
[ESG Bans Cost Texas.](#)

SYLVIE DOUGLIS, BYLINE: NPR.

DARIAN WOODS, HOST:

This is THE INDICATOR FROM PLANET MONEY. I'm Darian Woods.

WAILIN WONG, HOST:

And I'm Wailin Wong. And I hope everyone packed their galoshes today because we have to wade into the culture wars.

WOODS: Oh yeah, it is thick and deep, this morass. But don't worry, there is an economic lesson here.

WONG: And we're going to find it. Now, there's been a lot of public rhetoric from government officials who have attacked companies over their ESG policies. ESG stands for environmental, social and governance, and it's a broad term to describe business decisions around things like climate change and workplace diversity.

WOODS: And some states have gone a step beyond anti-ESG rhetoric. Last year, Texas banned local governments from working with certain banks. These were banks that the state leaders said were discriminating against things like oil and gas and guns. Here's how one state legislator, Republican Phil King, put it.

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npr.org

September 8, 2022

[Bet on Muni Rebound With ESG Benefits.](#)

Predictably, rising interest rates are proving punitive for various segments of the broader fixed income market. Municipal bonds haven't been immune to that pressure.

More recently, however, municipal bonds are outperforming aggregate bonds strategies, indicating there could be opportunities afoot with exchange traded funds, such as the SPDR Nuveen Municipal

Bond ESG ETF (MBNE).

The actively managed MBNE debuted in April and is part of a growing group of municipal bond ETFs tapping into green bonds or the environmental, social, and governance (ESG) investing boom. MBNE could also be well-timed because municipal bonds are ideal assets for adding recession protection to portfolios.

"A recession is characterized by a slowdown in consumer spending and an increase in unemployment. This may lead some to believe that at the onset of a recession, tax revenues for state and local governments fall, but this hasn't been the case. Historically, tax revenues have declined following a recession, but the negative impact is usually long after the recession has already started," noted Cooper Howard of Charles Schwab.

Despite the ongoing debate about the status of the U.S., MBNE offers investors other favorable attributes, including income potential without significant risk owing to the rookie ETF's stout credit quality. Over 84% of MBNE's holdings are rated AAA, AA, or A, according to issuer data.

Importantly, municipal bond fundamentals are strong, indicating downgrades aren't imminent in this corner of the bond market.

"Conditions for most state and local governments are strong, in our view, due to the substantial fiscal support after the start of the COVID-19 crisis. Tax revenues also have been surging, which has helped bolster state and local government's coffers. To illustrate, rainy-day fund balances, which is money that states have set aside and can use during unexpected deficits, are at near-record levels. Even Illinois, the lowest-rated state, has a rainy-day fund balance in excess of $1 billion. That's a substantial improvement from February 2020 when it was only $60,000," concluded Howard.

Municipal bonds issued by California and New York, which are two states that are among the biggest adopters of ESG principles, account for about 22% of the MBNE portfolio. Economies in both states are bouncing back from the COVID-19 pandemic, and tax collections in both are soaring, providing support for municipal bond obligations.

ETF TRENDS

by TOM LYDON

SEPTEMBER 9, 2022

Jackson's Water and the Crisis of Municipal Governance.

Is privatization a solution?

"Jackson's Water Woes Explained" (Review & Outlook, Sept. 6) gets to the core conflict of interest for municipally owned utilities. We've seen it across the country and now in Jackson, Miss. Utilities, as natural monopolies, are generators of cash and a convenient bank for other municipal activity. When they set rates and terms of operation, free of supervision by independent regulators, they maximize revenue and minimize investment in maintenance and upgrades.

It's time to consider the privatization of water. In the end, it costs less.

Both Jackson and Flint, Mich., are shrinking cities with high poverty rates, but the poor infrastructure condition in both was caused by years of neglect. The water industry knows how to address the neglect, and money is needed, but experience shows that leadership and workforce capacity go far even when money is scarce. Building this capacity starts with local elected officials who pay attention to public services, not just trendy politics.

Continue reading.

The Wall Street Journal

Sept. 9, 2022

Why Green Investors Should Think Thematically.

Jack Bogle, founder of Vanguard, revolutionized the investment management industry when he created index funds back in 1975, bringing to market price competitive strategies that allowed retail investors to follow broad indices like the S&P 500 or Dow Jones. Besides being an inexpensive product, funds tracking these benchmarks have added diversification to portfolios. Since then, passive investments have increased in popularity and in the past 40 years have competed for capital flow with the active strategies that try to beat the market and deliver excess returns. Index funds following broad markets have been a very popular strategy.

After the oil shocks of 1973 and 1979, fossil fuels became inexpensive and used extensively in industries from electricity to transportation and fertilizers to plastics. This also enabled a rapid increase in the mass-produced materials like cement and steel, to the great benefit of the new equity indices that represented a broad range of companies. However, what worked in the past now poses a lot of risk, as global economies begin to transition at differing speeds towards Net Zero.

For example, the S&P500 currently has about 20% of its weight represented by companies that are heavy carbon emitters, predominantly names in oil & gas, plastic packaging, automakers, gas utilities, trucking, gas distribution, and air freight.

Continue reading.

nasdaq.com

by Gabriela Herculano

SEP 6, 2022

TAX - PENNSYLVANIA

In re Coatesville Area School District

Commonwealth Court of Pennsylvania - August 19, 2022 - A.3d - 2022 WL 3567766

City and school district sought judicial review of county board of assessment’s grant of a partial real estate tax exemption in separate actions, which was based on purported charitable purposes of tax-exempt taxpayer’s property.

Following remand by the Commonwealth Court, the Court of Common Pleas issued two essentially identical, but differently captioned decisions and orders upholding the county board of assessment's grant of partial real estate tax exemption, the Commonwealth Court consolidated appeals and dismissed, holding that appeal of the trial court decision and order was precluded by unappealed essentially identical decision and order, which the Supreme CourT vacated and remanded for decision on the merits.

The Commonwealth Court held that:

- Trial court properly held that taxpayer's purpose of preservation of historic resource constituted advancement of charitable purpose;
- Taxpayer's service of preservation and maintenance of historic structure was rendered gratuitously;
- Trial court properly found that beneficiaries of taxpayer's activities of preservation and conservation included the public at large
- Taxpayer's maintenance and preservation of historic building had relieved Commonwealth of its assumed burden of preserving and maintaining historic structures;
- Revenue that taxpayer received from tenants occupying offices in historic building that taxpayer owned did not preclude taxpayer from receiving exemption from property taxes as a purely public charity; and
- Taxpayer was entitled to 100% exemption from property taxes.

Trial court properly held that taxpayer's purpose of preservation of historic resource constituted advancement of charitable purpose, as supported finding that taxpayer was purely public charity exempt from property taxes under provision of state constitution and statute providing for real property tax exemption for purely public charities, although taxpayer was wholly-owned subsidiary of trust; deed restrictions on property required that it only be used as office building and for purposes consistent with preservation and conservation as historic structure, property had consistently been operated at loss with subsidization of shortfalls by trust, and preservation of historic and esthetic values was matter of express public policy.

Taxpayer's service of preservation and maintenance of historic structure was rendered gratuitously, as weighed in favor of finding that taxpayer was purely public charity exempt from property taxes pursuant to provision of state constitution and statute providing for real property tax exemption for purely public charities, although taxpayer had derived income from charging rents to occupants for renting out space in building; costs of preservation and maintenance of building had exceeded income derived from rents, and law did not require that gratuitous services rendered by entity seeking exemption had to provide a tangible benefit.

Trial court properly found that beneficiaries of taxpayer's activities of preservation and conservation included the public at large, which enjoyed a historic resource it would otherwise lack, as supported finding that taxpayer was purely public charity exempt from property taxes pursuant to provision of state constitution and statute providing for real property tax exemption for purely public charities, although property was not open to the public; preservation and maintenance of property would not be within resources of general public, property was accessible to general public through museum operated on site, and historic and architectural features of building could be publicly viewed and appreciated.

Taxpayer's maintenance and preservation of historic building had relieved Commonwealth of its assumed burden of preserving and maintaining historic structures, as weighed in favor of finding that taxpayer was purely public charity exempt from property taxes pursuant to provision of state constitution and statute providing for real property tax exemption for purely public charities, although Commonwealth was not statutorily required to preserve historic structures; Environmental Rights Amendment (ERA) to state constitution and statute declaring policy that Commonwealth was trustee for the preservation of the historic values of the environment vested Pennsylvania Historical and Museum Commission with duty to conserve and maintain historic structures.

Revenue that taxpayer received from tenants occupying offices in historic building that taxpayer owned did not preclude taxpayer from receiving exemption from property taxes as a purely public charity; property operated at substantial loss that was subsidized by taxpayer's parent entity, and tenants benefited from taxpayer's mission of preserving and maintaining the property as taxpayer provided heat, electricity, ventilation, air conditioning, basic janitorial services, repairs, and exterior maintenance to all tenants.

Taxpayer was entitled to 100% exemption from property taxes assessed by school district as a purely public charity pursuant to provision of state constitution and statute providing for real property tax exemption for purely public charities, where rents collected by property were used to support its charitable purpose of preserving and maintaining historic property by offsetting some of the expense to maintain it, and property had operated at a deficit.

SEC Risk Alert for Municipal Advisors Highlights Key Compliance Issues: Ballard Spahr

Summary

The Security and Exchange Commission last month released a Risk Alert to notify municipal advisors of key compliance issues. The SEC's Division of Examinations adds client disclosure concerns to the list of most frequently observed compliance failures. Additionally, the Division warns that it intends to have a sharper focus on core standards of conduct and duties required of municipal advisors.

The Upshot

- Municipal advisors are required to register with both the SEC and the Municipal Securities Rulemaking Board. The SEC requires municipal advisor firms to file Form MA as well as a Form MA-I for each natural person engaging in municipal advisory activities. The MSRB requires firms to file Form A-12 as well as to pay an initial and annual fee.
- Municipal advisors should ensure that policies and procedures are up to date and accurately reflect recordkeeping requirements for specific record types.
- Municipal advisors must establish a supervisory system reasonably designed to achieve compliance and, at a minimum, provide for the establishment, implementation, maintenance, and enforcement of written supervisory procedures.

The Bottom Line

The SEC's patience, even with small entities, can decrease after it has issued multiple alerts about a particular area of concern. Municipal advisors should review policies and procedures to avoid negative findings in future examinations.

On August 22, 2022, the SEC's Division of Examinations (the Division) released a Risk Alert to notify municipal advisors of key compliance issues. The alert follows the Division's 2017 release and reiterates old concerns as well as raises new ones. While the 2017 release addressed deficiencies found in the areas of municipal advisor registration, recordkeeping, and supervision, this latest alert adds client disclosure concerns to the list of most frequently observed compliance failures. The Division warned that it intended to have a sharper focus on core standards of conduct and duties required of municipal advisors.

Filings and Fees

Prior to engaging in municipal advisory activities, municipal advisors are required to register with both the SEC and the Municipal Securities Rulemaking Board (MSRB). Registration with the SEC requires municipal advisor firms to file Form MA as well as a Form MA-I for each natural person associated with the municipal advisor who engages in municipal advisory activities. Registration with the MSRB requires firms to file Form A-12 as well as to pay an initial and annual fee. Forms MA and A-12 must be updated annually. In addition, all of the aforementioned registration forms must be updated promptly in the event of a material change to information previously provided, including filing new Forms MA-I for newly associated persons and updating existing Forms MA-I to reflect any departing associated persons. The Division exam staff found that registration forms often were incomplete, inaccurate, and not updated to reflect changes or disclosures as required. Staff also found that some municipal advisors failed to properly pay the initial and annual MSRB registration fees.

Municipal advisors should conduct annual reviews of their filings to ensure accuracy and require associated persons to certify that their personal information is current. Policies and procedures should be updated, as needed, to inform associated persons of their duty to timely provide information on material changes. This annual review should be documented and can be incorporated into the required annual review of the municipal advisor's supervisory system under MSRB Rule G-44. Similarly, payment of filing fees and of the MSRB's annual municipal advisor professional fee under MSRB Rule A-11 should be reviewed annually.

Recordkeeping

Exchange Act Rule 15Ba1-8 and MSRB Rules G-8 and G-9 impose various bookkeeping and record retention requirements with which municipal advisors' compliance was found to be lacking. Failure to maintain the following types of records were specifically noted:

- originals or copies of written communications relating to municipal advisory activities, particularly electronic communications including messages transmitted via personal email, text, and instant messenger;
- financial and accounting documents;
- records concerning compliance with MSRB Rule G-44, discussed below;
- written consents to service of process from associated persons;
- copies of documents created by the municipal advisor that were material to making a recommendation to a municipal entity or obligated person; and
- written agreements entered into by the municipal advisor with municipal entities and their employees, obligated persons, or otherwise relating to the municipal advisor's business.

Municipal advisors should ensure that policies and procedures are up to date and accurately reflect recordkeeping requirements for specific record types. Each item of required information should be easily located in a logical filing system and preserved in an appropriate manner in conformity with applicable MSRB and SEC record retention requirements. Testing and monitoring to ensure that records are correctly made, approved, and retained should be conducted, potentially as part of or in conjunction with the required annual review of the municipal advisor's supervisory system under MSRB Rule G-44.

Supervision

MSRB Rule G-44 requires municipal advisors to establish a supervisory system reasonably designed to achieve compliance and, at a minimum, provides for:

- the establishment, implementation, maintenance, and enforcement of written supervisory procedures (WSPs) that are reasonably designed to achieve compliance with applicable rules; and
- the designation of one or more municipal advisory principals to be responsible for supervision.

Furthermore, municipal advisors must do the following:

- implement processes to establish, maintain, review, test and modify written compliance policies and WSPs and review such supervisory systems at least annually;
- designate a chief compliance officer; and
- have its chief executive officer (or equivalent) certify in writing annually to the presence of these supervisory requirements.

Division staff found that some municipal advisors did not have WSPs in place and, where they did exist, such written policies were ineffective to ensure compliance with applicable rules. The alert also noted that WSPs were often not amended to reflect rule changes, e.g., MSRB Rule G-42, which establishes duties of care and loyalty and governs conflicts of interest, and MSRB Rule G-40 regarding advertising, which became effective in 2019. Failures to test supervisory systems annually or perform chief executive officer certifications were also noted.

Municipal advisors should develop effective supervisory systems that include, among other things, principal supervision, systematic maintenance of approvals, and a process to monitor and implement regulatory change. That supervisory system should be specifically described in the firm's WSPs. On an annual basis, the chief compliance officer should conduct or oversee testing and monitoring of WSPs and produce a report to the chief executive officer to support the required annual certification under Rule G-44(d).

Client Disclosure

MSRB Rule G-42 requires municipal advisors to provide their municipal entity or obligated person client with full and fair disclosure of all material conflicts of interest. Such disclosure must be made in writing and provide sufficient detail of the nature of the conflict, potential consequences, and how the municipal advisor will manage or mitigate each conflict. To the extent that a municipal advisor determines, following reasonable diligence, it has no known material conflicts, it must provide a written statement to that effect to the client. The municipal advisor must also maintain evidence of each municipal advisory relationship and update such documentation to reflect material changes.

Frequently cited deficiencies included a failure to disclose or to timely disclose conflicts of interest, for example, related to fee-splitting or contingent compensation arrangements. Municipal advisors also were cited for not providing a "no known material conflicts of interest" statement where applicable. Failures to adequately document client relationships also were found.

