian's office.

FirstSouthwest officials don't think the issue is quite so clear cut.

Regulations adopted by the Municipal Securities Rulemaking Board, Dodd-Frank legislation, and changes proposed by the U.S. Securities & Exchange Commission that go into effect in mid-January have changed the playing field with rules regulating how FAs operate.

FirstSouthwest would like the city to remove the language excluding underwriters noted in the first RFP and in another RFP seeking a financial advisor for eight different bond categories including general fund lease financings and tax anticipation notes, in which the city explains that while it has "in the past, accepted proposals from investment banking firms to act as financial advisors, the city now only hires independent financial advisors for general financial advisory services and the city's various bond programs."

It further says, "In light of the scope of the engagement and the emphasis on non-transaction-related financial advisory services, as well as the city's desire to hire financial advisors with no vested interest in the issuance of debt, the city will not consider proposals from firms that underwrite or otherwise trade in municipal bonds to serve as the lead financial advisor, in accordance with MSRB [Municipal Securities Rulemaking Board] G-23."

In November 2011, MSRB's Rule G-23 was modified to prohibit dealers from serving as financial advisors and underwriters on the same municipal bond deal.

"Their debt policy that is available through their web page is somewhat less restrictive than what is in the current RFP," said Brian Whitworth, senior vice president for FirstSouthwest.

The city used underwriters as co-financial advisors before the MSRB came out with its rules, but typically only in special situations where it wanted sell-side advice on an issue, city officials said.

Based on the language in the RFP, Whitworth said apparently the category allowing underwriters to act as co-financial advisors is now gone.

"We feel very strongly that all qualified financial advisors should be able to submit an application," Addams said. "The city should be able to pick whoever they want. We object to the city excluding very qualified FAs from even being able to apply."

Southwest officials question why the city frequently uses KNN Public Finance as a financial advisor, when the financial advisory firm is a division of Zions First National Bank, an underwriter. FirstSouthwest also was selected to act as a financial advisor for the Los Angeles Housing Department in 2006 and 2010, but was told it would not be considered for the city itself, its port, airports, and the Department of Water and Power, Addams said.

"There is no definition of 'independent' in any regulatory rules," Addams said. "That is why we wanted them to understand the ownership structure of PFM and KNN, who currently work for the city."

PFM, an advisor the most recent Los Angeles International Airport deal, is owned by a group of private equity investors that includes at least one underwriting firm that has an ownership interest, according to FirstSouthwest's letter.

The MSRB's fair-dealing rule requires underwriters to disclose to issuers that they do not have any fiduciary duty and that the transaction will be at arm's length.

Addams thinks those disclosure rules and similar ones outlined in Dodd-Frank will ensure that if a firm that conducts underwriting business is hired as an FA there is a guarantee it will act in the city's best interest.

The SEC is about to add its take on the issue when its municipal advisor rules takes effect by mid-January. Its rule would require anyone offering advice about municipal bonds, municipal derivatives, or the investment of bond proceeds to an issuer or other municipal entity or conduit borrower to

register as a municipal advisor.

“There have been a lot of changes since the city adopted its debt policy in 2005,” Addams said. “We have made a decision as a company that we will challenge this where we see it.”

In a city as prominent as Los Angeles, Addams said, “it’s very important we challenge this.”

FirstSouthwest was successful in getting Broward County, Fla. and Broward County School District to change the language in its RFPs allowing underwriters to be considered for FA work, according to Addams.

Two issuers interviewed for the story have not heard of anyone other than Los Angeles adopting such a policy, but said they understand why an issuer might do so.

“My guess is that on a practical basis, this will make it easier for all concerned to serve either in a fiduciary, or non-fiduciary role without any overlap,” said Laura Lockwood McCall, director of debt management manager at the Oregon State Treasury.

Julia Harper Cooper, director of finance at the City of San Jose, said issuers might feel better with a “clear delineation” between who their FA is and who their underwriter is, without worrying whether the lines might be blurred.

“It becomes more comfortable for issuers,” she said.

The Government Finance Officers Association “has discussed the issue of recommending that governments use independent FAs vs. those associated with broker/dealer firms in the past,” said Timothy Firestine, GFOA president and chief administrative officer of Montgomery County, Md.

“Due to the forthcoming MA rule, it is likely that this subject will be discussed again, as GFOA looks to ensure that issuer practices are in line with the rule. From my personal experience as a CFO, it is a better practice to use an independent FA. Helps avoid even the appearance of a conflict of interest.”

BY KEELEY WEBSTER

CNBC: Is the Muni Bond Market About to Blow Up?

When there is turmoil in the $3.7 trillion municipal bond market, as there has been this year, America’s mayors get very nervous. Scott Smith, mayor of Mesa, Ariz., and president of the United States Conference of Mayors, said, “The vast majority of infrastructure in this country is financed by tax-exempt financing; most of the schools, most of the streets, most of the sewer lines and the highways.” According to the Conference of Mayors, between 2003 and 2012 90 percent of the munis issued (worth about $1.65 trillion) went to build infrastructure.

Normally that pipeline of money is pretty steady, but this year has not been normal. Drawing parallels to the 2008 financial crisis, the sell-off in June was the biggest in 20 years, amounting to about 2.2 percent of the $680.7 billion managed by municipal bond mutual funds.

Add to that Detroit’s bankruptcy filing, the likelihood that Puerto Rico’s debt may be downgraded to junk status, SEC accusations that the city of Miami misled bondholders about the city’s financial

condition, and a proposed overhaul to the U.S. tax code, which might include eliminating the federal tax exemption for muni interest, and you have confluent forces stirring up a volatile market.

Bond fund managers and strategists keep insisting that the great majority of issuers are in decent financial shape. They also say the problems in Detroit and Puerto Rico have been well known for years and should have no ripple effect on healthy bonds. Nonetheless, the fear that unfunded pensions and health-care liabilities are waiting like time bombs elsewhere has persisted.

Market volatility

Since March, according to Morningstar, about $50 billion has fled the market. As of September, the S&P Municipal Bond Index was down roughly 3 percent for the year. According to BlackRock, as of September new issuance for 2013 was down 13 percent from last year.

The immediate danger for Puerto Rican bonds—which are widely held by U.S. bond funds—is that ratings agencies may downgrade the territory's debt to below-investment grade status. According to Morningstar, about 180 mutual funds with $100 billion in combined assets had at least 5 percent of their portfolios in Puerto Rico bonds as of their latest disclosures.

That would cause cash strapped Puerto Rico's borrowing costs to skyrocket. During an early October conference call with investors, Governor Alejandro Garcia Padilla denied that the territory was near bankruptcy or would need a federal bailout. "We will do everything, and I repeat, everything that is necessary for Puerto Rico to honor all its commitments," he said. "It's not only a constitutional, but also a moral obligation."

If history is a guide, a bond downgrade could foreshadow the state's fiscal downfall. Detroit's debt was downgraded to junk in 2009. That was the prelude to city's bankruptcy filing this July. A federal judge is hearing arguments about whether the city is actually bankrupt now. Some of the city's largest creditors including its municipal worker's unions insist that it is not.

If the bankruptcy goes forward, a big question for the judge to settle will be who has first dibs on Detroit's assets: its bondholders or its retirees? Any eventual ruling on the subject could influence the potential bankruptcy plans of other troubled municipalities and spook muni bondholders.

"This is a big deal," said George Friedlander, chief municipal strategist with Citicorp Investment Research and Analysis. Mayor Smith of the Conference of Mayors added, "If all of the sudden a retiree's medical benefits are on an equal stage or even take precedence over bondholders, you can well imagine that would certainly have a chilling effect on the municipal market."

Interest costs with and without tax exemption

$ in mil

current law with 28% cap with full repeal

Estimated interest cost with tax exemption Estimated total interest cost cost increase Estimated total interest cost cost increase

2003 114,128.55 130,876.97 16,748.42 161,981.19 47,852.64

2004 96,239.27 110,820.97 14,581.71 137,901.29 41,662.02

2005 121,966.14 141,458.44 19,492.31 177,658.44 55,692.30

2006 118,248.09 137,017.62 18,769.54 171,875.34 53,627.25

2007 125,282.78 145,214.14 19,931.35 182,229.50 56,46.72

2008 140,294.09 161,012.63 20,718.54 199,489.91 59,195.82

2009 110,288.35 126,890.90 16,602.55 157,724.20 47,435.85

2010 91,207.92 105,952.85 14,744.93 133,336.29 42,128.37

2011 83,022.35 95,965.70 12,943.35 120,003.35 36,981.00

2012 100,111.45 118,949.63 18,838.18 153,934.81 53,823.36

TOTAL 173,370.87 495,345.33

Source: SIFMA estimates based on Thomson Reuters data

Bracing for a tax overhaul

Another worry looming over the entire municipal bond market is the possibility that munis might be stripped of their federal tax exemption. The exemption has been part of the tax code since 1913. The Obama administration has proposed eliminating, or reducing that exemption, as part of a planned rewrite of the tax code. Any final tax reform plan would somehow have to satisfy Democrats who are looking to raise revenues and Republicans who have declared they will not tolerate any tax increases.

That has focused attention on eliminating loopholes, deductions and exemptions, like the one on munis. Muni issuers have argued that tampering with the exemption would be ruinous for their efforts to fund needed infrastructure and have launched an intense lobbying campaign against it.

In February, the National Association of Counties, the National League of Cities, and the U.S. Conference of Mayors released a report claiming that had the tax exemption on munis been eliminated in 2003, issuers would have had to make an additional $495 billion in interest payments between then and 2012. This summer 137 members of Congress signed a letter opposing the idea of altering the exemption.

The fallout effect

The Conference of Mayor’s Mayor Smith says reducing or eliminating the tax exemption would dramatically increase borrowing costs for cities and make needed infrastructure building prohibitively expensive. “We think that tinkering with it brings some uncertainty that is just untenable for cities.” He adds: “Two things would happen: either we’d have to redirect money from other programs, or we’d have to build less.”

Tax writers—Democratic Sen. Max Baucus, chairman of the Senate Finance Committee, and Republican Rep. Dave Camp, head of the House Ways and Means Committee—have so far kept all of their cards close to the vest. Scott Hodge, president of the Tax Foundation, a conservative leaning think tank, testified in favor of the idea before the Ways and Means Committee this March and says he met with a stony reception. “Most of the members were aghast,” he says, “It would have easier to suggest eliminating the charitable deduction.”

Congressional discussions about the budget this year have already proven rancorously partisan and

a deal on the budget or on tax reform are not expected before next year.

The Conference of Mayor's Mayor Smith, however, says the Conference will continue to visit members of Congress and the White House in an intense effort to kill any alteration of the muni tax exemption. Unless the Administration withdraws the proposal, he says, it is possible that a reduction or elimination of the exemption could find its way into law as part of "some last minute deal-making or horse trading. I don't know what the likelihood is but as long as it's still on the table you have to take it very seriously."

—By Peter Carbonara, Special to CNBC.com

What Gets You 6.5% Yield: 40-Yr Munis From A Bankrupt Issuer.

If you're looking to check off both interest-rate risk and credit risk from your holiday shopping list, look no further than Jefferson County's new municipal bonds. To recap: the county collapsed into bankruptcy in 2011 under the weight of $3.1 billion in debt related to its sewer system. This week it's attempting the extremely rare maneuver of selling new bonds, both short-term and long-term, while still under Chapter 9 bankruptcy protection, with the proceeds paying off holders of the county's old debt at well below face value.

Among the $1.8 billion in new bonds the county plans to sell this week is a tranche of subordinated debt that matures in 2053 and is expected to yield 6.5%. This is an uncommonly potent blend of interest-rate risk and credit risk. The long duration of the 40-year munis makes them particularly vulnerable to rising longer-term interest rates, while the bonds, being sold by an issuer that's still in bankruptcy, managed a BBB- rating from Standard & Poor's and a junk rating from Fitch.

At least that 6.5% yield is tax-free, but such is the state of the bond market these days that you have to load up on multiple risks to achieve anything approaching a double-digit after-tax yield. Hence hedge funds, not your average muni buyer, are among the investors being targeted by the underwriters of the new bonds.

For those looking for a little less credit risk, there's another tranche of 40-year bonds within the deal that's being insured by Assured Guaranty, which carries investment-grade ratings thanks to the insurance. That cuts the yield to around 5.75%. Even that arrangement, of course, isn't risk-free: Assured is one of the few remaining monoline insurance companies after most of its onetime competitors were felled by the credit crisis because they strayed from their core muni business and started wrapping riskier types of bonds. And you still get all the interest-rate risk of a 40-year muni bond.

By Michael Aneiro

Long-Dated Munis Quietly Outperforming.

The municipal bond market continues to struggle in many ways, but longer-dated muni bonds have quietly put together a bit of a winning streak. In its latest fixed-income strategy report, JP Morgan notes that muni bonds have significantly outperformed taxable bonds from October 22nd through mid-November, with long-dated A-rated tax-exempt bond yields have outperforming corporate bond

yields by approximately 26 basis points, while the 30-year high-grade bond outperformed the 30-year U.S. Treasury bond by 25bps during the same period. JPM reflects:

As such, current valuations in the longer portion of the tax-exempt municipal market are close to fair value versus similar corporate bonds and Treasury bonds, when viewed in the context of these relationships over the past six months. It is worth mentioning that the longer the look back period, the more attractive long dated municipal assets appear while municipals look richer in the context of shorter-term comparisons.

JPM says this municipal outperformance has not been broadly reflected in recent fund flows, but it sees better times ahead. ”We expect municipals will outperform considerably in 4Q14 given compelling yields on longer dated tax-exempt bonds and mutual funds,” JPM writes.

Stockton, Calif., Bankruptcy Plan Faces March Trial.

Creditors Expected to Object to Bankruptcy-Exit Blueprint for Central California Town

After more than a year of cost-cutting and debt negotiations, Stockton, Calif., leaders can now focus their efforts on a March courtroom trial that could be the final hurdle to getting the 300,000-resident city out of bankruptcy.