The client engagement process, which should encompass timely engagement documentation, including an accurate scope of services and any limitations thereto, as well as full and timely disclosure of conflicts, should also be covered in the municipal advisor's WSPs and be part of the annual compliance review and testing reporting process.

Core Duties and Standards of Conduct

While the Risk Alert did not delineate which of the core standards of conduct and duties required of municipal advisors it intends to focus more sharply upon in future examinations, the SEC's publicly announced enforcement activities and SEC staff statements at its annual outreach forums and in other venues can provide some sense of where staff priorities may lie. Substantive municipal advisor duties, beyond those described above, discussed during the three most recent joint SEC-MSR--FINRA compliance outreach programs for municipal advisors included documenting and fulfilling the municipal advisor's scope of services; potential municipal advisor duties during the new issue pricing process; role of municipal advisors in bank loans/direct placements; and the basis for the municipal advisor's own recommendations or its review of third-party recommendations. Recently filed SEC enforcement actions alleging breach of a municipal advisor's fiduciary duty involve duties with respect to the municipal advisor's role in disclosures in the offering document and the municipal advisor's participation in the preparation of allegedly fraudulent financial projections. Municipal advisors should consider how they address these or similar scenarios in their WSPs and compliance policies.

Key Takeaways

Municipal advisors should note that the SEC's patience, even with small entities, can decrease when it has issued multiple alerts about a particular area of concern and should take this opportunity to review policies and procedures in order to avoid negative findings in future examinations. As a foundation, municipal advisors should focus on addressing the following questions for each area of concern:

- Who is responsible for compliance?
- How and where are supervisory systems documented?
- How is compliance with documented WSPs evidenced?
- How frequently is compliance tested and monitored?
- Have written supervisory procedures and compliance manual been updated to address these topics?

by Lisa Brice, Scott Diamond, Teri Guarnaccia, Ernesto Lanza, Kimberly Magrini

September 9, 2022

Ballard Spahr LLP

NFMA Advanced Seminar on Public Power.

The NFMA will hold an Advanced Seminar on Public Power in Denver, the home of its newest society, MARMOT, on **November 3 & 4**. To view the program, click here. To register for this event, click here.

CDFA Infrastructure Finance Learning Series: Reviewing the Guidance

Tuesday, October 4, 2022 1:00 PM – 4:00 PM Eastern

Experts will join this session to provide a detailed review of the recently released guidance on the

Infrastructure Investment and Jobs Act. Presentations will cover the steps to apply and provide an overall timeline for when communities can expect to access funding. Presentations will also take a closer look at the top five funding categories to see how dollars are beginning to flow to these project areas. This session will continue the discussion around the utilization of IIJA funds in coordination with local funding through bond finance, tax credit programs, tax increment financing, and other development finance approaches to cover long-term project costs.

Click here to learn more and to register.

CDFA // BNY Mellon Development Finance Webcast Series: Financing Tools to Invest in Clean Energy

Tuesday, October 18, 2022 2:00 PM – 3:00 PM Eastern

Investing in clean energy is a critical component of building a sustainable economy and results in a wide range of benefits: increased grid reliability, lower long-term energy costs, better air quality, job opportunities, and more. Many financing tools are available for state, local, and tribal governments to develop clean energy strategies and achieve environmental goals. During this installment of the CDFA // BNY Mellon Development Finance Webcast Series, experts will provide an overview of the resources and financing tools – such as PACE financing, green bonds, and energy tax credits – that can help communities seize the benefits of investing in clean energy.

Click here to learn more and to register.

Inflation Reduction Act: Implications for Solar and Wind Tax Credit Equity Markets - Jones Walker

President Biden signed into law the Inflation Reduction Act on August 16, 2022 (IRA). The IRA included a number of provisions to strengthen the investment tax credit (ITC) and production tax credit for wind projects (PTC).

Elimination of Phasedowns

Under prior law, the ITC and PTC were subject to a gradual, phased reductions of the applicable credit percentage, including elimination of the PTC for projects after 2021. For the PTC, projects that began construction after December 31, 2021, were ineligible for the PTC altogether, while projects that began construction after December 31, 2016, but before December 31, 2021, were allowed a "phased down" PTC, tied to the begun construction date.

Similarly, the ITC was set to phasedown from a 30% rate for projects that began construction before January 1, 2023, phasing down to a 22% rate for projects that began construction during 2023.

Under the IRA, solar projects beginning construction in 2022, 2023, and 2024 will be eligible for the full 30% ITC and will no longer be subject to the phasedowns described above.

For wind projects qualifying for the PTC, the IRA extends the construction commencement deadline to December 31, 2024.

It is important to note that for projects that were placed in service prior to 2022, the IRA does not retroactively change the credit rate available for those projects. Thus, projects placed in service in 2021 will remain subject to the phasedowns and will not qualify for additional credits. On the other hand, projects placed in service in 2022, including projects placed in service before passage and enactment of the IRA, may be able to take advantage of higher ITC and PTC rates and thus qualify for additional credits.

Eligibility of Interconnection Costs and Storage Property for ITC

Historically, the ITC was limited solely to costs (or, in a lease passthrough structure, value) associated with energy-producing equipment. Thus, interconnection costs have traditionally been ineligible for the ITC. However, the IRA expanded the definition of "energy property" eligible for the ITC, to include "amounts paid or incurred by the taxpayer for qualified interconnection property…"

"Qualified interconnection property" is defined by the IRA to mean tangible property (other than property associated with a qualified microgrid controller), which: (i) is part of an addition, modification, or upgrade to a transmission or distribution system which is required at or beyond the interconnection point; (ii) is either constructed, reconstructed, or erected by the taxpayer, or the cost of construction, reconstruction, or erection is paid or incurred by the taxpayer; and (iii) the original use of which commences with a utility pursuant to an interconnection agreement.

Additionally, batteries historically were only eligible for the ITC to the extent incorporated into an ITC project. Thus, standalone storage systems were traditionally ineligible for the ITC. However, the IRA amends the definition of "energy property" to now include certain "energy storage technologies," defined generally as property that receives, stores, and delivers energy for conversion to electricity.

Transferability of Credits

The IRA now permits a one-time transfer of tax credits to a taxpayer who is not related to the transferor (within the meaning of Section 267(b) or 707(b)(1) of the Code), beginning in 2023. IRA further provides that amounts received as consideration for such transfer shall be excluded from the transferor's gross income. A transferee may not further transfer the credits. Credits which are subject to a credit carryforward or credit carryback under Section 39 of the Code are not eligible for transfer.

Though the transferability rules provide for further flexibility, a number of significant questions remain, including the potential effects transferability may have on the tax equity market. For example, while the IRA clearly states that a credit may only be transferred once, presumably, this rule would not restrict a transferee that is a passthrough entity from further allocating the transferred credit to its partners or shareholders, but this issue is not specifically addressed in the IRA text.

While transferability provides additional flexibility in structuring investments and provides the potential to avoid exit costs associated with traditional tax equity investments, it is important to note that transferability may limit the amount of equity a project sponsor is able to raise. For example, pricing in the ITC space is driven, in large part, by the desire to monetize accelerated depreciation deductions. Thus, it is likely that traditional tax equity structures will remain prevalent in ITC transactions. On the other hand, the PTC, which is calculated based upon production rather than cost, is not dependent upon depreciation, and therefore is more likely to benefit from transferability.

Credit Carryforward/Carryback

IRA extends the existing one-year credit carryback period under Section 39 to three years, and the credit carryforward period from 20 years to 22 years. With respect to PTCs, this appears to apply only to qualified facilities placed in service after December 31, 2022.

New Sections 45Y and 48E

As noted above, the IRA extends the PTC until December 31, 2024, which effectively phases out the PTC beginning in 2025. The IRA similarly includes a phaseout for the ITC for projects that begin construction after 2024. However, the text of IRA includes new Code Sections 45Y (Clean Electricity Production Credit, or CEPTC) and 48E (Clean Electricity Investment Credit, or CEITC), which effectively replace the PTC and ITC beginning in 2025.

The CEPTC and CEITC each provide for a base credit along with an alternative rate if the project satisfies certain requirements.

By Nicholas James Irmen, Jonathan Katz & Shawn J. Daray

Jones Walker LLP

Thursday, September 1, 2022

[Fifth Circuit Condemns Texas Transmission ROFR Law on Constitutional Grounds: Bracewell]

On August 30, 2022, the Fifth Circuit issued an [opinion] condemning a far-reaching Texas law on electric transmission right-of-first-refusal ("ROFR"). The decision concerns a 2019 Texas law that restricted the ability to build, own, or operate new transmissions lines to only those entities already owning transmission facilities in the same region of the state (for example, MISO or SPP). Prior to Texas adopting the law, NextEra sought to construct the Hartburg Sabine transmission project, a transmission project planned in Texas (but outside of ERCOT) pursuant to MISO's Order No. 1000 process. MISO awarded NextEra the rights to construct the project as part of that competitive process, and those rights were subsequently "derailed" by the new Texas ROFR law.

The court's action rested on Dormant Commerce Clause grounds. Siding with NextEra and the U.S. Department of Justice's Antitrust Division, the court found that the lower court erred in dismissing NextEra's dormant commerce clause arguments—according to the court, such arguments could withstand a challenge of failure to state a claim.

In the thorough decision, the court reviewed FERC's efforts in Order No. 1000 to balance federal and state jurisdiction, discusses intrastate versus interstate utility facilities, and addresses Texas ROFR law's discriminatory effect on those not doing business within Texas. The court reasons that because the "electricity grid is on its own an interstate market, state protectionist measures regulating its instrumentalities run a much greater risk of harming out-of-state interests—the ability of companies to compete, the prices consumers pay—than regulations on" other entities like retail wine stores, dairies, or waste processing facilities.

Dormant Commerce Clause and Other State ROFR Laws

The lower court had dismissed the case for failure to state a claim and the Fifth Circuit decision reverses the lower court's determinations, in part, and sends the case back for further litigation to determine whether Texas “has no other means to ‘advance[] a legitimate local purpose.’” The decision includes a discussion comparing the Texas ROFR to state transmission ROFRs in Nebraska, Oklahoma, North Dakota, Minnesota, and South Dakota. According to the Fifth Circuit, the Texas ROFR is far more restrictive than those found in other states.

In particular, the Fifth Circuit distinguishes between the Texas ROFR and the Minnesota ROFR law that was at issue in a previous Eighth Circuit decision in *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020). According to the Fifth Circuit, the Minnesota ROFR law upheld in *LSP Transmission* “does not go nearly as far as the Texas law in banning new entrants outright.” Specifically, the Fifth Circuit explains that the Texas ROFR provides no time limit on the incumbent transmission owner to exercise its rights. In contrast, the Minnesota ROFR law provides the incumbent provider 90 days to exercise its ROFR rights. In addition, the Texas ROFR law requires competing developers to own existing certificated facilities in the relevant market to the proposed transmission project, something that is not present in the Minnesota ROFR law.

The relevant statute, Tex. Util. Code § 37.-56(e), provides:

A certificate to build, own, or operate a new transmission facility that directly interconnects with an existing electric utility facility or municipally owned utility facility may be granted only to the owner of that existing facility. If a new transmission facility will directly interconnect with facilities owned by different electric utilities or municipally owned utilities, each entity shall be certificated to build, own, or operate the new facility in separate and discrete equal parts unless they agree otherwise.

Recent, Related FERC Action on ROFRs

The Fifth Circuit’s decision comes at a time when FERC has been considering making significant changes to its treatment of ROFRs. In its April 21, 2022 Notice of Proposed Rulemaking on transmission planning (“Transmission NOPR”) in Docket No. RM21-17-000,1 FERC appears to concede that its earlier elimination of the federal ROFR in Order No. 1000 may have been counterproductive and served to reduce investment occurring through the regional planning process. As a result, the Transmission NOPR proposes to allow incumbent transmission providers to retain a federal ROFR conditioned on a demonstration that the incumbent has established a qualifying joint ownership arrangement with an unaffiliated non-incumbent transmission developer or other unaffiliated entity. The deadline for initial comments in the Transmission NOPR proceeding was August 17, 2022. The ROFR proposal in particular attracted significant attention from commenters, including many supporting the proposal and many opposing the proposal. Among opponents included the U.S. Department of Justice and Federal Trade Commission (the “Agencies”). The Agencies submitted joint comments and expressed concern about the proposed reinstatement of a federal ROFR: “By its nature, a ROFR, conditional or otherwise, limits who can build transmission projects and is thus a regulatory barrier to entry. Although at this time competition may not be feasible in transmission planning due to the unique characteristics of the industry, recent experience in some RTOs underscores that competition in the design and construction of specific projects can work and benefits customers.” Agencies Comments at p. 11(Aug. 17, 2022). Reply comments in the proceeding are due on or before September 19, 2022.

Bracewell LLP – Catherine P. McCarthy, Rachael Novier Marsh, Tyler S. Johnson and Boris Shkuta

September 6 2022

[First Circuit Holds that Fifth Amendment Takings Claims Must be Paid in Full: Dechert]

The U.S. Court of Appeals for the First Circuit recently ruled in the Puerto Rico bankruptcy case that Fifth Amendment takings claims cannot be discharged or impaired by a bankruptcy plan. As a matter of first impression in that circuit, the Court disagreed with the Ninth Circuit and held that former property owners affected by prepetition takings must be paid in full.

In re Fin. Oversight & Mgmt. Bd., 41 F.4th 29 (1st Cir. 2022)

The Puerto Rico restructuring is one of the largest and longest-running public bankruptcy cases. After nearly five years of litigation, the Financial Oversight and Management Board of Puerto Rico (the "**Board**") secured the confirmation of a plan of adjustment (the "**Plan**") for the Commonwealth of Puerto Rico (the "**Commonwealth**") under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).

In confirming the Plan, however, the District Court for the District of Puerto Rico ruled against the Board in holding that prepetition claims arising under the Takings Clause of the United States Constitution cannot be impaired or discharged. The Board appealed that ruling. On July 18, 2022, as a matter of first impression, the First Circuit affirmed.

Background

Former property owners filed proofs of claim in Puerto Rico's bankruptcy cases seeking just compensation for prepetition takings of their private property (the "**Takings Claimants**"). Some of those claims arose from proceedings under the Commonwealth's "quick take" eminent domain statute, which allows the Commonwealth to acquire private property by depositing the estimated compensation amount in a Puerto Rican local court and permits the former property owner to sue for additional compensation. Other claims arose from the Commonwealth's takings made without a deposit.

In its plan, the Board proposed to treat Takings Claims as general unsecured claims. Claims for which the Commonwealth had made a prepetition deposit would be considered secured up to the amount of the deposit and entitled to full recovery of that amount. Any difference between the deposited amount and the yet-to-be-determined just compensation would be considered unsecured.

The Takings Claimants objected to that construct, and the District Court held that their treatment in the Plan violated the Takings Clause. The Court ruled that the Takings Clause creates an "irreducible entitlement to just compensation," and thus the impairment of prepetition takings claims was impermissible.

The Board amended the Plan to comply with the District Court's ruling, while preserving its right to appeal the confirmation order on the grounds that prepetition takings claims may be impaired and discharged.

The First Circuit denied the Board's appeal, holding that just compensation guaranteed by the Takings Clause may not be adjusted by a bankruptcy plan.