At a hearing Monday in U.S. Bankruptcy Court in Sacramento, Judge Christopher Klein designated March 5 as the starting date for a trial that will allow the city’s bondholders and other creditors to protest its bankruptcy-exit plan. Federal bankruptcy rules state that the city’s plan must be “fair and equitable.”

The city’s bondholders and others haven’t raised specific concerns yet over the 199-page bankruptcy-exit summary, which Judge Klein said on Monday can be sent to those creditors for a vote. The city’s confirmation hearing could take a little as a few hours if no objections are raised, but a lawyer for the city said at Monday’s hearing that they’re bracing for challenges that will require a courtroom battle.

“We’re anticipating that there would be a trial,” said Stockton bankruptcy attorney Marc Levinson during the hearing, joking that he hoped that the trial would finish up before Easter.

Earlier this year, bondholder groups criticized Stockton leaders for not trying to lower payments to California Public Employees’ Retirement System, which collects millions of dollars’ worth of retirement money each year for city workers. The fund was expected to collect about $245 million from the city over the next decade—a large burden that bondholders have argued shouldn’t be shielded as city officials press others for cuts.

Bondholders who are being repaid different amounts might also protest the deal. One pair of municipal-bond investors—Franklin High Yield Tax-Free Income Fund and Franklin California High Yield Municipal Fund, which are owed about $35 million—complained in court papers that many of the city’s bondholder groups are expected to recover more than half of their debt, while the pair’s debt—which is backed by two public golf courses and a park—might only get repaid a fraction of what they are owed.

Stockton’s bankruptcy-exit plan calls for both cost cutting and revenue increases.

The city's largest debt, about $125 million in pension bonds, would be repaid over a longer period. The city also said that its roughly 1,300 workers and retirees who had $538 million in claims against the city agreed to accept a $5.1 million payment.

Stockton is also counting on more tax money to help repair its finances. Earlier this month, voters approved a 3/4-cent sales-tax to pay for more police officers in a city that is often criticized for being unsafe. The tax is also meant to cover legal fees and other bankruptcy-related costs that have topped $10 million since the case was filed last year.

Stockton's leaders put the city into bankruptcy on June 28, 2012, blaming the real estate crash that crippled its tax revenue.

The city, located about 80 miles inland from San Francisco, was declared "ground zero" for the subprime-mortgage crisis by Judge Klein. He has also blamed the city's financial woes on former leaders who offered overly generous pay to city workers and took on debt for new projects that the city couldn't afford.

By KATY STECH

WSJ: Judge Approves Jefferson County, Ala., Bankruptcy-Restructuring Plan.

A bankruptcy judge cleared Jefferson County, Ala., to exit Chapter 9 protection with a plan that cuts its $3.1 billion sewer debt nearly in half but places a heavy repayment burden on residents for decades to come.

At a hearing Thursday in the U.S. Bankruptcy Court in Birmingham, Ala., Judge Thomas Bennett said he would confirm the county's bankruptcy-exit plan, which lays out a sewer bond-repayment strategy and the difficult cost-cutting measures that elected leaders have taken on since putting the 658,000-resident county under Chapter 9 protection two years ago.

The plan was crafted around about $1.4 billion worth of bond breaks that county officials negotiated with bondholders, who began extending money to the county in 1997 for construction projects to stop sewage from flowing into local rivers.

Judge Bennett's confirmation, the last major step in the bankruptcy process, was granted after about 14 hours of courtroom arguments, mostly from two activist lawyers who questioned whether the county can afford the $1.7 billion in sewer debt that still remains.

Jefferson County is scheduled to repay its new sewer debt over 40 years for a total cost of about $6.7 billion, with the biggest payments to bondholders coming as the repayment period ends in 2053.

County officials said sewer-debt payments have to be lower for the first 10 years to free up cash to help fix the leaky sewer system, which—despite the county's heavy sewer spending—still isn't fully in compliance with federal environmental law.

Lawyers who fought the plan said that sewer bills for county residents and businesses have already risen throughout the case, and they could be asked to pay even more than the gradual rate increases that are built into the restructuring plan. Alabama law says that public utility rates must be "reasonable."

Judge Bennett, however, determined that the plan is affordable and didn't find fault with the decision to push bigger payments to the future.

"Absent that, the rates would be even higher today," he said.

Lawyers for Jefferson County, which is home to the city of Birmingham, had argued that its population could rise to cover the additional cost. They also said that future county leaders could negotiate a new, more affordable deal with Wall Street investors as the county regains its financial footing.

Judge Bennett's approval marked a rare moment in U.S. municipal bankruptcy history. Only about two dozen cities, towns and counties that have filed for Chapter 9 protection since 1954 have seen their bankruptcy-exit plans confirmed by a judge, according to figures kept by Chapman and Cutler LLP, a Chicago law firm.

About half of U.S. states ban their municipalities from bankruptcy, and those that allow it usually have tight restrictions that make it easy for judges to dismiss a case on a technicality.

Jefferson County listed its overall debt at $4.2 billion when it filed for bankruptcy protection in November 2011, making it the country's largest municipal bankruptcy until the city of Detroit filed in July with about $18 billion in debt.

During the confirmation hearing, one lawyer objecting to the restructuring plan said the county should abandon the plan and pursue corruption-related lawsuits against Wall Street firms to try to win what he estimated could be $1.6 billion in damages.

The county's sewer-borrowing deals were tainted by a bribery scandal that landed several former officials in jail. J.P. Morgan Chase & Co. agreed to pay $722 million to settle with the U.S. Securities and Exchange Commission, which accused the bank of improperly courting elected officials in Jefferson County. The bank didn't admit wrongdoing.

Jefferson County lawyers criticized that approach as expensive and uncertain, and Judge Bennett said during the hearing that the county's case has had "significant extensive complex litigation from the day [it] was filed."

Jefferson County leaders began negotiating with sewer bondholders when the debt went into default during the 2008 financial crisis. Throughout the bankruptcy, J.P. Morgan, which arranged the borrowing deals, agreed to forgive about $942 million of its roughly $1.2 billion in sewer-bond debt. Bond insurers, hedge funds and other banks also agreed to a discount.

As part of the deal, county leaders were required to find new investors to purchase the remaining $1.7 billion worth of bonds. Earlier this month, the county said it successfully found buyers, debunking claims by some analysts who said the taint of bankruptcy would repel municipal bond investors.

Money from the bond sale, which could be finalized on Dec. 3, is supposed to pay off current bondholders, which could enrich some distressed-debt-focused hedge funds that purchased the county's bonds at a discount.

Aside from the sewer-debt reductions, county officials said they imposed cost-cutting measures to save more than $100 million in annual expenses. Throughout the bankruptcy, the county closed remote courthouses, cut staff "in essentially every department" and scaled back operations at Cooper Green Mercy Hospital, the county-owned hospital for the poor, according to court papers

filed before Thursday's hearing.

"These measures fulfill a basic purpose of debt adjustment under Chapter 9—matching expenses to revenues," county attorneys said in court papers.

By KATY STECH

Bill Thompson Goes Back to Bond Firm after Failed New York Mayor Bid.

NEW YORK (Reuters) – Bill Thompson, a former top New York city finance chief and two-time mayoral hopeful, is rejoining his former municipal bond house, Siebert Brandford Shank & Co, after losing the Democratic primary for New York city mayor, the firm said on Wednesday.