The Court noted that the Takings Clause itself establishes the quantum of compensation that must be provided in the event of a taking. It referenced Supreme Court cases holding that "just compensation" means the "the full monetary equivalent of the property taken" to "put [the owner] in the same position monetarily as he would have occupied if his property had not been taken." The Court held that this constitutional guarantee of "the full monetary equivalent" cannot be altered in bankruptcy.

The First Circuit rejected the Board's argument that takings claims may be impaired because the ability of a debtor in bankruptcy to restructure its debts itself has a constitutional basis, flowing from the Bankruptcy Clause of the Constitution. The Court explained that most laws are passed by Congress pursuant to some constitutional authority, but this does not authorize acts of congress to trump other constitutional provisions. The Court held that "[t]he bankruptcy laws are subordinate to the Takings Clause," and the express constitutional authority to enact uniform laws on the subject of bankruptcies cannot overcome the requirements of the Fifth Amendment.

The Court also rejected the Board's arguments that payment of just compensation is a mere monetary remedy for a constitutional violation, similar to any other monetary award given as compensation for constitutional violations and, thus, subject to adjustment. Unlike with other constitutional violations for which compensation may be an appropriate remedy, "in the case of the Takings Clause, the Constitution clearly spells out both a monetary remedy and even the necessary quantum of compensation due. Accordingly, the denial of adequate (read: just) compensation for a taking is itself constitutionally prohibited."

Accordingly, the First Circuit declined to follow the majority opinion in *In re City of Stockton*, 909 F.3d 1256 (9th Cir. 2018), where the Ninth Circuit held that takings claims are not different to other claims arising from constitutional violations that are routinely adjusted in bankruptcy proceedings. The First Circuit found Judge Friendad's dissent in *City of Stockton* more persuasive. Judge Friendad concluded that the Takings Clause afforded just compensation special protection, such that "claims for just compensation should be excepted from discharge, so that they survive any bankruptcy intact."

The First Circuit also rejected the Board's arguments that takings claims may be modified by operation of law in other ways, as when they are judged to be time-barred or are waived or settled, all without violating the Fifth Amendment. The Court clarified that the enforcement of a statute of limitations and the settlement or waiver of claims are litigation decisions under the control of the takings claims holder. The same cannot be said for bankruptcy impairment or discharge. In addition, the Court explained that the Board was conflating what makes the denial of just compensation substantively unlawful with what may make a claim unavailable for procedural reasons.

The Court also refused to accept the Board thesis that a payment-in-full rule would pose significant challenges for future municipal bankruptcies. The Court reasoned, to the contrary, that allowing the impairment or discharge of takings claims, would create a perverse incentive for municipalities or the government to take private property and then restructure the related claims.

What's Next?

The First Circuit may not have had the last word. Given the split between the First and Ninth Circuits' decisions, the Board recently announced its intention to file a petition for writ of certiorari to the United States Supreme Court.

Dechert LLP – Shmuel Vasser, David A. Herman and Isaac D. Stevens

S&P U.S. Local Governments Credit Brief: California Counties And Municipalities Means And Medians

Overview

California counties and municipalities (or local governments [LGs]) have maintained or improved credit quality during the past year through a combination of conservative budgeting practices, better-than-expected local revenue performance, and the receipt of stimulus funds to aid recovery from the COVID-19 pandemic. However, macroeconomic conditions–including high inflation and the rising risk of recession–are headwinds for rated issuers, and S&P Global Ratings is focused on labor negotiations as employees face the prospect of negative wage growth in real terms absent larger-than-typical compensation increases. We expect growing tax bases and very strong budgetary flexibility stemming from recent positive operating results to partly mitigate these challenges.

S&P Global Ratings maintains ratings on 259 LGs within the state. Overall, LG credit quality remained stable, with 5% experiencing rating actions since October 2021. During this period, we took seven positive rating actions and revised six outlooks to positive on general obligation or general-fund-secured bonds with no negative rating actions. In addition, almost 99% of the ratings have a stable outlook. We have negative outlooks on our ratings for one county (Madera County) and two municipalities (Anaheim and Torrance), and a positive outlook on the ratings for one municipality (Vallejo). Although we revised the outlook to negative on 3% of our ratings on California LGs in 2021, we revised most of those outlooks to stable in 2022 based on the LGs' resilience through the pandemic and the credit pressures that we anticipated at the outset either not materializing or being mitigated by the receipt and use of stimulus funds.

Continue reading.

7 Sep, 2022

Hilltop's Kozlik Sees Opportunities in Mass Transit.

Tom Kozlik, head of municipal research and analytics at Hilltop Securities, doesn't expect a record amount of volume in munis this year. He speaks with Taylor Riggs on "Bloomberg Markets: The Close."

Watch video.

Bloomberg Markets: The Close

September 7th, 2022

Municipal Bonds Suddenly Look Cheap. Some Are Tax Traps.

Investors are bailing out of municipal bond funds at a record pace, but bargain hunters should beware of some potential pitfalls

When the investing herd stampedes in one direction, it can pay to go the opposite way—but only if you step carefully.

Consider municipal bonds, long cherished by individuals looking to earn tax-free investment income. Their prices have been falling this year as interest-rates rise and bonds overall have entered a bear market.

That has many investors on the run. In the first eight months of 2022, investors have pulled an estimated $83 billion from mutual and exchange-traded funds specializing in municipal debt, according to Refinitiv Lipper. That's more than in any full year on record.

Continue reading.

The Wall Street Journal

By Jason Zweig

Sept. 9, 2022

Want to Learn More About the NFMA?

Individuals wishing to consider membership in the NFMA are invited to listen to **NFMA 101**.

Click here to view the Webinar.

August Edition of GFR Now Available.

Dive into the August edition of Government Finance Review to learn about bridging political divides, entrepreneurial thinking in local government, internal controls, legal financing, and much more.

READ ONLINE

Recently Enacted Laws Provide Financial Assistance to Municipalities in Maine: Bernstein Shur

What You Need to Know

There have been two recent updates to Maine state law that provide financial assistance to municipalities engaged in specific activities related to adult-use marijuana and affordable housing.

Adult-Use Marijuana

The Maine State Legislature recently enacted a law that added a provision to the Adult Use Marijuana Public Health and Safety Fund (the fund). This new provision allows money credited to the fund to be used to reimburse municipalities for qualifying expenses incurred as a result of opting into the Adult Use Cannabis Program. This means that municipalities that permit the operation of some or all adult-use marijuana establishments are eligible for up to $20,000 in reimbursement.

For an expense to qualify for reimbursement, it must meet two requirements:

1. The expense must have been incurred within three years of the date that the municipality voted to opt into the Adult-Use Cannabis Program.
2. The expense must be associated directly with the municipality's process of opting into the Adult-Use Cannabis Program.

In the new provision, a "qualifying expense" is defined as: "legal fees and costs associated with the drafting and adoption of a warrant article or the adoption or amendment of an ordinance, including the conduct of a town meeting or election, by a municipality that opted to permit the operation of some or all adult-use cannabis establishments within the municipality.

In order for the Office of Cannabis Policy to make a determination that the expenses qualify for reimbursement, municipalities will need to provide thorough records of the expenses incurred. The Office of Cannabis Policy has recently launched a portal for municipalities to request reimbursement, which will be processed on a first-come, first-served basis.

Affordable Housing

The recently enacted affordable housing law— often referred to as L.D. 2003—provides financial assistance to municipalities to support municipal ordinance development, technical assistance, public input, community engagement, and regional coordination between municipalities.

The process to allocate these funds will involve a competitive grant application, which has not yet been released by the Maine Department of Economic and Community Development ("DECD"). Based on the most recent publication from DECD, the rulemaking process will begin in Fall 2022.

Next Steps

Municipalities should consider taking the following steps to take advantage of these recent updates in Maine state law:

- Create a profile in the Office of Cannabis Policy portal. As noted above, requests will be processed on a first-come, first-served basis.
- Prepare a list of your municipality's qualifying expenses under both programs.
- Continue to watch for the release of the housing opportunity fund application.

We will update municipalities as we learn more about both of these opportunities for financial assistance.

Bernstein Shur – Amanda Methot, Philip R. Saucier and Shoshana Cook Mueller

September 7 2022

Mitigate Your Tax Bill With This Muni ETF.

While the key benefits of exchange traded funds such as lower costs, trading flexibility, transparency, and tax efficiency are known to many investors, not everyone is aware that ETFs also may help reduce tax bills through a strategy called tax-loss harvesting. Tax-loss harvesting is a strategy that can be employed with taxable accounts to sell losing positions to offset capital gains.

This can come in handy during volatile markets. Market turbulence can be a perfect time to reassess a portfolio. Capitalizing on losses can help offset future gains while also offering the chance for rebalancing.

“Investment losses can be hard to swallow, but tax-loss harvesting lets you take the losses of one investment to offset the gains of another,” according to American Century Investments. “Of course, taxes alone shouldn’t drive investment decisions. But harvesting losses in concert with your overall investment plan could help with tax planning when you are rebalancing your portfolio.”

In addition to adopting this strategy, investors worried about paying higher taxes may also want to consider the American Century Diversified Municipal Bond ETF (NYSEArca: TAXF), which seeks to provide consistent tax-free income by employing an active, research-driven process that draws from across the municipal bond universe and adjusts exposure depending on prevailing market conditions. As with local government bonds in the U.S., credit risk is minimized with close to 80% of the fund ranging in debt rated at AAA to A (as of May 31).

The fund attempts to top the S&P National AMT-Free Municipal Bond Index, and by way of being actively managed, it can capitalize on credit opportunities by allocating up to 35% of its lineup to high-yield munis. While junk-rated municipal bonds reward investors with higher yields due to elevated credit risk, these bonds are usually less volatile than high-yield corporates.

TAXF also features a low expense ratio of 29 basis points.

ETF TRENDS

by JAMES COMTOIS

SEPTEMBER 6, 2022

DMB: Municipal Rated Bond CEF With A Low But Steady Yield

Summary

- DMB provides investors a monthly federal tax-exempt dividend by investing in high-yielding municipal bonds, with an emphasis on infrastructure projects.
- Due to a looming recession, many investors find municipal bond funds like DMB attractive due to their local government appeal and tax-exempt status.
- DMB’s steady monthly yield generated for the past few years is almost certain to stay constant as it is covered by the average coupon earned on its portfolio.

Continue reading.

Seeking Alpha

Sep. 06, 2022

Top 4 Municipal New York City Bond Funds.

KEY TAKEAWAYS

- New York City bond funds primarily invest in municipal districts and are used to build public projects such as highways, hospitals, and parks.
- These municipal bonds provide long-term, steady capital appreciation with a low degree of volatility.
- Generally, interest income earned on these bonds are also tax-exempt on local, state, and federal levels.

Continue reading.

INVESTOPEDIA

By STEVEN NICKOLAS Updated September 05, 2022

- SEC Municipal Advisor Examination Observations: Mayer Brown
- SEC Approves MSRB Amendments to CUSIP Application Process.
- Regulation Implementing the Adjustable Interest Rate LIBOR Act: SIFMA Comment Letter
- Will One PFAS Consequence Be Cities and Towns Getting Out of the Water Business? – Mintz
- Red State Republicans' War on ESG Will Have Losses on Both Sides.
- Fundamentals of Local Government Budgeting: GFOA eLearning Course
- *Town of Indian River Shores v. City of Vero Beach* – District Court holds that town plausibly alleged existence of a "horizontal market allocation" in violation of the Sherman Act related to a service territory agreement between city and county that allegedly foreclosed town from obtaining essential water services from county in the future.
- And Finally, I Dunno, Coast Guard? is brought to us this week by *Bohanon v. City of Indianapolis*, in which a bar fight got just a wee bit out of hand. Two individuals engaged another in the bar, "put him in a chokehold" and "punched him several times in the head." The chokehold caused [the individual] to lose consciousness. The two [assailants] then dragged him by his feet, face down, out of the pub and into the parking lot. Once outside, the [assailants] kicked the still-unconscious [individual] in the back and stepped on his head, grinding his face into the pavement. [The individual] briefly regained consciousness but was stomped back into the ground and knocked unconscious again." "When he regained consciousness, he was covered in blood and the cash from his wallet was gone." Well that hardly seems sporting. Someone should have called the cops. They were there, you say? In what capacity? They participated? In breaking up the fight? No? No? So you're saying… Oh. Crap. Oh crap, indeed.

MUNICIPAL ORDINANCE - ALABAMA

City of Center Point v. Atlas Rental Property, LLC

Supreme Court of Alabama - August 26, 2022 - So.3d - 2022 WL 3700376

Landlords sought preliminary and permanent injunctive relief from city ordinance requiring certificates of occupancy for rental-housing units.

The Circuit Court entered preliminary injunction enjoining ordinance's enforcement. City appealed.

The Supreme Court held that:

- The Alabama Uniform Residential Landlord and Tenant Act (AURLTA) expressly preempted the ordinance;
- Landlords demonstrated that they would suffer irreparable harm in the absence of a preliminary injunction; and
- Balance of harms favored entering a preliminary injunction.

Alabama Uniform Residential Landlord and Tenant Act (AURLTA) expressly preempted city ordinance requiring certificates of occupancy for rental-housing units; despite argument that the AURLTA governed only the landlord-tenant relationship, the AURLTA expressly prohibited ordinances relative to residential landlords, rental housing codes, or the rights and obligations governing residential landlord and tenant relationships.

Landlords alleging that the Alabama Uniform Residential Landlord and Tenant Act (AURLTA) preempted city ordinance requiring certificates of occupancy for rental-housing units demonstrated that they would suffer irreparable harm in the absence of a preliminary injunction, despite argument that landlord's alleged harm could remedied through an award of monetary damages; it was evident from the nature of the requirements of the ordinance, as well as the nature of the penalties for compliance with the ordinance, that it would be difficult, if not impossible, to accurately calculate the future damages that the landlords might suffer if the ordinance were allowed to stand, notwithstanding its determination that the ordinance was preempted by the AURLTA.

Balance of harms favored entering a preliminary injunction enjoining enforcement of city ordinance requiring certificates of occupancy for rental-housing units; city was attempting to regulate an area of the law that the legislature intended the Alabama Uniform Residential Landlord and Tenant Act (AURLTA) to exclusively occupy, and city had other avenues to protect the health and safety of its citizens, such as building regulations that governed the conditions and maintenance of all property, buildings, and structures within the city, not just rental-housing units.

BREACH OF CONTRACT - CALIFORNIA

CAM-Carson, LLC v. Carson Reclamation Authority

Court of Appeal, Second District, Division 8, California - August 23, 2022 - Cal.Rptr.3d - 2022 WL 3593158 - 2022 Daily Journal D.A.R. 8974

Commercial real estate developer brought action against city and city reclamation authority for breach of contract and breach of the covenant of good faith and fair dealing, alleging that developer entered contracts with defendants to develop 40-acre site after defendants remediated soil and groundwater contamination, installed infrastructure, and built roads, that defendants engaged in gross mismanagement and malfeasance that created massive funding deficit which derailed project, causing damages to developer of over $80 million, and that city was alter ego of reclamation authority.

City demurred to the complaint. The Superior Court sustained demurrer. Developer appealed.

The Court of Appeal held that:

- The alter ego doctrine may be applied to a government entity in a case where the facts justify an

equitable finding of liability;
- Developer alleged that city and reclamation authority were operated with integrated resources in pursuit of single business purpose, that city dominated reclamation authority such that reclamation authority had no separate mind, will or existence of its own, and that inequitable result would follow if acts in question were treated as those of reclamation authority alone, as required to state claim against city under alter ego theory for breach of contract; and
- Developer alleged that city and reclamation authority were alter egos and that developer and city were also parties to development agreement, as required to state claim against city for breach of implied covenant of good faith and fair dealing.

ANTI-TRUST - FLORIDA

Town of Indian River Shores v. City of Vero Beach

United States District Court, S.D. Florida - August 23, 2022 - F.Supp.3d - 2022 WL 3593152

Town brought action against city, alleging antitrust violations of the Sherman Act arising from a service territory agreement between city and county that foreclosed town from obtaining essential water services from county in the future.

City moved to dismiss.

The District Court held that:

- Legal interests were sufficiently adverse to establish a substantial, ripe controversy;
- Town made sufficient showing of hardship for ripeness;
- Town plausibly alleged existence of a “horizontal market allocation” in violation of the Sherman Act;
- “Clear articulation” requirement for state-action immunity was not satisfied; and
- County was not a required party that had to be joined in the action.

Parties’ legal interests in town’s action against city, alleging anticompetitive harm under the Sherman Act arising from a service territory agreement between city and county that foreclosed town from obtaining essential water services from county in the future, were sufficiently adverse to establish a substantial, ripe controversy that was fit for judicial decision, irrespective of whether city ultimately decided to withhold its approval for services contract between town and county; town alleged existence of veto right implicating antitrust liability, as city allegedly engaged in ongoing monopolistic abuse of town by reducing competition for essential water services, and fact that parties had exhausted extensive dispute resolution procedures demonstrated parties’ enduring disagreement.

Town made sufficient showing of hardship, as an element of ripeness analysis, in action against city, alleging anticompetitive harm under the Sherman Act arising from a service territory agreement between city and county that foreclosed town from obtaining essential water services from county in the future, where town showed that putting the case on hold pending future action by the city, exercising its alleged right under the agreement to refuse to allow tow to obtain essential water services from county, could force it to choose either between continuing to receive essential water services from city or potentially leaving residents without service.

Town plausibly alleged existence of a “horizontal market allocation” in violation of the Sherman Act related to a service territory agreement between city and county that allegedly foreclosed town from obtaining essential water services from county in the future, where town alleged that the agreement provided that county “shall not provide water or sewer service” within city service area without city’s written approval, and that city construed the agreement as creating a permanent territorial allocation for water services that foreclosed city’s existing customers, including town, from ever obtaining competing essential water services from county without city’s consent, which was supported by a city letter to county asserting city’s rights under the agreement.

City’s alleged anticompetitive conduct, based on a service territory agreement between city and county, was not clearly authorized by the state so as to pass the “clear articulation” requirement for state-action immunity from federal antitrust law, in town’s action alleging anticompetitive harm under the Sherman Act due to its being foreclosed by the agreement from obtaining essential water services from county in the future; while the Florida legislature authorized municipalities to develop public utilities for water services, it did not contemplate the alleged anticompetitive conduct that effectively granted one municipality exclusive market control over services of another incorporated municipality when same statute limited exercise of municipal corporate powers within corporate limits of another municipality.

County was not so situated that its absence in town’s case against city, alleging anticompetitive harm under the Sherman Act from service territory agreement between city and county that allegedly foreclosed town from obtaining essential water services from county in the future, and thus, county was not a “required party” within meaning of the joinder rule; while county was party to the agreement that was at issue of the litigation, county had specifically disclaimed any interest in the litigation, and neither party had identified any other reason that would require presence of county in the litigation.

LIABILITY - INDIANA

Bohanon v. City of Indianapolis

United States Court of Appeals, Seventh Circuit - August 22, 2022 - F.4th - 2022 WL 3585003

Bar patron filed § 1983 against city alleging that off-duty police officers had used excessive force, in violation of his Fourth Amendment rights.

After jury entered verdict in patron’s favor, the United States District Court granted city’s motion for judgment as matter of law. Patron appealed.

The Court of Appeals held that city was not subject to municipal liability under § 1983 based on off-duty police officers’ use of excessive force against bar patron.

City was not subject to municipal liability under § 1983 based on off-duty police officers’ use of excessive force against bar patron, even though city’s general order prohibiting officers under influence of alcohol from performing any law enforcement functions contained exception for extreme emergency situations; it was not obvious that policy prohibiting police action while drinking, subject to narrow and specific exception to protect life and limb, would lead off-duty officers to use excessive force, no similar incident—let alone pattern of similar incidents—had occurred since general order was enacted, officers violated city policy regarding use of force, and their actions did not fall within general order’s narrow exception.

MANDAMUS - MINNESOTA

[Spann v. Minneapolis City Council]

Supreme Court of Minnesota - August 24, 2022 - N.W.2d - 2022 WL 3640919

City residents filed a petition for a writ of mandamus, seeking to compel city council and mayor to hire more police officers.

The District Court granted petition by issuing alternative writ requiring the mayor and city council to show cause why they have not employed and funded at least 731 sworn police officers, the equivalent of 0.0017 officers per resident based on the most current census data. City council and mayor appealed. The Court of Appeals reversed. Residents petitioned for further review, which was granted.

The Supreme Court held that:

- City council was obligated under city charter to fund a police force of at least 731 officers and provide for those employees' compensation;
- Mayor had a clear legal duty under city charter to employ 731 officers based on the most recent census data;
- City council did not violate its clear legal duty to provide funding to fund at least 731 officers;
- Residents were not entitled to supplement the record with later-created materials;
- Alternative writ of mandamus did not impermissibly instruct mayor how to exercise hiring discretion; and
- City council was meeting its uncontested clear legal duty under city charter to fund at least 731 sworn police officers, thus precluding issuance of alternative writ of mandamus requiring city council to fund at least 731 officers.

IMMUNITY - MISSOURI

[Poke v. Independence School District]

Supreme Court of Missouri, en banc.July 12, 2022647 S.W.3d 18

School-district employee brought action against district, asserting violation of state statute through alleged retaliation for filing workers' compensation claim.

The Circuit Court granted summary judgment to district. Employee appealed.

On transfer from the Court of Appeals, the Supreme Court held that statute creating private right of action for employees who are discharged, or discriminated against, by employer for exercising workers' compensation rights, read in conjunction with statute defining an "employer" for purposes of Workers' Compensation Law to include governmental entities, waived any sovereign immunity that school district had to employee's action; overruling *Krasney v. Curators of University of Missouri,* 765 S.W.2d 646; and *King v. Probate Division, Circuit Court of County of St. Louis,* 21st Judicial Circuit, 958 S.W.2d 92.

EMINENT DOMAIN - NEW YORK

[Rag Herkimer, LLC v. Herkimer County]

Supreme Court, Appellate Division, Fourth Department, New York - August 4, 2022 - N.Y.S.3d - 2022 WL 3097542 - 2022 N.Y. Slip Op. 04854

Former property owner brought action against county, seeking just compensation for property that county acquired through eminent domain.

Following bench trial, the Supreme Court, Herkimer County, entered judgment, determining the fair market value of the property was $575,600. Former owner appealed.

The Supreme Court, Appellate Division, held that the Supreme Court did not abuse its discretion in accepting comparable sales of county's expert.

Trial court did not abuse its discretion in accepting comparable sales of county's expert rather than comparable sales of former property owner's expert in determining fair market value of owner's property and amount of just compensation award for property that county acquired through eminent domain; even if comparable sales of county's expert left "much to be desired," trial court found that remote comparable sales of owner's expert were derived from strikingly different markets, and trial court could accept sales of county's expert as best basis for evaluating the property and utilize such sales with proper adjustment for differences from owner's property.

EMINENT DOMAIN - NORTH CAROLINA

[Anderson Creek Partners, L.P. v. County of Harnett]

Supreme Court of North Carolina - August 19, 2022 - 876 S.E.2d - 2022 WL 3570917 - 2022-NCSC-93

Developers brought consolidated actions against county seeking refunds for one-time fees paid to county for water and sewer services to be furnished to their future real estate developments, which county imposed as precondition for its concurrence in developers' applications to North Carolina Department of Environmental Quality (DEQ) for water and sewer permits, as well as seeking declaratory judgment that fee ordinance was invalid.

The Superior Court granted county's motion for judgment on the pleadings, and developers appealed. The Court of Appeals affirmed. The Supreme Court granted discretionary review.

The Supreme Court held that:

- Water and sewer fees were impact fees, not user fees;
- As a matter of first impression, water and sewer fees constituted exactions;
- "unconstitutional conditions" doctrine required water and sewer fees to have essential nexus and rough proportionality with county's costs of expanding water and sewer infrastructure into developments;
- Developers adequately alleged that county coerced them to pay fees in order to obtain land use permits;
- Developers' admission precluded any argument that fees lacked essential nexus to costs of infrastructure expansion;
- Issue of whether fees were roughly proportional to costs of infrastructure expansion could not be resolved on motion for judgment on the pleadings; and
- New fee ordinance pursuant to new statute did not render action moot.

One-time fees that county charged developers for water and sewer services constituted impact fees, not user fees, for purpose of determining whether fees were takings without just compensation under "unconstitutional conditions" doctrine, even though county called fees "capacity use" fees; such fees were intended to cover cost of expanding water and sewer infrastructure to accommodate new development, rather than being paid by customers at fixed rate in accordance with their monthly water and sewer usage for purpose of paying for services they used at time of actual use.

Impact fees that county required developers to pay for water and sewer services as condition of county's concurrence in water and sewer permit approval constituted exactions, for purpose of determining whether fees constituted takings without just compensation under "unconstitutional conditions" doctrine; fees were imposed on developers based on their respective prorated shares of cost of expanding utility services to developments, and term "exaction" included monetary exactions, not only a requirement that a developer dedicate land.

Under "unconstitutional conditions" doctrine, one-time impact fees that county charged developers as monetary exactions for water and sewer services, as precondition for county's concurrence in developers' water and sewer permit applications, were required to have essential nexus and rough proportionality with costs that proposed developments imposed on county's water and sewer infrastructure in order for fees not to constitute takings, even though fees were not discretionary, administrative, or imposed in lieu of any dedication of land; each fee was linked to specific parcel of land proposed for development, and allowing county to increase fees or use fee proceeds for non-development-related purposes would enable county to pressure developers to give up property without just compensation.

Developers adequately alleged that county's imposition of one-time sewer and water fees, which constituted impact fees and exactions, had effect of coercing developers into paying fees in order to obtain land use permits, supporting their claim against county for takings without just compensation under "unconstitutional conditions" doctrine, where developers alleged that county conditioned its concurrence in developers' applications for sewer and water permits on developers' payment of impact fees, that payment of fees was not merely necessary to permit developers to connect to water and sewer system, and that requiring fees before county would support developers' applications for water and sewer permits necessary to record subdivision plots precluded development of properties as planned.

In developers' action against county for violations of Takings Clause based on county's imposition of impact fees for expansion of water and sewer system into planned developments, which developers alleged constituted unconstitutional condition on county's consent to water and sewer permits, county, not developers, bore burden of showing that fees had essential nexus to and were roughly proportional to developments' impact on county's water and sewer infrastructure.

Developers' admission, in their complaint against county for imposing monetary exaction in form of water and sewer impact fees as condition of county's consent to water and sewer permits in violation of Takings Clause, that water and sewer impact fees were collected by county to pay for costs of future improvements to county's water and sewer system precluded developers from arguing that fees lacked essential nexus to county's objective of funding expansion of its water and sewer system capacity to serve proposed developments, as requirement for fees to be permissible under "unconstitutional condition" doctrine.

Issue of whether water and sewer impact fees that county imposed on developers as condition of its consent to developers' water and sewer permit applications were roughly proportional to costs of expansion of water and sewer system to serve proposed developments, as necessary for fees to be permissible under "unconstitutional conditions" doctrine, could not be resolved on county's motion for judgment on the pleadings with respect to developers' complaint against county for violation of Takings Clause based on contention that fees constituted unconstitutional conditions on permits; county had not demonstrated that its estimates of water and sewer capacity expansion costs, upon which fees were estimated, were roughly proportional to actual cost of expanding water and sewer system to accommodate proposed developments.

ZONING & PLANNING - NORTH CAROLINA

Visible Properties, LLC v. Village of Clemmons

Court of Appeals of North Carolina - August 2, 2022 - S.E.2d - 2022-NCCOA-529 - 2022 WL 3031723

Outdoor advertising sign company petitioned for writ of certiorari after city zoning board of adjustment rejected company's application for zoning permit to construct billboard with digital technology on property bordering city highway.

The Superior Court granted petition and affirmed board's decision. Company appealed.

The Court of Appeals held that:

- City zoning ordinances allowed construction of company's proposed sign;
- Company's proposed sign, which periodically changed static digital images, was not "moving and flashing sign" prohibited by city zoning ordinances; and
- Company's proposed sign was not "electronic message board" prohibited by city zoning ordinances.

Provisions for off-premises signs contained in sign regulations portion of city zoning ordinances, which allowed off-premises signs on property near city highway, superseded two other more general ordinances governing property, which did not allow off-premises signs, and thus city zoning ordinances allowed outdoor advertising sign company to construct proposed billboard with digital technology on property; sign-specific rules directly applied to use at issue, and sign-specific rules stated that other zoning restrictions did not apply if proposed use was regulated by specific regulations of that section.

Outdoor advertising sign company's proposed digital billboard, which periodically changed static images, was not "moving and flashing sign" within meaning of city zoning ordinance prohibiting moving and flashing signs near city highway; ordinary usage of ambiguous terms "moving" and "flashing" did not squarely describe digital billboard, which was not capable of movement and had no sudden or transient display of lights, excluding billboards that changed static images did not render superfluous ordinance's exclusion of electronic time, temperature, and message signs, and specific examples of prohibited signs, including pennants, banners, and spotlights, were capable of either physically moving or shining light in sudden or intermittent manner.

Outdoor advertising sign company's proposed digital billboard, which periodically changed static images, was not "electronic message board" within meaning of city zoning ordinance prohibiting electronic message boards near city highway; reading ordinances to prohibit any electronic sign displaying any form of message would render "electronic message board" term superfluous, ordinary meaning of ambiguous term electronic message board referred to narrower category of sign, such as mobile electronic signs seen near road construction, or digital message boards often affixed beneath business's name or logo and listing business hours or product offerings, which would not be described as billboards like company's proposed sign.

DEDICATION - PENNSYLVANIA

In re Township of Jackson

Commonwealth Court of Pennsylvania - August 1, 2022 - A.3d - 2022 WL 3021688

Township petitioned for leave of court under the Donated or Dedicated Property Act to sell land dedicated for use as a public park, alleging that, due to the topography of the land as well as the cost to maintain the lot, it was not practicable to develop the lot as a public park.

After evidentiary hearings, the Court of Common Pleas denied the petition. Township appealed.

The Commonwealth Court held that:

- Procedural requirement that defense of equitable estoppel to be raised in responsive pleading did not apply to Donated or Dedicated Property Act proceedings;
- Evidence supported trial court's conclusion that township actively facilitated residents' belief that land would remain as open space;
- Township did not establish that retaining recreational use for which land was dedicated was no longer physically or financially practicable; and
- Evidence supported conclusion that maintaining land as pocket park continued to serve interest of the public.