Thompson, who served as city Comptroller from 2002 to 2009, where he oversaw more than $100 billion of city pension funds and acted as watchdog for the city's budget, will return to Siebert as chief administrative officer and senior managing director.

Siebert specializes in the underwriting municipal bonds. The firm said Thompson would be critical as it explores "new business opportunities in other sectors" outside infrastructure.

"Given all of the uncertainty surrounding federal, state and city budgets in recent years, it is more important than ever for municipalities to have access to experienced financial industry guidance," Thompson said in a press release.

Thompson left Siebert, where he had worked from 2010 to 2013, to run for mayor of New York, losing in the Democratic Primary to Bill De Blasio. Thompson ran for mayor previously in 2009. He secured the Democratic nomination but lost the race to incumbent Michael Bloomberg by a narrow margin.

(Reporting by Edward Krudy; Editing by Bernard Orr)

- *Washoe-Mill Apartments v. U.S. Bank Nat. Ass'n* – Pursuant to the Trust Indenture, and Section 11(b) of the United States Housing Act of 1937, court finds that HUD was entitled to funds remaining in trust account after bonds issued to fund a HUD-subsidized facility were redeemed.
- *City of College Station, Tex. v. Star Ins. Co.* – In suit against insurer for failure to defend/indemnify, court of appeals holds that zoning-related allegations in underlying complaint against city did not fall within the scope of policy's "inverse condemnation" exclusion.
- *State v. Moore Outdoor Properties, L.P.* – In inverse condemnation action, court holds that lessee's interests in a sign permit, billboard structure, and leasehold form an intertwined property interest – as opposed to personal property – that is compensable in a condemnation proceeding.
- SIFMA Weighing Campaign Against Muni Advisor Rule Provisions.
- NYT: Bonds Backed by Solar Power Payments Get Nod.
- GASB Toolkit Helps Pension Plans Implement New Accounting Standards.
- Moody's: Detroit's DIP Proposal Differs Substantially From its Corporate Predecessors.
- Moody's: Report Analyzes Impact of Elimination of Federal Deductions for State, Local Taxes.
- Use EMMA's Email Reminder Service for Recurring Financial Disclosures.
- NYT: Jury Finds Pipe Maker Defrauded Governments.

- "While on duty on duty, Mr. O'Hern left his patrol assignment and went to his private vehicle. He drove to the top floor of a downtown parking garage, consumed a bottle of whiskey and ingested nearly a dozen Clonazepam (anti-anxiety) tablets. He then tasered himself and discharged his firearm over twenty times, shooting through the windshield and roof of the vehicle." Turns out that incidents such as this are likely to end up on your permanent record.

EMINENT DOMAIN - ARKANSAS

Giles v. Ozark Mountain Regional Public Water Authority

Court of Appeals of Arkansas - November 6, 2013 - Not Reported in S.W.3d - 2013 Ark. App. 639

Ozark Mountain Regional Public Water Authority (Ozark) filed a complaint for condemnation and declaration of taking in which it sought to take property owned by appellants for the construction of a water-treatment and intake facility together with all necessary roadways, water transmission lines, and a water tower. An appraisal determined the fair market value of the property to be $66,986, which amount was deposited by Ozark in favor of appellants. Following a trial, the jury fixed the compensation for the property at $341,500.

Appellants filed a motion for attorney's fees. Ozark opposed the motion, arguing that it exercised its taking power under the procedures of a subsection of the Arkansas Code that does not allow for attorney's fees. The circuit court denied appellants' motion for attorney's fees. Appellants appealed. That's how appellants are made.

Appellants argued that the circuit court erred by determining that the waterworks attorney's fee statute is not applicable in this case.

Ozark is a public-water authority, an entity sanctioned by the enactment of Act 15 of 2001, which is codified at Arkansas Code Annotated sections 4–35–201 et seq. None of those code sections contain any authority for an award of attorney's fees. A public-water authority has the power to exercise eminent domain in accordance with the procedures prescribed by Arkansas Code Annotated sections 18–15–301 et seq. Ark.Code Ann. § 4–35–210 None of the statutes in subchapter 3 allow for an award of attorney's fees.

Arkansas Code Annotated sections 18–15–601 et seq. set out the eminent-domain authority and procedure for water and water-generated electric municipal corporations. Subchapter 6 does allow for an award of attorney's fees if the amount awarded by the jury exceeds the amount deposited by the corporation or water association in an amount that is more than twenty percent of the sum deposited. Ark.Code Ann. § 18–15–605(b) (Repl.2003). Appellants argue that section 18–15–605(b) applies in this case.

The court concluded that an analysis of the procedure for the exercise of eminent domain by a public-water authority is restricted to subchapter 3, which contains no provision for an award of attorney's fees. The circuit court, therefore, did not have authority to award any fees, and its decision to deny the motion for fees was correct.

EMINENT DOMAIN - CALIFORNIA

Bank of New York Mellon v. City of Richmond

United States District Court, N.D. California - November 6, 2013 - Not Reported in F.Supp.2d - 2013 WL 5955699

After the Court dismissed a nearly identical case filed by Wells Fargo, the City of Richmond and its "advisor," a private company named Mortgage Resolution Partners LLC (collectively, "Defendants"), moved to dismiss this action on the same grounds, arguing that the issue was not yet ripe for determination for constitutional and prudential purposes. Here, Bank of New York Mellon and Wilmington Trust Company (collectively, "Plaintiffs") challenge the Court's prior determination regarding ripeness, and argue that this case presents unique issues—particularly related to the effect of its request for declaratory judgment—that the Court had not yet considered.

Defendants here are considering purchasing underwater mortgages from Richmond homeowners and refinancing the mortgages so that the homeowners would have lower payments and protection from foreclosure.

Plaintiffs filed suit for injunctive and declaratory relief, arguing that Defendants' eminent domain plan is both unconstitutional and sufficiently imminent such that the case is ripe for determination. Plaintiffs argued that the Court should deny this motion, emphasizing that the case is ripe for determination and that the Court had not explicitly ruled on ripeness related to actions for declaratory judgment.

The Court once again found that the case is not yet ripe for determination and granted Defendants' motion to dismiss without prejudice.

"To intervene before the Richmond City Council adopts an eminent domain program would stretch the role of the judiciary beyond what is contemplated by Article III and what is reasonable to maintain judicial efficiency. If the courts were expected to intervene in every legislative proposal that had potential constitutional ramifications, their dockets would be filled with prospective litigation. This is exactly the purpose of the ripeness doctrine; where, as here, factual contingencies could arise that would make litigation unnecessary, it is not reasonable to expect the courts to devote their resources to resolve undefined and potentially non-existent constitutional conflicts."

PUBLIC CONTRACTS - INDIANA

Kitchell v. Franklin

Supreme Court of Indiana - November 13, 2013 - N.E.2d - 2013 WL 6009720

Resident filed petition against city seeking declaration that ordinance authorizing mayor to negotiate public-private agreement was invalid.

The Supreme Court of Indiana held that the Public-Private Agreement Act does not require a political subdivision to adopt the Act before it may issue a request for proposals or begin contract negotiations consistent with Act.