Procedural requirement that defense of equitable estoppel be raised in responsive pleading did not apply to proceedings conducted under Donated or Dedicated Property Act, and thus testimony of township residents, as parties-in-interest under Act, could raise issue of whether township was equitably estopped from selling park land, in proceedings on township's petition for leave of court to sell land dedicated for use as public park; while no opponent of sale filed responsive pleading or expressly raised defense of equitable estoppel, Pennsylvania Rules of Civil Procedure had not been incorporated into proceedings conducted under Act, and local rules had not been adopted to cover such proceedings.

Substantial evidence supported trial court's conclusion that township actively facilitated residents' belief that land dedicated for use as public park would remain as open space, as grounds for application of doctrine of equitable estoppel in proceedings on township's Donated or Dedicated Property Act petition for leave to sell park; township approved land development plan designating land as proposed public park, township accepted donation of land and dedicated land to public park use, and township never advised public that it might use land for any other purpose.

Township did not establish, in proceedings on its Donated or Dedicated Property Act petition for leave to sell land dedicated for use as public park, that retaining recreational use for which land was dedicated was no longer physically or financially practicable, as requirement for grant of judicial relief under Act; township's supervisor acknowledged that township could keep land as open space in its unimproved state, which involved minimum maintenance, and township's consulting engineer testified that land could be developed with walking trail and basketball court.

Substantial evidence supported trial court's conclusion that maintaining land dedicated for recreational public use as a pocket park continued to serve the interest of the public, as grounds for denial of township's Donated or Dedicated Property Act petition for leave to sell the park, where a number of people representing a significant proportion of the development in which the park was located signed a petition seeking to save the park.

New Ways to Finance Your Renewable Energy Projects Thanks to the U.S. Government: Procopio

Two forthcoming changes to U.S. law have the potential to significantly change how renewable energy projects are financed. Both changes are part of the Inflation Reduction Act signed into law by President Joe Biden on August 11, 2022, which along with provisions for business taxes, health care and Internal Revenue Service enforcement efforts contains incentive programs to combat climate change.

Specifically, the new law monetizes renewable energy credits through the *direct pay election* (under new Internal Revenue Code ("Code") §6417) and the *credit transfer election* (under new Code §6418). Both elections are effective for tax years beginning after December 31, 2022.

Let's look at each, one at a time.

Direct Pay Election
The direct pay election was predominantly designed to provide the below-listed refundable tax credits to tax-exempt entities, state and local governments and political subdivisions, the Tennessee Valley Authority, tribal governments, Alaska Native Corporations, and cooperatives that furnish electricity to rural areas (the forgoing collectively referred to as "Tax-Exempt Entities"). New Code §6417 also provides a narrow allowance for refundable tax credits to taxable partnerships and S corporations in respect to the clean hydrogen production credit, the carbon capture credit, and the advanced manufacturing credit.

In spite of the fact Tax-Exempt Entities do not typically pay tax under the Code, new Code §6417 treats Tax-Exempt Entities as having made tax payments equal to the amount of the credits listed below. Whether paid by taxable entities or deemed paid by Tax-Exempt Entities, new Code §6417 treats the payments of tax or deemed payments of tax as having been made as of the later of the date of filing, the due date of the entity's tax return or the date a return would be due if required in the case of Tax-Exempt Entities that are government entities that do not file tax returns. Entities that make the election can then claim a refund of the excess taxes paid or deemed paid. The direct pay election applies to the following renewable energy credits:

- So much of the credit for alternative fuel vehicle refueling property as is treated as a business credit under Code § 38;
- So much of the credit for renewable electricity production attributable to qualified facilities originally placed in service after December 31, 2022;
- So much of the carbon oxide sequestration credit attributable to carbon capture equipment originally placed in service after December 31, 2022;
- The zero-emission nuclear power production credit;
- So much of the credit for clean hydrogen production credit attributable to qualified clean hydrogen facilities originally placed in service after December 31, 2012;
- For the U.S., states and political subdivisions, U.S. possessions, tax-exempt organizations other than cooperatives under Code §521, and tribal governments, the credit for qualified commercial clean vehicles determined under Code §45W(d)(3);
- The credit for advanced manufacturing production;
- The credit for clean electricity production;

- The credit for clean fuel production;
- The credit for energy investment determined under Code §48;
- The credit for qualifying advanced energy project investment; and
- The credit for clean electricity investment determined under Code §48E.

Credit Transfer Election
All taxpayers, *excluding* Tax-Exempt Entities, may transfer all or a portion of their eligible credits to an unrelated taxpayer (again, excluding Tax-Exempt entities). Eligible credits include all credits listed above minus the credit for qualified commercial clean vehicles. The transfer consideration must be paid in cash, is not deductible to the transferee nor includible in the income of the transferor.

After the transfer, the transferee will be treated as the taxpayer entitled to the credit for all purposes under the Code. Applicable credits belong to a partnership, not its partners, which means the partnership must elect to transfer the credits.

The Monetization Impact on Project Funding
Both of the above options have the potential to change the financing models of renewable energy projects.

- The direct pay option allows pension funds, universities, municipalities, and investment funds with such tax-exempt investors to make direct investments in renewable energy products under certain conditions.
- The credit transfer provision expands the pool of available investors for renewable energy projects by allowing project developers to monetize applicable credits through third party sales without requiring those third-party transferees to be directly involved in the project, thereby mitigating development, construction and operational risks for the transferee assuming the transfer is properly negotiated and documented.

Both the direct pay and transfer elections will require planning as related to the amount of cash received and the timing of receipt. The direct pay option requires alternative financing to gap the bridge in time between the date of project funding the date the applicable entity receives the refundable tax credit after filing its federal tax return the following year. Similarly, the transferee of a credit transfer may require a discount on the purchase price of the credit due to the fact the transferee cannot claim the credit and receive its benefit until it files its tax return the year after the credit is generated.

We expect forthcoming guidance from the U.S. Department of Treasury to clarify the manner and timing of the elections.

Outside counsel can provide guidance on the appropriate choices to make when considering taking advantage of the benefits of the Inflation Reduction Act of 2022.

Procopio, Cory, Hargreaves & Savitch LLP

by John Pedro Dombrowski

August 31, 2022

Infrastructure Investment and Jobs Act: Department of Energy - Faegre Drinker

Loan Programs Summary

The Loan Programs Office (LPO) within the Department of Energy (DOE) provides a variety of different loans and loan guarantees for energy-related projects, with over $40 billion in total funding available for such programs. This report summarizes these programs. The LPO provides access to debt capital, flexible financing, close partnerships throughout the loan term, and specialized financial, legal, technical and environmental expertise to all of the programs listed below. These programs also focus on projects which aim to reduce, avoid or sequester greenhouse gas emissions.

Advanced Fossil Energy Projects Loan Guarantees
The LPO has $8.5 billion in loan guarantee authority for Advanced Fossil Energy projects under the Title 17 Innovative Energy Loan Guarantee Program (Title 17), authorized by the Energy Policy Act of 2005. This program helps finance projects in four broad technology categories: advanced resource development, low-carbon power systems, carbon capture and efficiency improvements.

Advanced Nuclear Energy Projects Loan Guarantees
The LPO has $10.9 billion in loan guarantee authority for Advanced Nuclear Energy Projects, including $2 billion for front-end projects, under Title 17 Innovative Energy Loan Guarantee Program (Title 17), authorized by the Energy Policy Act of 2005. This program helps finance projects in four broad technology categories: advanced nuclear reactors, small modular reactors, uprates and upgrades at existing facilities, and front-end nuclear technology (uranium conversion or enrichment, and/or nuclear fuel fabrication).

Continue reading.

by Juan Reyes III

August 30, 2022

Faegre Drinker Biddle & Reath LLP

Fitch: Rising Fuel Costs and Inflationary Trends Pressure Public Power

Fitch Ratings-New York/Austin-30 August 2022: Inflationary pressures and rising fuel costs could weaken credit quality across the public power sector if costs are not recovered in a timely manner, Fitch Ratings says. The US Energy Information Administration (EIA) forecasts power prices could double in 2022 from 2021 across the US as a result of higher commodity prices and capacity constraints that reduce available supplies of wholesale power. While increased fuel and purchased power costs are largely being passed through to retail and wholesale customers, broader inflationary pressures, including supply chain delays and capital investment escalation, could require additional rate increases to support credit quality, particularly if current trends persist in 2023.

Fitch’s base case natural gas price expectations for 2022 and 2023 were recently raised by 47% and 23%, to $6.25/mcf and $4.00/mcf, respectively. However, Fitch expects natural gas prices to trend lower in 2024 and stabilize at $2.75/mcf by 2025, with heightened fuel cost pressures also declining over the next two years.

Increases in coal commodity and transportation costs, although less than those for natural gas, and higher replacement power costs for drought-related reductions in hydropower are also contributing to higher electric prices. US power markets remain reliant on natural gas-fired and coal-fired generation for over 57% of the energy supply.

Continue reading.

Two Tools for Tracking the American Rescue Plan's Local and National Impacts.

The 2021 American Rescue Plan Act (ARPA), particularly the flexible dollars it made available to state and local governments through State and Local Fiscal Recovery Funds (SLFRF), marked a generational experiment in fiscal federalism. Not since the late 1980s has Washington engaged in general revenue sharing with state and local governments. And this time, the scale of investment—$350 billion distributed over two years—was far greater.

The context for ARPA was also far different. Congress appropriated substantial aid to help counteract potentially devastating fiscal, economic, and health impacts of the COVID-19 pandemic at the state and local levels. Under the regulations implementing SLFRF, recipient governments must report information to the Treasury Department on how they are planning to use these funds, consistent with a set of broad categories of eligible spending under ARPA. However, much of that information varies in quality, consistency, coverage, and comparability, hampering efforts to understand spending priorities and better coordinate investment across places and time in support of a broad-based economic recovery.

These factors motivated our respective organizations—Brookings Metro and GREATER MSP—to create tools that gather, summarize, and visualize how local governments are putting SLFRF dollars to work. Brookings Metro partnered with the National League of Cities and the National Association of Counties to produce the Local Government ARPA Investment Tracker, which tracks data on SLFRF-supported projects in more than 300 large cities and counties around the country. And as part of its MSP Federal Funding Hub project, GREATER MSP partnered with 12 cities and 17 counties in the Minneapolis-Saint Paul region to generate the MSP ARPA Tracker, which tracks those jurisdictions' spending plans using the same categories as the Local Government ARPA Investment Tracker. Our organizations have used these tools to assess the rate at which local governments are committing SLFRF dollars to specific projects, the broad spending priorities they are identifying, and how these vary across cities and counties and by jurisdiction size.

Continue reading.

The Brookings Institution

by Alan Berube, Peter Frosch, and Allison Bell

August 30, 2022

EPA Will Propose to Designate PFOA and PFOS as CERCLA Hazardous

Substances.

The U.S. Environmental Protection Agency (EPA) announced on August 26, 2022, that it will propose to designate perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), "two of the most widely used per- and polyfluoroalkyl substances (PFAS)," as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The proposal will include the salts and structural isomers of PFOA and PFOS. The rulemaking would require entities to report immediately releases of PFOA and PFOS that meet or exceed the reportable quantity (RQ). EPA will publish a notice of proposed rulemaking (NPRM) in the Federal Register "in the next several weeks," beginning a 60-day comment period. EPA has posted a prepublication version of the NPRM.

The NPRM proposes to designate PFOA and PFOS, including their salts and structural isomers, as hazardous substances under CERCLA Section 102(a). Upon designation, any person in charge of a vessel or an offshore or onshore facility, as soon as they have knowledge of any release of such substances at or above the RQ, must immediately report such releases to the federal, state, Tribal, and local authorities. The proposed RQ for these designations is one pound or more in a 24-hour period. According to the NPRM, once EPA has collected more data on the size of releases and the resulting risks to human health and the environment, it may consider issuing a regulation adjusting the RQs for these substances.

The five broad categories of entities potentially affected by this action include:

- PFOA and/or PFOS manufacturers (including importers and importers of articles);
- PFOA and/or PFOS processors;
- Manufacturers of products containing PFOA and/or PFOS;
- Downstream product manufacturers and users of PFOA and/or PFOS products; and
- Waste management and wastewater treatment facilities.

In addition, when selling or transferring federally-owned real property, federal agencies would be required to meet all of the property transfer requirements in CERCLA Section 120(h), including providing notice when any hazardous substance "was stored for one year or more, known to have been released, or disposed of" and providing a covenant warranting that "all remedial action necessary to protect human health and the environment with respect to any [hazardous substances] remaining on the property has been taken before the date of such transfer, and any additional remedial action found to be necessary after the date of such transfer shall be conducted by the United States." EPA notes that there would also be an obligation for the Department of Transportation (DOT) to list and regulate PFOA and PFOS as hazardous materials under the Hazardous Materials Transportation Act (HMTA).

According to the NPRM, the final designations would provide additional tools that the government and others could use to address PFOA/PFOS contamination and, thus, could facilitate an increase in the pace of cleanups of PFOA/PFOS contaminated sites. The indirect, downstream effects of these designations could include the following:

- EPA and other agencies exercising delegated CERCLA authority could respond to PFOA and PFOS releases and threatened releases without making the imminent and substantial danger finding that is required for responses now;
- EPA and delegated agencies could require potentially responsible parties to address PFOA or PFOS releases that pose an imminent and substantial endangerment to public health or welfare or the environment;
- EPA and delegated agencies could recover PFOA and PFOS cleanup costs from potentially

responsible parties, to facilitate having polluters and other potentially responsible parties, rather than taxpayers, pay for these cleanups; and
- Private parties that conduct cleanups that are consistent with the National Oil and Hazardous Substances Contingency Plan (NCP) could also recover PFOA and PFOS cleanup costs from potentially responsible parties.

According to the NPRM, in addition to this action, in 2022, EPA will be developing an advance notice of proposed rulemaking (ANPR) seeking comments and data to assist in the development of potential future regulations pertaining to other PFAS designation as hazardous substances under CERCLA.

Commentary

The proposal comes as no surprise and it is part of EPA's broad PFAS Action Plan. The designation of these chemicals, found everywhere in contaminated media, would mean that CERCLA's liability and cost recovery scheme would apply to the cleanup of contaminated media once the rule is issued in final, as is expected. Reporting requirements would also apply to releases of one pound or more of PFOA and PFOS within a 24-hour period that are not otherwise exempt from reporting.

Not everyone is thrilled with the initiative. Senator Capito (R-WV) expressed concern with the "uncertainty and unintended consequences" of the proposal and urged EPA to prioritize the development of technologies to detect, remove, and destroy PFAS at the government's expanse, not manufacturers. The Environmental Working Group, on the other hand, has identified some 42,000 industrial and municipal sites in the United States known or suspected still to be using PFAS, although how many are known or suspected of using PFOA and PFOS is unclear.

The remediation implications of the proposal are staggering. Given the ubiquity of the substances and their many uses, few entities will be spared CERCLA and related cleanup liability in cases where PFOA and PFOS contamination is found. Many are expected to comment on the proposal.

Bergeson & Campbell PC

August 29 2022

Will One PFAS Consequence Be Cities and Towns Getting Out of the Water Business? - Mintz

Now that EPA has designated as "hazardous substances" at least two of the hundreds of "forever chemicals" known collectively as PFAS, does it make sense for the hundreds if not thousands of cities and towns across the country whose water supplies have been contaminated by PFAS to remain in the water business?

Here in the northeastern United States, the provision of drinking water has remained a municipal function in many municipalities even though regional drinking water and wastewater treatment providers are available. But perhaps PFAS will finally drive the regionalization of this critically important service?