ZONING - IOWA

Residential and Agricultural Advisory Committee, LLC v. Dyersville City

Council

Court of Appeals of Iowa - November 6, 2013 - Slip Copy - 2013 WL 5951191

Residential and Agricultural Advisory Committee, L.L.C., filed a petition for writ of certiorari and request for stay and injunction against the Dyersville City Council, the mayor of Dyersville, and the individual city council members. The plaintiffs alleged the city council had acted (1) in violation of Iowa law, (2) in violation of Dyersville city ordinances, (3) in excess of its authority, (4) arbitrarily and capriciously, and (5) in contravention of public safety, health, morals, and the general welfare by passing Resolution Number 38–12, which rezoned certain property from A–1 Agricultural to C–2 Commercial. The property in question included that known as the "Field of Dreams."

At the initial hearing, the District Court denied plaintiffs' petition for writ of certiorari.

Plaintiffs appealed, asserting that under Iowa Rule of Civil Procedure 1.1406 the issues before the court at the initial hearing were limited to the sufficiency of the petition for writ of certiorari, whether an injunction should have been issued, and whether a bond would be required. They contend the district court improperly considered the merits of the case before they had an opportunity to conduct discovery.

The Court of Appeals agreed, concluding that the district court improperly decided the merits of the petition for writ of certiorari after the initial hearing, rather than confine its decision to whether the writ should be issued.

EMPLOYMENT - LOUISIANA

O'Hern v. New Orleans Police Dept.

Supreme Court of Louisiana - November 8, 2013 - So.3d - 2013-1416 (La. 11/8/13)

Police officer, who pleaded nolo contendere to illegal use of weapons, appealed his termination of employment alleging that it was unlawful because of failure to timely complete the investigation.

The Supreme Court of Louisiana held that disciplinary investigation of police officer's conduct in drinking alcohol, taking drugs, and shooting his gun multiple times in his personal vehicle while on a police shift was completed within 60 days, as required by statute. Preliminary investigation was a criminal investigation that was not governed by 60-day rule, and subsequent administrative investigation was completed within 60 days. A criminal investigation into actions of a police officer tolls time limit for the administrative investigation.

"The investigation in question stems from the following incident. While on duty on December 12, 2009, Mr. O'Hern left his patrol assignment and went to his private vehicle. He drove to the top floor of a downtown parking garage, consumed a bottle of whiskey and ingested nearly a dozen Clonazepam (anti-anxiety) tablets. He then tasered himself and discharged his firearm over twenty times, shooting through the windshield and roof of the vehicle. Responding officers found Mr. O'Hern incapacitated and took him to a medical facility where he informed personnel that he attempted to commit suicide. His blood alcohol content was 0.105%."

BANKRUPTCY - MICHIGAN

In re City of Detroit, Mich.

United States Bankruptcy Court, E.D. Michigan, Southern Division - November 6, 2013 - B.R. - 2013 WL 5963141

Plaintiffs who had commenced actions challenging the constitutionality of state statute pursuant to which emergency manager was appointed for bankrupt municipality sought determination that automatic stay arising upon commencement of municipality's Chapter 9 case did not apply to their lawsuits or, in alternative, relief from automatic stay.

The Bankruptcy Court held that:

- Automatic stay, as extended to protect employees, agents and representatives of municipality that had filed for Chapter 9 relief, applied to federal lawsuit filed by residents of city challenging the constitutionality of statute pursuant to which emergency manager was appointed;
- Stay did not apply to federal lawsuit brought, not only by residents and officials of bankrupt municipality, but by residents and officials of other municipalities in Michigan for which emergency managers had been appointed, challenging the constitutionality of state statute pursuant to which these appointments were made; and
- "Cause" did not exist to modify automatic stay to allow residents and officials of bankrupt municipality to proceed with federal lawsuit.

IMMUNITY - MISSISSIPPI

Harris ex rel. Harris v. Board of Trustees of Clinton Public School Dist.

Court of Appeals of Mississippi - November 12, 2013 - So.3d - 2013 WL 5976624

High school student filed tort-claims action against public school district, stemming from incident in which teachers refused to allow student to use restroom during administration of state standardized test.

The Court of Appeal held that:

- Teachers' refusal to allow student to use restroom was discretionary function subject to immunity, and
- Teachers' decision to deny restroom request was for public-policy purpose.

Public school teachers' refusal to allow high school student to use restroom during administration of state standardized test was discretionary function subject to immunity under Mississippi Tort Claims Act (MTCA), since element of choice or judgment was involved in decision to allow restroom use in case of emergency. While school district was required to establish student-testing plan, testing-security procedures of plan were left to discretion of district employees, particularly assigned test administrators, as there was no automatic requirement under plan that administrators allow students to use restroom.

Public school district teachers' decision to grant or deny high school student's restroom request during administration of state standardized test was for public-policy purpose of maintaining integrity and security of test and testing environment, grounded in maintenance of student discipline, safety, and order, as required for immunity from suit under MTCA. Purpose was crucial for administering test in way that gave fair and accurate results as means of measuring student performance, and paramount to ability of protecting integrity and security of test was ability of administrator to have discretion to conduct test and to control classes.

PUBLIC UTILITIES - MISSOURI

In re Union Elec. Co.

Missouri Court of Appeals, Western District - October 15, 2013 - S.W.3d - 2013 WL 5614208

Customers appealed from order of Public Service Commission (PSC) allowing electric utility to pass Regional Transmission Organization (RTO) electricity transmission charges onto customers through Fuel and Purchased Power Adjustment Clause (FAC).

The Court of Appeals held that:

- "Transportation," as used in statute that allowed electric utilities to apply to PSC for interim energy charges or periodic rate adjustments to reflect increases in transportation costs, included transmission charges, and
- PSC's order was reasonable.

Fact that type of transmission charges passed onto customers of electric utility did not exist at time of enactment of statute, which allowed electric utilities to apply to PSC for interim energy charges or periodic rate adjustments to reflect increases in transportation costs, did not preclude PSC's determination that transmission charges by RTO to utility were eligible to be passed onto customers through FAC. The statute did not expressly describe or limit charges eligible to be recovered, except that such charges be "prudently incurred."

PUBLIC RECORDS - MONTANA

Billings Gazette v. City of Billings

Supreme Court of Montana - November 8, 2013 - P.3d - 2013 MT 334

Newspaper brought action against city seeking disclosure of documents related to discipline of city employees due to inappropriate computer usage. The District Court ruled that city was required to disclose unredacted documents. City appealed.

The Supreme Court of Montana held that:

- Employees had actual expectation of privacy in identities related to disciplinary investigation;
- Expectation was one society was willing to accept as reasonable; and
- Demand for individual privacy clearly exceeded the merits of public disclosure.

An examination of a request under the public right to know provision of the Montana Constitution requires a three-step process: (1) whether the provision applies to the particular political subdivision against whom enforcement is sought; (2) whether the documents in question are documents of public bodies subject to public inspection; and (3) if the first two requirements are satisfied, whether a privacy interest is present, and if so, whether the demand of individual privacy clearly exceeds the merits of public disclosure.

City employees had actual expectation of privacy in their identities in relation to internal disciplinary proceedings, and therefore demands of individual privacy clearly exceeded the merits of public disclosure so as to support preclusion of disclosure of records regarding internal disciplinary proceedings stemming from employees' purported use of work computers to view pornography,

where city's internet use policy for employees addressed only the city's knowledge of the employee's internet use, not the identities of the employees involved in internal disciplinary proceedings.

City employees' expectation of privacy in their identities in relation to internal disciplinary proceedings was an expectation of privacy that society was willing to accept as reasonable, so as to support preclusion of disclosure of identities of employees involved in disciplinary proceeding stemming from purported use of work computers to view pornography, where employees were not elected officials, department heads, or high management, internet usage was not related to employees' public duties, employees received only a five-day suspension and were not discharged or forced to resign, no criminal charges had been filed or were contemplated against employees, and there was no allegation of violation of any specific duty related to performance of a public trust function.

BONDS - NEVADA

Washoe-Mill Apartments v. U.S. Bank Nat. Ass'n

United States District Court, D. Nevada - September 30, 2013 - Slip Copy - 2013 WL 5493301

Washoe–Mill Apartments (WMA) is a Nevada General Partnership. WMA entered into a partnership agreement in order to construct and operate a HUD subsidized facility for seniors and disabled citizens, the Washoe–Mill Apartments. In 1993, Bank of America Nevada (BOAN) and the Washoe Housing Finance Corporation (WHFC) entered into a Trust Indenture Agreement (the "Agreement") regarding bonds used to refinance WMA's mortgage loans for the WMA facility. The Agreement was executed pursuant to HUD's tax-exempt bond financing program regulations. Under the Agreement, BOAN was the trustee of the bond proceeds and was charged with making payment to bondholders. HUD states that these bonds were tax-exempt, the mortgage was insured by HUD, and WMA received rental subsidies from HUD.

The WMA facility was sold on January 21, 2011, and the payoff amount for the mortgage loan was remitted as full settlement of the mortgage. A year later, in January 2012, a trust officer for U.S. Bank informed WMA that it had conducted an audit that revealed the existence of $229,160.81 remaining in the trust account. U.S. Bank conducted an investigation to determine who the funds belonged to but was unable to reach a conclusion.

WMA brought a claim for the full amount remaining in the trust. HUD counterclaimed and moved for summary judgment on the grounds that the contractual language of the Agreement is clear that the interpleaded funds belong to HUD.

The Agreement was entered into pursuant to Section 11(b) of the United States Housing Act of 1937. HUD explained that Section 11(b) was originally designed to finance the acquisition, construction, or rehabilitation of low income housing. After interest rates dropped in the late 1980s, however, Section 11(b) was used exclusively to pay off existing bonds by issuing new bonds at a lower interest rate. In addition to insuring the mortgage through these tax-exempt bonds, HUD also provides rent subsidies. In exchange for these benefits, "[u]pon full payment of the principle and interest on the obligations (including that portion of the obligations attributable to the funding of the debt service reserve), any funds remaining in the debt service reserve shall be remitted to HUD." 24 C.F.R. § 811.108(a)(3).

HUD asserted that Section 413 of the Agreement incorporates this statutory requirement. Section

413 states that, "[u]pon final payment of all principal of, premium, if any, and interest on the Bonds, and upon satisfaction of all claims against the Issuer and the Trustee hereunder … any moneys remaining in all Funds shall be paid at the written direction of the Issuer to HUD." The court agreed, granting HUD's motion for summary judgment.

NEGLIGENCE - NEW YORK

Koerner v. City of New York

Supreme Court, Appellate Division, First Department, New York - November 12, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07410

Worker brought action against city and its board of education, seeking to recover damages for injuries he allegedly sustained while working at school, as result of presence at school of fungal pathogen that caused his eye infection.

The Supreme Court, Appellate Division, held that:

- There was insufficient evidence that board was on notice of dangerous condition alleged, and
- There was no evidence that board exercised supervision and control over work performed by worker.

A general awareness that a dangerous condition may be present is legally insufficient to charge a defendant with constructive notice.

Awareness of unsanitary conditions at school was insufficient evidence that city's board of education was on notice of presence of fungal pathogen that allegedly caused worker's eye infection, as would support worker's statutory and common law negligence claims against board, absent any evidence that the fungus existed at the school at all, other than speculation based on worker's unusual infection.

There was no evidence that city board of education exercised supervision and control over work being performed by worker who allegedly sustained injury while working at school, as result of presence at school of fungal pathogen that caused his eye infection, so as to impart liability pursuant to statute imposing general duty to protect the health and safety of employees.

LIABILITY - NEW YORK

Williams v. City of New York

Supreme Court, Appellate Division, First Department, New York - November 7, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07268

In personal injury suit against city and its transit authority, the Supreme Court granted authority's motion to correct rate of interest on judgment from nine-percent to three-percent. Plaintiff appealed.

The Supreme Court, Appellate Division, held that by statute, proper interest rate was three-percent.

By statute, rate of interest against authority could not exceed three-percent and both authority and city were found to be jointly and severally liable for 100% of judgment, and authority was obligated to indemnify city pursuant to lease of subject property.

EMPLOYMENT - NEW YORK

Fiducia v. DiNapoli

Supreme Court, Appellate Division, Third Department, New York - November 7, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07245

Police officer commenced Article 78 proceedings, seeking review of determination denying his application for accidental disability retirement benefits.

The Supreme Court, Appellate Division, held that officer slipping and falling while descending stairway in abandoned building was not an accident. An incident at issue in application for accidental disability retirement benefits does not qualify as an accident where the injury results from an expected or foreseeable event arising during the performance of routine employment duties. Rather, the precipitating event must emanate from a risk that is not an inherent element of the petitioner's regular employment duties.

CBA - NEW YORK

Buffalo Niagara Airport Firefighters Ass'n v. DiNapoli

Supreme Court, Appellate Division, Third Department, New York - November 7, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07227

Firefighters union brought article 78 proceeding to review a State Comptroller's finding that newly hired firefighters were not eligible to participate in a noncontributing special retirement plan. The Supreme Court, Albany County, dismissed the proceeding, and union appealed.

The Supreme Court, Appellate Division, held that:

- Triborough Amendment to the tier 5 retirement legislation did not entitle newly hired firefighters to participate in noncontributory special retirement plan provided for in expired collective bargaining agreement (CBA), and
- Union and transportation authority were prohibited from agreeing to a noncontributory retirement plan, and could not bind third parties, such as State Comptroller, to such a plan.

CBA providing for a noncontributory plan, executed seven months after the effective date, could not be considered to be retroactively "in effect" on that date.

SCHOOLS - PENNSYLVANIA

In re Petition to Realign Regional Election Districts in Pennsbury School Dist.

Commonwealth Court of Pennsylvania - November 8, 2013 - A.3d - 2013 WL 5962796

The Bucks County Court of Common Pleas issued an order approving a school district reapportionment petition filed by the Pennsbury School District Board of School Directors pursuant to Section 303 of the Public School Code of 1949.

An unincorporated association, Concerned Residents of Pennsbury (CROP), which had developed a competing plan for the School District, appealed.