The Boston Globe reports that at least for now the City of Cambridge will be getting its drinking water from the Massachusetts Water Resources Authority after hundreds of years providing its own water from reservoirs in Cambridge and nearby towns.

Given the level of treatment necessary to reduce PFAS concentrations to the infinitesimally small (parts per quadrillion or thousandths of a trillion) concentrations EPA will say (and Massachusetts DEP has already said) is safe, and the cost of that treatment, perhaps regional treatment of drinking water is an idea whose idea has come. And perhaps moving to regional supplying of drinking water might be a step on the path toward regional wastewater treatment?

> In Cambridge, Owen O'Riordan, the acting city manager, said the city's move to the MWRA "reflects our commitment" to provide safe water to residents, including pregnant or nursing women, infants, and people with compromised immune systems — all of whom are among those most impacted by increased PFAS levels.

Mintz – Jeffrey R. Porter

August 29 2022

S&P: U.S. Convention Center Authorities Make Their Comeback As Big Events Lift Revenue

Key Takeaways

- Large-scale events have returned to U.S. convention centers as vaccination rates, health measures, and audience comfort levels improve
- Many convention center authorities are managing event schedules in the summer and fall of 2022 that mirror the number of 2019 bookings
- During the shutdown some issuers restructured their debt, which extended maturities. While this didn't have a material impact on the credit quality of most issuers, if not managed well, extending maturities can create more fixed-cost pressure over the long term.

Continue reading.

29 Aug, 2022

Federal Grants for Broadband Expansion Begin to Flow.

Louisiana is the first state to receive planning dollars from a pair of high-speed internet programs in the infrastructure law. Funding is expected to reach other states soon.

The federal government is cracking open the spigot on billions of dollars available to states for expanding high-speed internet access.

The Commerce Department's National Telecommunications and Information Administration said this week Louisiana was the first state to receive planning grants under two programs that are part of the bipartisan infrastructure law President Biden signed last year. All 50 states and six territories applied for funding from these programs and grants will be awarded on a rolling basis, according to Commerce.

“The Internet for All initiative is on track and on schedule,” Secretary of Commerce Gina Raimondo said in a statement, referencing the name the Biden administration is using for a slate of broadband programs in the infrastructure law. “Over the coming weeks, every state and territory will have funding in hand.”

Continue reading.

Route Fifty

By Bill Lucia

SEPTEMBER 1, 2022

Fitch: Cyber Risk Mitigation Adds to Cost Pressures for Not-for-Profit Hospitals

Fitch Ratings-New York/Chicago/Austin-29 August 2022: Cyber risk mitigation is becoming more expensive for not-for-profit hospitals and healthcare systems, which are subject to increasing frequency and severity of attacks, Fitch Ratings says in its report Cyber Risk Continues to Grow for U.S. Not-For-Profit Hospital and Health Systems. Increasing risk requires greater investment in hardware, software and internal controls in order to prevent and address cyber breaches. However, not-for-profit hospitals are reporting thinner margins amid ongoing cost pressures, necessitating cost containment and revenue-raising measures, and cyber security spending may not be prioritized.

Both quantitative and qualitative factors, including the persistence of effects on operations and management responses, influence the effects of cyber breaches on ratings. Fitch has not downgraded any hospitals or health systems due to a cyberattack to date.

However, the credit effects of a cyberattack could be amplified due to labor pressures and inflation compressing not-for-profit hospital margins. Operating metrics are down significantly in interim 2022 for most health systems compared with 2021. Issuers with weaker financial profiles would have fewer resources available to prevent or recover from a cyberattack, potentially leading to quality of care and reputational risks, and further margin erosion.

Cyber breaches that disclose patient information carry the risk of loss of consumer confidence, litigation costs and federal regulatory enforcement actions, all of which could negatively affect financial performance. Cyberattacks also have the potential to affect quality of care by affecting medical devices or denying access to patient data.

Cyber insurance remains a key risk mitigant. However, the rapid pace of cyber insurance premium growth and a tightening underwriting environment may result in the policies becoming cost prohibitive to less financially flexible organizations. Fitch considers cybersecurity in its analysis as part of its Environmental, Social and Governance (ESG) framework. A hospital’s ESG Relevance Score would be elevated if cyber risk were deemed to be material to the rating.

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The above article originally appeared as a post on the Fitch Wire credit market commentary page. The original article can be accessed at www.fitchratings.com. All opinions expressed are those of Fitch Ratings.

[The Inflation Reduction Act: How Will its Provisions Impact Offshore Wind Development? - Day Pitney]

The Inflation Reduction Act of 2022 (IRA or the act) was signed into law on August 16, 2022. Among the hundreds of pages of this legislation, the IRA contains some significant provisions geared toward the development of clean energy, including from offshore wind. In this advisory, we focus on four main areas of the IRA that could impact the development of offshore wind: (1) planning for the transmission infrastructure needed for the development of offshore wind; (2) support for state siting and other permitting authorities to do their review and approval work in siting offshore wind transmission, including through potentially more certainty in the timing of such approvals; (3) expansion of the potential lease areas for offshore wind offered by the Bureau of Ocean Energy Management (BOEM); and (4) beneficial changes to the tax credits available for renewable energy developers, including offshore wind developers.

Regional transmission planning: funding to study transmission solutions

Part 5 of the IRA relates to electric transmission. In particular, §§ 50152 and 50153 provide funding in various forms for activities related to the development of offshore wind transmission. Section 50153 specifically appropriates $100 million for expenses associated with planning, modeling and analysis regarding interregional electric transmission and, particularly, transmission of electricity generated by offshore wind. The studies conducted pursuant to § 50153(b)(2) must specifically take into account the local, regional, and national economic, reliability, resilience, security, public policy and environmental benefits of, among other things, transmission of electricity generated by offshore wind.

Potential impact: The issuance of funds to convene stakeholders to discuss interregional and offshore wind transmission and perform studies on interregional and offshore wind transmission planning could move needed transmission infrastructure development forward. This initiative will dovetail with efforts already underway at the state level, with the Regional Transmission Organizations and Independent System Operators, and at the Federal Energy Regulatory Commission (FERC) to plan and build the transmission needed to support the clean energy grid. These efforts, collectively, could significantly improve the ability of the large amounts of offshore wind generation being developed to be interconnected and transmitted to populous load centers.

Continue reading.

Day Pitney Advisory

Day Pitney Co-author(s) Paul N. Belval, Eric K. Runge, Margaret Czepiel

August 30, 2022

New Mass. Law a Step Forward for Offshore Wind: Day Pitney

Day Pitney Energy Attorneys Eric Runge, Margaret Czepiel and Paul Belval authored the article, "New Mass. Law a Step Forward for Offshore Wind," for Law360. The article discusses a significant piece of legislation aimed at moving Massachusetts toward its goal of net-zero greenhouse gas emissions by 2050, with a focus on offshore wind development.

Read the full article here.

Day Pitney Co-author(s) Paul N. Belval, Eric K. Runge, Margaret Czepiel

August 29, 2022

Investors Snap Up Airport Munis.

$1.8 BILLION

That's the amount of municipal debt Chicago's O'Hare International Airport sold Tuesday, in the largest airport bond sale this year. The sale reflects strong investor demand, driven by expectations that air travel will continue to bounce back from the Covid-19 pandemic.

S&P Global Ratings this year raised O'Hare and the Dallas-Fort Worth airport to a rating of A+ from A and upgraded aviation revenue bonds issued by Miami-Dade County to A from A-.

Mutual funds and other investors this week submitted orders for four times as much debt as Chicago had to sell, allowing the city to trim interest rates, said finance chief Jennie Huang Bennett. Ten-year securities ultimately carried a tax-exempt yield of 2.94%.

The Wall Street Journal

By Heather Gillers

Aug 31, 2022

Chicago O’Hare Sells $1.8 Billion of Debt in Year’s Largest Airport Deal.

- **January 2031 bonds priced with a 5% coupon and 3.69% yield**
- **City plans annual issuance for next decade to fund revamp**

Chicago has sold the largest municipal airport transaction this year amid swirling volatility in fixed-income markets, pricing $1.8 billion of debt that will partially fund improvements at O’Hare International Airport.

The $1.1 billion Series 2022A includes bonds due in January 2031 which priced with a 5% coupon and 3.69% yield, while debt due 2055 with a 5% coupon yielded 4.74%, according to data collected by Bloomberg.

“We are very happy with where the pricing ended up,” said Jennie Huang Bennett, Chicago’s chief financial officer, in an interview. She said the deal drew more than 100 investors and received about $6.3 billion of orders, making it at least four-times oversubscribed. Bennett attributed part of that investor interest to recent upgrades on the credit from both S&P Global Ratings and Fitch Ratings.

The O’Hare deal, which is the third-largest bond issue in Chicago history, priced into a weak market which saw benchmark municipal bond yields rise so far this week. Thirty-year top-rated municipals are yielding 3.29% — a five-basis point increase from where the market closed last Friday. Municipal market returns have been negative for much of the year, as an aggressive Federal Reserve rate hike schedule roils fixed-income assets. The market more broadly has lost about 8.6% since January, with a 2.2% loss so far in August.

“We garnered a lot of market attention over the course of the last few days, just given our relative size,” said Bennett. “Ultimately we were able to command a lot of attention on this transaction.”

The $1.8 billion deal will both refinance existing debt and fund $1.1 billion of new capital investments as the city embarks on its O’Hare 21 project, which encompasses runway extensions, the expansion of Terminal 5, and the terminal area plan, which includes construction of two satellite concourses as well as a revamped global hub that doubles the size of Terminal 2.

Another $1.5 billion sale in about a year’s time is in the works, said Bennett. She anticipates annual issuance to the tune of $1 billion as the airport completes its terminal area plan over the next decade.

It’s been a busy year for airport bonds with issuance up 70.2% year-to-date, according to data compiled by Bloomberg, even as overall municipal bond issuance has contracted by about 12%. Much of that volume comes from deferred maintenance projects as airport activity shrank at terminals and across the market during the pandemic.

Bloomberg Markets

By Mackenzie Hawkins and Danielle Moran

August 31, 2022

[Some GOP States Push Back Against ESG Investing Trend.]

Republicans are stepping up their efforts to prevent investors from considering environmental and other factors in their decisions. They are running up against the trillions of dollars in investments committed to funds addressing such concerns.

In the past week, Florida Gov. Ron DeSantis and other officials banned state pension fund managers from incorporating environmental, social and governance—or ESG—factors into investments. Texas Comptroller Glenn Hegar barred BlackRock Inc., BNP Paribas SA, Credit Suisse Group AG and others from doing business there because they “boycott energy companies.” West Virginia in July took a similar step, kicking out BlackRock, JPMorgan Chase & Co. and others while saying ESG hurts its economy.

The criticism focuses on the belief that Wall Street and investors are cutting off fossil-fuel producers from lending and investment. Republicans have also accused investors of trying to force companies to follow a liberal agenda at the expense of a pursuit of profit.

Continue reading.

The Wall Street Journal

By Amrith Ramkumar

Aug. 30, 2022

Red State Republicans’ War on ESG Will Have Losses on Both Sides.

GOP lawmakers in some of the most conservative US states are trying to ban banks and asset managers that consider ESG criteria from their pension funds and municipal markets, but the move might backfire.

The financial consequences for most asset managers and banks from all the anti-ESG rhetoric coming out of the mouths of Republican politicians in the US is almost certain to be minimal—at least for now.

Even if money managers who consider ESG criteria were banned from handling public pension funds in states such as Florida, Texas, Oklahoma, and West Virginia—where ESG skepticism is high—a back of the envelope review supports the notion that any business losses would be insignificant relative to the firms’ overall bottom line.

Take Florida for example. Governor Ron DeSantis has arguably been the most outspoken basher of environmental, social and governance investing. He said last week that the state’s pension funds will no longer consider ESG criteria when seeking to generate the highest returns possible.

While DeSantis didn’t single out any companies, BlackRock Inc., the world’s largest asset manager, has received criticisms from several GOP-run states who contend the New York-based firm is pursuing ESG investment policies to the detriment of their state pension funds.

BlackRock oversaw about $7.2 billion for the Florida Retirement System Pension Plan as recently as June. Given BlackRock's business model, it's safe to assume that most of those assets were in index-tracking funds that charge fees equal to less than 10 basis points, said Jon Hale, director of sustainability research for the Americas at Morningstar Inc.'s Sustainalytics unit.

Presuming these figures are accurate, BlackRock would be earning about $7.2 million of annual fees from the Florida pension. That's a tiny amount when compared with the firm's total net revenue of $19.4 billion in 2021. In other words, Florida's business probably isn't enough to cause BlackRock to rethink its ESG policies.

And BlackRock isn't alone. Examples like this indicate that the financial repercussions from the GOP's prognostications about other large asset managers and banks will be very little, Hale said.

"And I doubt these efforts will have much long-term impact," he said. "For now, they're mostly being used as political talking points."

Hale said the Florida rule simply reflects DeSantis's rage at corporations for becoming more focused on issues such as climate change and societal inequities.

Still, there is business beyond state pension plans to consider. Financial firms also provide municipal bond underwriting and other services—and states may want to think twice before blocking these companies from offering their expertise. It could end up backfiring.

One example where this already may be the case is Texas. The state introduced two laws last year that bar banks that "boycott" oil and gas companies or "discriminate" against firearms entities from government contracts. The gun ruling resulted in lower municipal bond market share for banks such as Goldman Sachs Group Inc., JPMorgan Chase & Co., Bank of America Corp. and Citigroup Inc. that sought to limit financing for certain retailers and manufacturers, said Rob Du Boff, senior ESG analyst at Bloomberg Intelligence.

However, the decision to exclude major banks on the basis of their ESG policies also made the market less competitive and probably led to higher coupon payments for Texas entities in the order of $303 million to $532 million in the first eight months under the new laws, Du Boff said, citing a study from Daniel Garrett of the University of Pennsylvania and Ivan Ivanov of the Federal Reserve Board of Governors.

Still, what if politics outweigh the financial downsides for states and all this anti-ESG bluster leads to more boycotts? Andrew Poreda, senior ESG research analyst at Sage Advisory Services, said the longer-term effects for the financial-services industry may be greater than generally perceived.

What's happening in states like Florida and Texas highlights "a bigger fear that appears to be playing out," he said in a telephone interview from his office in Austin, Texas. "Are asset managers ultimately going to be forced to pick a side and be 'red' or 'blue' managers? If you asked us six months ago, we would have thought that very notion to be far-fetched. Now, it sure looks like we are headed that way."

This may end up having serious implications for asset managers, municipal bond underwriters and investment bankers in the country's biggest states, Poreda said. It never used to be the requirement of a fiduciary to align ideologically in lockstep with their client, "but that appears to be our new future, unless cooler heads prevail," he said.

Bloomberg Green

By Tim Quinson

August 31, 2022

To ESG or Not: "Damned If You Do, Damned If You Don't," at Least in Some US States - Mayer Brown

On July 28, 2022, the West Virginia State Treasurer named five banks as the first-listed Restricted Financial Institutions under West Virginia's Senate Bill 262 for having engaged in boycotts of energy companies and thus effectively has banned these banks from future banking contracts with the state.

Apparently not to be outdone, on August 24, 2022, the comptroller of public accounts for the State of Texas (Comptroller) released the list of financial companies that boycott energy companies, a list required under the Texas statute (Tex. Gov't Code sec. 809.051) prohibiting investment in financial companies that boycott certain energy companies (the Texas Boycott Code). The list includes 10 financial firms (mostly non-US banks) and 348 registered investment companies.