CROP asserted three arguments: 1) that the approved plan did not satisfy the "one person, one vote" requirement of the Equal Protection Clause of the United States Constitution; 2) that the approved plan did not satisfy the requirement of Section 303(b)(3) of the Public School Code that the population of voting regions in school board elections be "as nearly equal as possible;" and 3) that the trial court abused its discretion in approving the plan over its plan.

The appeals court concluded that none of these contentions was valid. Contrary to CROP's assertions, the trial court judge, in her well-reasoned opinion, correctly applied the law and acted well within her discretion.

IMMUNITY - PENNSYLVANIA

Oliver v. Tropiano Transp., Inc.

Commonwealth Court of Pennsylvania - November 8, 2013 - A.3d - 2013 WL 5962809

Parking garage customer filed complaint against parking authority, alleging that its negligence caused passenger to sustain foot fractures while exiting parking shuttle. The Court of Common Pleas found authority liable. Authority appealed.

The Commonwealth Court held that:

- Parking authority was local authority, rather than Commonwealth agency;
- Customer was barred from recovering damages for pain and suffering; and
- Customer's claim did not fall under real property exception to governmental immunity.

To maintain negligence claim under the real property exception to governmental immunity, plaintiff must prove that his or her injury resulted from a dangerous condition arising from local agency's care, custody, or control of real property.

Parking garage customer's negligence claim against parking authority, as local agency, did not fall under real property exception to governmental immunity, as the ramp itself was not defective, but rather purported negligence of shuttle operator in leaving customer on ramp was cause of customer's injuries.

INVERSE CONDEMNATION - TEXAS

Edwards Aquifer Authority v. Bragg

Court of Appeals of Texas, San Antonio - November 13, 2013 - S.W.3d - 2013 WL 5989430

Commercial pecan growers filed action against Edwards Aquifer Authority (EAA) for an alleged taking of growers' property, and for alleged violations of growers' federal civil rights, as result of decisions denying one water permit application and partially denying another. Lawsuit was removed to federal court, which dismissed civil rights claims and remanded takings claims back to state court. The district court granted partial summary judgment on liability for takings claim and, following bench trial, awarded compensation. Both parties appealed.

On denial of motion for rehearing, the Court of Appeals held that:

- As a matter of apparent first impression, EAA is a proper party to a takings lawsuit instituted

under the Edwards Aquifer Authority Act (EAAA), even though actions of EAA giving rise to suit may not have been discretionary, and even if the state might be a proper party;
- EAA was not judicially estopped, based on successful arguments in federal court regarding accrual of growers' § 1983 claims, from subsequently arguing an earlier accrual date for growers' takings claim;
- Ten-year statute of limitations for an adverse possession claim applies where a regulatory taking results from an unreasonable interference with the landowner's right to use and enjoy the property;
- Growers' regulatory-takings claims did not accrue for limitations purposes until EAA made its final decisions regarding application of EAAA to growers' permit applications;
- Permitting system under EAAA that dictated the decisions on growers' applications resulted in compensable "regulatory taking" of two orchards;
- Proper time for determining the value of groundwater rights subjected to regulatory taking was the time at which time at which the statutory provisions that dictated those decisions were applied to the properties in question; and
- Just compensation would be determined by reference to the best and highest use of the two properties at issue, i.e., as commercial pecan orchards, and by valuing the orchards immediately before and immediately after the EAAA was applied to the orchards.

"Based on our discussion above, we conclude the trial court erred in calculating the compensation owed for the takings of the two orchards. Therefore, we remand this cause for the trial court to calculate the compensation owed on the Home Place Orchard as the difference between the value of the land as a commercial-grade pecan orchard with unlimited access to Edwards Aquifer water immediately before implementation of the Act in 2005 and the value of the land as a commercial-grade pecan orchard with access to Edwards Aquifer water limited to 120.2 acre-feet of water immediately after implementation of the Act in 2005. We also remand this cause for the trial court to calculate the compensation owed on the D'Hanis Orchard as the difference between the value of the land as a commercial-grade pecan orchard with unlimited access to Edwards Aquifer water immediately before implementation of the Act in 2004 and the value of the land as a commercial-grade pecan orchard with no access to Edwards Aquifer water immediately after implementation of the Act in 2004."

EMINENT DOMAIN - TEXAS

State v. Moore Outdoor Properties, L.P.

Court of Appeals of Texas, El Paso - November 13, 2013 - S.W.3d - 2013 WL 6002035

State filed a petition for condemnation of a parcel of land located along Interstate 30 in Fort Worth for a highway construction project. Moore Outdoor Properties, L.P., owned the land. A large billboard structure was located on the property. Arrington purchased the billboard structure, permit, and leasehold rights from Moore at a price of $1,268,454.3 Moore retained ownership of the land underneath the billboard structure and Arrington leased the land for 99 years with an option to extend the lease for four 50 year periods.

Following a hearing, the Special Commissioners awarded $334,194 jointly to Moore and Arrington for the total condemnation. Arrington counterclaimed for inverse condemnation for the State's taking of its leasehold property interests and sought to recover compensation.

The State responded that it is not required to compensate Arrington for the billboard structure because it is personal property, not real property, and that a sign permit does not create a property

right, and therefore, it is not required to compensate Arrington for this interest.

Arlington argued that its interests in the sign permit, billboard structure, and leasehold form an intertwined property interest or aggregate asset which would be sold together in the market. It reasons that the combined "leasehold property interests" are compensable in a condemnation proceeding.

The jury found that the fair market value of Arrington's property interests on the date of the taking was $969,243, which it awarded, and the appeals court affirmed.

Register for MSRB's Online Outreach Seminar.

It's not too late to register to attend the online version of a December 5th municipal securities outreach event co-hosted by the Municipal Securities Rulemaking Board (MSRB) and the Municipal Advisory Council of Michigan. Beginning at 2:00 P.M. ET, representatives from the MSRB will discuss municipal advisor regulation, promoting price transparency and providing resources for state and local government issuers, which are among the MSRB's initiatives that support its mission to protect investors and municipal entities.

View the seminar agenda: http://msrb.org/msrb1/pdfs/MichiganOureachSeminarAgenda.pdf

Register at: https://www2.gotomeeting.com/register/647692618

EMINENT DOMAIN - TEXAS

City of College Station, Tex. v. Star Ins. Co.

United States Court of Appeals, Fifth Circuit - November 14, 2013 - F.3d - 2013 WL 6028315

City brought action against its general commercial liability insurer, seeking to recover defense costs, indemnification, and statutory penalty interest, after insurer refused to defend or indemnify the city in an underlying lawsuit.

In the underlying lawsuit, a real-estate investment trust alleged that city's zoning decisions were discriminatory and driven by an irrational animus, depriving the trust of its right to equal protection, that the city's zoning decisions were arbitrary, and therefore violated trust's right to substantive due process, and that city council members conspired with third-party landowners to poach the trust's prospective tenants, thereby tortiously interfering with trust's contracts and business expectancies.