The criteria initially used by the Comptroller to screen financial firms for the list included public pledges to Climate Action 100+ and membership in the United Nations-convened Net-Zero Banking Alliance or the Net Zero Asset Managers Initiative, as well as ESG rating information provided by MSCI. Requests for verification were apparently also sent to the firms.

Continue reading.

Mayer Brown – J. Paul Forrester, Erin K. Cho, Leslie S. Cruz and Adam D. Kanter

August 29 2022

The Cost of Mixing Culture Wars With Public Finance.

As with pension fund divestment policies, it's tempting for states and local governments to blacklist companies over their public policy stances. But it's the taxpayers who are likely to be the collateral damage losers.

Given the nation's deep political divisions nowadays, it should come as no surprise that some state and local politicians from both sides of the aisle would seek to leverage their governments' purchasing power to send messages to corporate America and play to their base by doing so. After all, it's not their own money — it's the public's — so why not exploit political power to advance one's partisan posturing?

The most common manifestations of these impulses to make political statements through public funds have historically been public pensions' divestment campaigns, starting with South Africa in the 1960s, then with Sudan in the early 2000s and continuing up to this year's Russia divestment wave. Critics would say that pension policies focused on corporations' environmental, social and governance (ESG) profiles are liberals' playbook strategy to pressure companies into bending to their political will. The same might be said about pension funds that avoid investing in firearms manufacturers.

The complaint — and it's a valid one in my view — has always been that these political statements rarely work to the benefit of the pension funds and that the employers' taxpayers are ultimately obligated to foot the bill for investment underperformance. That grievance is now popular with 19 Republican attorneys general. However, many ESG advocates would counterclaim that more-sustainable and farsighted corporate policies will produce better investment returns over the long term. That debate in pension-land doesn't look likely to end any time soon; we really can't properly evaluate investment efficacy in less than a decade or even two.

Continue reading.

governing.com

by Girard Miller

Aug. 30, 2022

Texas' Answer to 'Woke' Investing Looks Kind of Woke.

The state's anti-ESG plan to punish financial firms deemed hostile to fossil-fuel producers is the same values-based approach it claims it is retaliating against.

One of the more surprising aspects of Texas' anti-ESG law, just unleashed on the likes of BlackRock Inc., is that it turns out to offer a great lesson on environmental, social and governance investing's cousin, socially responsible investing, or SRI. Not intentionally, of course.

ESG investing is often conflated with SRI. Both get lumped together as financial piety or under that term now so overused and abused your dad probably says it, "woke." They are not the same thing. SRI is based on values and most commonly exclusionary: "I don't want to fund X undesirable sector, so I won't give it my money." ESG is based on risk and more nuanced: "I foresee risks related to ESG issues that may either impair or enhance a security's value, take account of measures to address those, and then under or overweight it accordingly." SRI is about maximizing virtuousness; ESG is about maximizing wealth.

Can ESG labels be used to mask other intentions? Of course; as with any other investing theme, there is ample potential for hucksterism or simple sloppiness. Even Larry Fink, BlackRock's chief executive officer, has been known to mix up ESG with SRI.

Continue reading.

Bloomberg Opinion

By Liam Denning

August 29, 2022

Urban Migration Slows in 2022 for Many Major US Cities.

New data suggests that the pandemic-spurred flight from big coastal metros is reversing as employers push workers to return to the office.

Several major US cities that saw increased out-migration during the pandemic are starting to see the trend reverse, according to a new report from Markerr, a real estate insights company that uses United States Postal Service change-of-address data, census information, and its own data-science methods to estimate population change.

New York City, Los Angeles, Chicago, San Francisco and Washington, D.C., all continued to see more people leave than move to their metro areas in the first half of 2022. But the flight is less dramatic than before. As of July, all those cities lost fewer people this year than they did through July of 2021, 2020 or even 2019 — before pandemic disruptions began.

Continue reading.

Bloomberg CityLab

By Sarah Holder

September 3, 2022

SEC Municipal Advisor Examination Observations: Mayer Brown

SEC risk alert highlights areas of continuing deficiencies and future focus of examinations.

On August 22, 2022, the Division of Examinations (the "Division") of the U.S. Securities and Exchange Commission ("SEC") published a risk alert (the "2022 Risk Alert") to raise awareness of the most frequently cited deficiencies and weaknesses observed in recent municipal advisor examinations.1 Topics include municipal advisor registration and filings, recordkeeping, supervision and disclosure of conflicts of interest. The Division previously highlighted many of these topics in a 2017 risk alert (the "2017 Risk Alert") with respect to newly registered municipal advisors.2 The Division has included examinations of municipal advisors as an examination priority each year since 2019.3

The 2022 Risk Alert, together with two SEC enforcement actions against municipal advisors in June of this year,4 may signal an increase in scrutiny from SEC examination and enforcement staff regarding municipal advisor practices, policies and procedures relating to the topics highlighted in the risk alert. As such, firms should consider reviewing and assessing their compliance with each of the topics. In this regard, we note that the Division indicated that it intends for future examinations "to include a more prominent focus on the core standards of conduct and duties applicable to municipal advisors."5

The following is a brief summary of the Division's key observations in the 2022 Risk Alert.

Registration and Filings
Municipal advisors filed SEC Forms MA and MA-I with inaccurate or incomplete information, including information regarding their associated persons' other business and other required

disclosures (e.g., customer complaints, tax liens). Additionally, municipal advisors did not amend, or did not amend timely, SEC Forms MA and MA-I and Municipal Securities Rulemaking Board ("MSRB") Form A-12, such as to reflect changes in ownership of the firm or disciplinary actions involving the firm or its associated persons (e.g., disclosure of judicial actions or judgments/liens, change in employment or other business).

Recordkeeping
Municipal advisors did not make or keep true, accurate and current copies of certain required books and records, or did not preserve such records, including with respect to:

- *Written communications* relating to municipal advisory activities, particularly electronic communications, such as business-related email sent from a personal email address, text messages on mobile devices and instant messages. We note that this topic has been a focus of the SEC with respect to broker-dealers.
- *Financial and account documents*, including cash reconciliations and general ledgers.
- *Written agreements* entered into by the municipal advisor with municipal entities and their employees, obligated persons or otherwise relating to the firm's business.

Supervision
Municipal advisors either did not have any written supervisory procedures ("WSPs") or the WSPs were not sufficient, not implemented and/or not enforced. For example, deficiencies related to gifts, gratuities and expenses, and, as noted above, the preservation of electronic communications and/or the filing and updating of required forms. Moreover, some firms failed to promptly amend their WSPs to reflect the adoption of MSRB Rule G-42 (Duties of Non-Solicitor Municipal Advisors),6 which became effective in 2016, or MSRB Rule G-40 (Advertising by Municipal Advisors),7 which became effective in 2019. Firms also failed to conduct annual reviews of their WSPs pursuant to MSRB Rule G-44(b) and/or their Chief Executive Officers failed to certify annually, in writing, that the firm had in place processes to establish, maintain, review, test and modify WSPs, pursuant to MSRB Rule G-44(d).

Disclosure to Clients
Municipal advisors failed to disclose in writing to clients, or did not disclose timely, their material conflicts of interest, including with respect to the firms' relationships with other parties (e.g., underwriters or other parties providing services to or on behalf of a municipal entity client) or between the municipal advisor and the municipal entity client itself. Other deficiencies involved disclosures relating to fee-splitting arrangements and contingent compensation arrangements. Finally, firms failed to document, or did not document adequately or timely, their municipal advisory relationships.

Footnotes
1 See SEC Division of Examinations, Risk Alert: Observations from Municipal Advisor Examinations (Aug. 22, 2022).

2 See SEC Office of Compliance Inspections and Examinations, Risk Alert: Observations from Municipal Advisor Examinations (Nov. 7, 2017) ("In sum, the staff observed that [municipal advisors] were generally unfamiliar with many of their regulatory obligations."). The 2017 Risk Alert noted that "[s]ome firms were referred to the [SEC's] Division of Enforcement." Id. at 2.

3 See Examination Priorities for 2019, 2020, 2021 and 2022.

4 These cases involve municipal advisors who, among other things, breached their fiduciary duties to their municipal clients and, in one case, failed to disclose to nearly 200 municipal clients that the

firm had material conflicts of interest arising from its compensation arrangements.

5 Risk Alert at 1.

6 Among other things, MSRB Rule G-42 establishes core standards of conduct, including duties of care and loyalty, and provides for the disclosure of conflicts of interest for municipal advisors that engage in municipal advisory activities, other than municipal solicitation activities.

7 MSRB Rule G-40 establishes requirements for advertisements by municipal advisors, including a requirement that each advertisement be approved in writing by a municipal advisor principal prior to first use.

Pension Funds Are Selling Their Office Buildings.

Big investors unwind bets on office space as changing work environment raises prospect many downtown buildings will be less used

Major U.S. and Canadian pension funds are cutting back investments in office buildings, betting that prices will likely fall as the five-day office workweek becomes a thing of the past.

Retirement funds are still buying property, partly in a bid to reduce the impact of inflation. But those investments are more focused on warehouses, lab space, housing and infrastructure such as airports.

The shift is part of a broader transition away from traditional real estate holdings in offices and shopping centers as the Covid-19 pandemic has accelerated the rise of e-commerce and remote work.

Continue reading.

The Wall Street Journal

By Heather Gillers

Aug. 25, 2022

Banks Keep Buying Hard-Hit Muni Bonds.

Banks are buying lots of municipal debt at a time when that is not a hugely popular thing to do.

The par value of municipal bonds held by banks reached a 10-year record of $430 billion, according to FDIC data compiled by BankRegData and Municipal Market Analytics. But falling bond prices have reduced the market value of those holdings to $405 billion.

Banks are also making more private loans to state and local governments, including more than $9 billion in the second quarter, the most in a decade. That brings the total amount of so-called privately placed municipal debt to a record $204 billion, according to the data.

State and local governments sometimes choose to borrow directly from banks when they need a relatively small amount and want to avoid the costs and administrative work associated with selling securities on the public market.

The banks are buying up the debt at low prices as many investors flee bonds in response to rising rates. In a market dominated by mutual funds, where prices can drop quickly when household investors freak out, this means bondholders cashing out may have another potential buyer they count on.

“Banks love state and local borrowers,” said Municipal Market Analytics partner Matt Fabian. “When regular muni investors are selling, banks may well be buying.”

The Wall Street Journal

By Heather Gillers

Aug 24, 2022

Fundamentals of Local Government Budgeting: GFOA eLearning Course

- **October 13, 2022 | 1-3:30 p.m. ET**
- **October 14, 2022 | 1-3:30 p.m. ET**
- **October 17, 2022 | 1-3 p.m. ET**
- **October 19, 2022 | 1-3:30 p.m. ET**
- **October 21, 2022 | 1-3:30 p.m. ET**
- **October 24, 2022 | 1-3 p.m. ET**

Details:
As finance officers deal with financial challenges related to the COVID-19 recession and participate in broader conversations on the role of government and its ability to provide services equitably, a local government’s ability to budget will be critically important. This virtual training will emphasize the fundamental components of a local government’s budget policies and processes along with best practices and techniques required for effective budgeting. Each training module/day will focus on a specific topic and feature both presentation and interactive discussion/exercises. Attendees will go through the basic structures of a local government budget, learn how budgeting can be better used to promote long-term planning, process improvement, and community outcomes. In addition, the course will cover specific techniques for developing the budget, communicating budget messages, and identifying strategies for approaching cut back budgeting to deal with the current crisis.

Who Will Benefit: Finance and budget professionals desiring to learn budget fundamentals in light of COVID-19

Learning Objectives

Those who successfully complete this seminar should be able to:

- Learn the basic structure of a government budget (i.e., funds, departments, accounts, programs, projects, etc.) and how budgeting principles relate to accounting and financial reporting
- Understand why budgeting is important and the connection to long-term planning and performance management

- Learn how to perform basic revenue and expenditure analysis
- Understand the various methods local governments use to develop a budget
- Learn techniques for personnel budgeting and capital budgeting
- Identify strategies for public engagement
- Develop strategies for effective communication and presentation of the budget
- Identify methods to monitor and evaluate budgetary performance
- Learn about GFOA's Fiscal First Aid techniques and how to balance the budget in a recession

Member Price: $490.00
Non-member Price: $980.00

Click here to learn more and to register.

BDA Bonding Time Podcast.

The latest episode of BDA's Bonding Time podcast featuring the BDA's Brett Bolton with Hilltop Securities' Tom Kozlik on Municipal Bond Provisions and the Congressional agenda.

Listen to audio.

Bond Dealers of America

Mike Nicholas

August 31, 2022

Munis And Vegas (Bloomberg Audio)

Joe Mysak, Editor of the Bloomberg Brief: Municipal Markets, breaks down the muni market across the country. Hosted by Paul Sweeney and Kriti Gupta.

Listen to audio.

Bloomberg Audio

Sep 02, 2022

The Key Risks Facing the Muni Bond Market.

S&P Global Ratings Managing Director Robin Prunty discusses the key risks facing the municipal bond market with Taylor Riggs on "Bloomberg Markets: The Close."

Watch video

Bloomberg Markets: The Close

August 31st, 2022

Morgan Stanley’s Haskell Steps Down as Head of Muni Business.

- **Bank is the fourth largest municipal bond underwriter**
- **Haskell had overseen US state and local debt business**

Morgan Stanley’s Patrick Haskell has stepped down from his role leading the municipal securities business at the bank, according to a memo seen by Bloomberg.

Haskell oversaw the US state and local debt business at the New York-based bank, which is one of the biggest underwriters in the market. Jared Mesznik will assume Haskell’s responsibilities, according to a person familiar with the matter.

Morgan Stanley is the fourth-biggest municipal underwriter in the US this year, according to data compiled by Bloomberg.

“Since 2013, Pat has led the Municipal Securities Business and built a top franchise while managing through structural shifts in the municipals market,” the Aug. 26 memo said. “Key to his success was effectively bringing together the new issue, trading and lending businesses while building out structured solutions to better align with our clients’ evolving needs.”

A spokesperson for the bank declined to comment. Haskell, who joined Morgan Stanley in 2009, declined to comment.

Bloomberg Markets

By Amanda Albright

August 30, 2022

TAX - NEW YORK

Eisenhauer v. Watertown City School District

Supreme Court, Appellate Division, Fourth Department, New York - August 4, 2022 - N.Y.S.3d - 2022 WL 3096652 - 2022 N.Y. Slip Op. 04832

Homeowners brought declaratory judgment and article 78 proceeding, seeking to annul results of school district election to extent that results enacted proposition for a tax on real property within school district for purposes of constructing a public library.

The Supreme Court granted city and school district’s motion to dismiss. Homeowners appealed.

The Supreme Court, Appellate Division, held that:

- City was not a proper party to the proceeding;
- Homeowners were not required to exhaust their administrative remedies before filing suit;
- School district had authority to levy, collect, and appropriate taxes for construction of public library;

- School district's proposition did not violate equal protection clause; and
- Homeowners' due process rights were not violated.

City was not a proper party to homeowners' declaratory judgment and article 78 proceeding, seeking to annul results of school district election to extent that they enacted a proposition for tax on real property to fund construction of a public library, where homeowners failed to show city had any involvement in the approval, certification, or passage of the new tax, and homeowners did not seek specific relief against city.