The Court of Appeals held that allegations in underlying complaint against city did not fall within the scope of policy's "inverse condemnation" exclusion. The policy excluded liability "arising out of (3)27 any principle of eminent domain, condemnation proceeding, [or] inverse condemnation," and that language could not reasonably be read to extend to liability arising out of all zoning decisions.

IMMUNITY - WYOMING

DiFelici v. City of Lander

Supreme Court of Wyoming - November 12, 2013 - P.3d - 2013 WY 141

Pedestrian who was injured when she fell after stepping into a hole drilled in the gutter of a street brought action against city, alleging negligence and claiming entitlement to recovery under specific statute rendering cities and towns liable for injuries resulting from excavations or obstructions which make streets or sidewalks unsafe.

The Supreme Court of Wyoming held that:

- Hole was result of street maintenance that was excluded from waiver of immunity otherwise provided under Claims Act;
- Collection or diversion of storm water runoff on a city street did not constitute liquid waste collection or disposal as contemplated by waiver provisions; and
- Pedestrian was not entitled to recover under specific statute rendering cities and towns liable for injuries resulting from excavations or obstructions which make streets or sidewalks unsafe.

Collection or diversion of storm water runoff on a city street did not constitute liquid waste collection or disposal, thus depriving pedestrian of an exception to the immunity conferred on city by the Governmental Claims Act, in negligence action brought by pedestrian who was injured when she fell after stepping into a hole drilled in the gutter of a street for purposes of draining storm water. Claims Act was not designed to prevent cities from returning surface water to natural watercourses and aquifers, and the liability which would have resulted from claims that a surface water drainage system did not operate properly would have been overwhelming.

SEC Investor Advisory Committee to Vote Friday on Fiduciary Plan.

While SIFMA 'strongly supports' some recommendations, others are 'incongruous' with Dodd-Frank's intent, says SIFMA's Carroll

The SEC's Investor Advisory Committee plans to vote Friday on one of its subcommittee's recommendations on how the SEC should craft its fiduciary rule for brokers.

The draft proposal by the Investor as Purchaser Subcommittee, which is headed by Barbara Roper, director of investor protection for the Consumer Federation of America, was scheduled to come up for a vote at the Investor Advisory Committee's Oct. 10 meeting, but that was postponed because of the government shutdown.

Roper told ThinkAdvisor that the subcommittee's hope is that "by weighing in early in the [fiduciary rulemaking] process, we can help to shape the form that commission rulemaking takes."

The subcommittee says that a fiduciary duty for investment advice should include, "first and foremost, an enforceable, principles-based obligation to act in the best interest of the customer."

In approaching this issue, the subcommittee says that the SEC's goal "should be to eliminate the regulatory gap that allows broker-dealers to offer investment advice without being subject to the same fiduciary duty as other investment advisors but not to eliminate the ability of broker-dealers to offer transaction-specific advice compensated through transaction-based payments."

The subcommittee adds that "Though it may require both regulatory flexibility to permit the

existence of conflicts of interest and some regulatory changes to reduce the most severe conflicts of interest in the broker-dealer business model, the Committee believes that advisory services offered as part of a transaction-based securities business can and should be conducted in a way that is consistent with a fiduciary standard of conduct."

While the SEC is not bound by any recommendations of the Investor Advisory Committee, which was created under Section 911 of the Dodd-Frank Act, Section 911 does require the SEC to "review the findings and recommendations of the committee" and "each time the committee submits a finding or recommendation to the commission, promptly issue a public statement assessing the finding or recommendation of the committee; and disclosing the action, if any, the commission intends to take with respect to the finding or recommendation."

While fiduciary advocates have voiced their support of the recommendations in comment letters to the subcommittee, some other groups have not. For instance, while the Securities Industry and Financial Markets Association says that "many if not most" of the subcommittee's recommendations "are in accord" with SIFMA's views on how to implement Section 913 of Dodd-Frank, some recommendations are "incongruous with the intent and requirements" of Section 913.

Kevin Carroll, SIFMA's managing director, told the subcommittee in his comment letter that the "incongruities" exist in preserving the broker-dealer business model and in the "intent to maintain forward progress under Section 913." These incongruities, he said, "may be attributable to the fact that the subcommittee (and indeed, the committee) does not have a single broker-dealer representative."

SIFMA "strongly agrees" with the subcommittee's recommendation that brokers should provide investors with up-front disclosures, similar to Form ADV, Part 2, about potential conflicts of interest, compensation arrangements, the scope of services, and other important details about the customer relationship, Carroll said.

However, SIFMA and the subcommittee "diverge" in their beliefs that investors can be harmed under the broker-dealer suitability standard, Carroll said.

"The subcommittee states that it is essential that the SEC's Section 913 cost-benefit analysis acknowledge the harms that can result from advice delivered under the current, broker-dealer suitability standard," he wrote.

The subcommittee's list of "alleged harms" include: an investor mistakenly believing that a financial advisor is acting in his best interest, when that is not the case, and thereby receiving advice that carries additional costs and risks; and failure to receive ongoing account supervision.

Carroll countered, however, that "there is no evidence that investors are being harmed by the current suitability standard," and that "there could never be an empirical showing of whether or not suitability-based advice harms investors because there are too many independent variables, including investors' choice to follow the advice or not, and the quality of the advice given, regardless of the best intentions of the giver."

Thus, he argued, "imposing a 'harm' requirement would only serve as an insurmountable obstacle to implementing Section 913 — which seems contrary to the subcommittee's stated goal."

By Melanie Waddell, ThinkAdvisor

Washington Bureau Chief

IRS Issues Draft Form 1099-OID With New Fields.

The IRS on November 15 posted to its website a draft 2014 Form 1099-OID, “Original Issue Discount,” that eliminates two former fields and adds two new fields for taxpayers to report market discount and acquisition premiums.

The IRS on November 15 posted to its website a draft 2014 Form 1099-OID, “Original Issue Discount,” that eliminates two former fields and adds two new fields for taxpayers to report market discount and acquisition premiums.

The two fields eliminated from the form are “Foreign tax paid” and “Foreign country or U.S. possession.”

The addition of the acquisition premium box represents a “paradigm shift,” according to Stevie D. Conlon of Wolters Kluwer Financial Services Inc. “Completion of the form went from standardized data based on the issued price of the instrument for the entire issue of the debt to a calculation of acquisition premium for each tranche offering,” she said.

Acquisition premium is the excess of a debt instrument’s adjusted basis immediately after purchase over the debt instrument’s adjusted issue price at that time. The amount will have to be calculated for each series in a debt offering. Before the new reporting requirements, a taxpayer did not have to calculate the unique purchase price for each purchaser for each series in the offering.

The new reporting requirements will require more work to complete the forms, Conlon said. However, she said the new draft form dovetails with the new cost basis reporting requirements. Treasury in April issued final regulations (T.D. 9616) on broker reporting of basis for debt instruments and options. The final regs implement the rules in phases; basis reporting for less complex debt instruments begins January 1, 2014, while reporting for more complex debt instruments, including those without fixed yield and maturity dates, won’t begin until January 1, 2016.

Opponents of the new reporting requirements are expected to argue that they don’t have systems in place to calculate the acquisition premiums. However, Conlon said the requirements represent good tax policy because they will provide more accurate data for investors.

by William R. Davis