Homeowners were not required to exhaust administrative remedies before they brought declaratory judgment and article 78 proceeding against school district and public library, seeking to annul results of school district election to extent that results enacted proposition to tax real property within school district to fund construction of a public library; validity of school district election was not at issue, rather, homeowners were challenging legality of school district's approval and certification of tax and validity of the proposed tax itself.

School district had authority to levy, collect, and appropriate taxes as part of proposition in school district election to tax real property within school district to fund construction of public library; provisions under Education Law did not foreclose other entities from providing public library with additional funding or preclude school district's ability to submit proposition to fund public library through taxes, and proposition did not unconstitutionally shift burden of cost to operate public library to taxpayers outside city limits as public library was not a governmental service or function of the city.

School district's proposition in school district election to tax real property within school district to fund construction of public library did not violate equal protection clause of the United States Constitution; although certain residents outside city and school district could use public library without directly supporting it by way of tax, that did not render tax an example of hostile and oppressive discrimination against homeowners, and homeowners did not demonstrate how school district's proposition treated them disparately.

Homeowners' due process rights were not violated by school district's proposition in school district election to tax real property within school district to fund construction of a public library, where homeowners were afforded opportunity to vote in the school district election as eligible voters and school district residents.

Two Options for ESG and Muni Exposure.

2 Bond ETF Options as ESG Growth Proliferates in Munis

Environmental, social, and governance (ESG) continues to grow, and this year, the space is seeing expansion into municipal bonds. Real estate prices have climbed in the last few years, creating the need for affordable housing, which is feeding into ESG and muni growth.

"ESG is poised for another record-breaking year of new issuance in the $4 trillion municipal-bond market as state and local agencies look to Wall Street for help addressing the affordable housing crisis," a Bloomberg Law article noted.

"Sales of municipal bonds that are branded with a green, social or sustainability label are up 2.6% this year — bucking the roughly 12% decline in the overall market, according to data compiled by

Bloomberg. Total ESG muni issuance could surpass last year's record to reach over $60 billion by the end of 2022, per S&P Global Ratings projections released in February.

One option for ESG muni exposure is the Vanguard ESG U.S. Corporate Bond ETF (VCEB). Additionally, the fund doesn't command a high premium with its low expense ratio of 0.12%.

VCEB seeks to track the performance of the Bloomberg MSCI US Corporate SRI Select Index, which excludes bonds with maturities of one year or less and with less than $750 million outstanding, and it is screened for certain ESG criteria by the index provider, which is independent of Vanguard.

VCEB highlights:

- Provides debt issues screened for certain ESG criteria.
- Specifically excludes bonds of companies that the index sponsor determines are involved in and/or derive threshold amounts of revenue from certain activities or business segments related to adult entertainment, alcohol, gambling, tobacco, nuclear weapons, controversial weapons, conventional weapons, civilian firearms, nuclear power, genetically modified organisms, or thermal coal, oil, or gas.
- Excludes bonds of companies that, as determined by the index sponsor, do not meet certain standards defined by the index sponsor's ESG controversies assessment framework, as well as firms that fail to have at least one woman on their boards.

One place to get tax-free municipal bond exposure is via an ETF wrapper with funds like the Vanguard Tax-Exempt Bond ETF (VTEB). With a 0.06% expense ratio, the fund offers low-cost exposure to municipal debt.

VTEB tracks the Standard & Poor's National AMT-Free Municipal Bond Index, which measures the performance of the investment-grade segment of the U.S. municipal bond market. This index includes municipal bonds from issuers that are primarily state or local governments or agencies whose interests are exempt from U.S. federal income taxes and the federal alternative minimum tax (AMT).

ETF TRENDS

by BEN HERNANDEZ

SEPTEMBER 1, 2022

Embracing Muni Bonds for Recession Protection.

Debate lingers regarding whether or not the U.S. economy is in a recession, but recent GDP data are discouraging, indicating market participants may want to evaluate recession-buffering assets.

Traditionally, investors turn to fixed income assets when recessions set in, but that strategy is imperiled this year due to rising interest rates. Speaking of which, Federal Reserve Chairman Jerome Powell last Friday spooked markets, signaling the central bank will remain aggressive with its rate hikes in a bid to cool inflation. Some traders believe there's at least a 60% chance the Fed raises rates by 75 basis points following its September meeting.

Logically, some investors are skittish about bonds in the current environment, but some experts see opportunities in municipal bonds for recession protection. On that note, the VanEck Vectors High Yield Muni ETF (HYD) is an exchange traded fund to consider.

“A recession is characterized by a slowdown in consumer spending and an increase in unemployment. This may lead some to believe that at the onset of a recession, tax revenues for state and local governments fall, but this hasn’t been the case. Historically, tax revenues have declined following a recession, but the negative impact is usually long after the recession has already started,” noted Cooper Howard of Charles Schwab.

Tax collection is a primary concern for investors with any municipal bond ETF. Although HYD is a high-yield fund, the ability of its component states to collect taxes, broadly speaking, isn’t a major concern as of yet. For example, California is the ETF’s largest state allocation at 12.6% and revenue in the Golden State is soaring.

Another point in favor of HYD, particularly given its status as a high-yield ETF, is that credit quality across the municipal landscape is improving. That could support HYD’s status as a recession-buffering asset for investors to consider.

“Conditions for most state and local governments are strong, in our view, due to the substantial fiscal support after the start of the COVID-19 crisis. Tax revenues also have been surging, as illustrated in the chart above, which has helped bolster state and local governments’ coffers. To illustrate, rainy-day fund balances, which is money that states have set aside and can use during unexpected deficits, are at near-record levels. Even Illinois, the lowest-rated state, has a rainy-day fund balance in excess of $1 billion. That’s a substantial improvement from February 2020 when it was only $60,000,” concluded Howard.

Illinois is HYD’s second-largest state exposure at 12%.

ETF TRENDS

TOM LYDON

AUGUST 29, 2022

TAX - MINNESOTA

Under the Rainbow Early Education Center v. County of Goodhue

Supreme Court of Minnesota - August 24, 2022 - N.W.2d - 2022 WL 3641789

Early childhood education center, a licensed childcare facility for infants through children 12 years of age, filed petition against county challenging county assessor’s denial of its application for a property tax exemption as a seminary of learning.

The Tax Court denied summary judgment to center and granted summary judgment to county. Center petitioned for certiorari.

The Supreme Court held that:

- Center was an educational institution, as required to be tax-exempt seminary of learning;
- Center provided a general education, as required to be tax-exempt seminary of learning; and
- Center provided a thorough and comprehensive education, as required to be tax-exempt seminary

of learning.

Early childhood education center, a licensed childcare facility for infants through children 12 years of age, was an “educational institution,” as required to be tax-exempt seminary of learning; to maintain its license with Department of Human Services (DHS), center followed program plan with goals to promote physical, intellectual, social, and emotional development of children in its care, it performed regular evaluations of the children and hosted regular conferences with parents, its staff had to meet educational requirements to qualify as teachers and assistant teachers, and DHS rating and certification program required that center teach a preapproved curriculum developed by independent childhood education professionals to foster early learning and development.

County forfeited argument before Supreme Court that, even if other portions of early childhood education center’s operations were tax-exempt, the programs caring for infants and school-age children did not qualify as tax-exempt seminary of learning because infants were too young to learn from formal teaching and standards used for center’s licensing and rating from Department of Human Services (DHS) were not relevant to school-age children, where county made no arguments before the tax court below about dividing center’s services into exempt and nonexempt portions, presented no evidence on the effect of education on infants, and presented no evidence that the educational standards governing center’s operations were inappropriate for school-age children.

The required showing for determining whether a program teaches a general curriculum, as required for an institution to qualify as a tax-exempt seminary of learning, is whether the program embraces a sufficient variety of academic subjects to give the student a general education.

Early childhood education center, a licensed childcare facility for infants through children 12 years of age, provided a general education, as required to be tax-exempt seminary of learning; to maintain its license with Department of Human Services (DHS), center had to demonstrate that its educational programming provided daily learning opportunities in eight categories specified by rule, it performed child evaluations using comprehensive forms developed by DHS, and to maintain its four-star rating with DHS certification program, center used age-appropriate daily lesson plans for each child, followed current best practices for early education, and taught curriculum that was preapproved by the State, and that curriculum addressed emotional, physical, and intellectual development.

Early childhood education center, a licensed childcare facility for infants through children 12 years of age, provided a thorough and comprehensive education, as required to be tax-exempt seminary of learning; DHS regulations required that center’s staff meet training and educational standards and that it limit the number of children each teacher could oversee, in order to ensure that children received individual attention and support, to maintain its rating with DHS certification program, center’s staff had to complete more the minimum required professional development hours, and center had to implement a preapproved curriculum and be inspected and approved by state university’s center for early education development.

CDFA Ohio Financing Roundtable.

September 14, 2022 | Columbus, OH

We are excited to bring back the CDFA Ohio Financing Roundtable on September 14, 2022! During this special one-day conference, we will share knowledge of best practices within the state’s development finance industry. This event will feature economic development finance experts from around the state discussing the latest and most innovative development finance tools, authorities, resources, and approaches, and how these can affect the Ohio economy going forward. After what seems like an eternity apart, we are ready to get back together in-person for the networking opportunities we have all been missing. Space is limited, so be sure to register soon and grab your seat at the roundtable. See you there!

Click here to learn more and to register.

California Law Lets Cities Eject People Who Disrupt Public Meetings.

As city-council and school-board events across the country grow rowdier, the Golden State has new rules for dealing with the most aggressive offenders.

The heckling, threats and insults had gone on for months, but it was at a town meeting last fall that a personal nightmare finally became a public scandal for Marico Sayoc. As the first Filipina mayor of the small Silicon Valley city of Los Gatos, California, Sayoc had been targeted throughout her term for her race, gender and policies by a small group of locals who disagreed with her.

The group of protesters, some of whom allegedly had affiliations with white supremacist groups, had showed up to her house, promised to hurt her, and accused her of being a Marxist. Her son, a high schooler, had also become politically active during the pandemic, raising awareness about George Floyd's killing by police, anti-Asian hate and gay rights. This made him a target, too. In October 2021, protesters showed up to the Los Gatos town council meeting to complain about mask mandates and progressivism run amok — and to spread "lies" about her son, Sayoc said.

"No elected official should ever have to worry that their children's personal, private lives will be brought into a town meeting," she said. According to first-hand accounts and a video of the meeting, Sayoc — audibly shaken — called for a recess. The public was removed, the Zoom feed was cut, and her husband and the protesters got in a heated argument outside. The meeting restarted nearly an hour later.

Continue reading.

Bloomberg CityLab

By Sarah Holder

September 1, 2022

SEC Continues Scrutiny of Municipal Bond Offerings: Goodwin Proctor

The SEC recently brought fraud charges against Sterlington, Louisiana and its former mayor and separately against Rochester, New York and its former executives and Rochester's municipal advisors and principals/owners for misleading investors related to their respective bond offerings.

At a high level, the SEC alleged (collectively between the two matters):

1. Investors were misled because offering documents included false or outdated financials and city officials and municipal advisors failed to disclose material facts related to the offerings.
2. Claims against city officials for misleading a credit rating agency by failing to disclose a projected budget shortfall, failing to further inquire about financial conditions despite knowledge of financial distress, and failing to apprise investors of the associated risks.
3. Activity by an unregistered municipal advisor as well as substantive claims of misleading investors, breaching fiduciary duty, and failing to disclose material conflicts of interest.

These cases are only the latest in a string of SEC settlements with municipalities and their advisors, including those resulting from the agency's 2016 "MCDC" Initiative against dozens of municipal issuers and underwriters related to their failure to satisfy continuing disclosure obligations under Exchange Act Rule 15c2-12. Unlike the MCDC actions, the Sterlington and Rochester cases did not implicate the underwriters of the bond offerings (at least not yet).

Lapses in disclosures in the municipal securities market has been, and will continue to be, an area of SEC focus. This should come as no surprise given that the Division of Examinations included municipal securities as an area of focus in its 2022 examination priorities. A recent risk alert from the Division of Examinations also summarized staff's observations from municipal advisor examinations, including noting deficiencies in registration, conflicts disclosures, and recordkeeping.

Other noteworthy takeaways from the Sterlington and Rochester cases include:

- The SEC made its usual assertions of violations of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.
- The SEC also alleged that Rochester's municipal advisors and its principals violated MSRB Rules G-17, G-42, and G-44 and Exchange Act Section 15B(c)(1).
- The SEC settled with the town of Sterlington and, interestingly, imposed no fines or other penalties against the city. The SEC took into account Sterlington's corrective measures to enhance its internal controls and financial oversight (establishing a committee to oversee and approve borrowing, applying, and disbursements of funds).
- Sterlington's former mayor is contesting the charges against him, in which the SEC is seeking a fine and a ban from engaging in future municipal securities offerings.
- Sterlington's municipal advisor and its owner settled with the SEC and agreed to pay ill-gotten gains, accrued interest, and fines, which are yet to be determined by the court (advisory fees for the bonds sold totaled $26,303).
- In the Rochester case, the city and its municipal advisors and owners are contesting the SEC's allegations. The SEC is seeking fines and payment of ill-gotten gains and accrued interest by the municipal advisor based on the alleged violations.
- Rochester's former CFO settled with the SEC and consented to a $25,000 fine and a ban from engaging in future municipal securities offerings.

Goodwin Procter LLP – Nick Losurdo and Lauren A. Schwartz

August 31 2022

SEC Approves MSRB Amendments to CUSIP Application Process.

The SEC approved an MSRB proposal to amend MSRB Rule G-34 ("CUSIP Numbers, New Issue, and Market Information Requirements") to better align the requirements for applying for a CUSIP number with the actual process for obtaining one.

As previously covered, the MSRB proposed (i) requiring that CUSIP applications be submitted only to a board's designee, (ii) allowing municipal advisors a more flexible timetable to apply for a CUSIP and (iii) authorizing the board's designee to determine the necessary information required in a CUSIP application. The final rule was adopted with minimal changes and the SEC stated that the proposal does not pose a threat to the facilitation of capital formation.

Fried Frank Harris Shriver & Jacobson LLP

August 25 2022

Jersey City Short Term Rental Regulation Not a Regulatory Taking.

A week ago, the U.S. Third Circuit Court of Appeals decided that Jersey City's regulations limiting the ability to use private property for short-term rentals was not a taking. 2022-8-16 Nekrilov v Jersey City Third Circuit. Our associate Michael Realbuto detailed the lower court's decision – here – so I'll get right to why the Third Circuit's affirmed and reasoned there was no taking. Quite unlike my last post about the Texas Appellate Court affirming a regulatory taking's case, ("Because we conclude the evidence supports the trial court's findings and conclusions on the *Lucas* theory, we do not discuss the *Penn Central* theory"), the *Nekrilov* case is all about *Penn Central's* heightened (and ever-shifting) standard of proving that an owner's 'investment-backed expectations' were so frustrated as to render its property valueless.

In short, the owners purchased investment property intended to be used for short-term rentals after Jersey City passed an ordinance that broadly permitted said use (circa 2015) but prior to a subsequent municipal ordinance substantially curtailing that use (circa 2019). The owners alleged that the subsequent ordinance effected a regulatory taking of its property and was politically motivated because the Mayor was retaliating against AirBNB for failure to support his re-election campaign.

The Court of Appeals credited the owners' property investments as alleged in the complaint (which it must as the appeal was from dismissal on the pleadings):

"Between the passage of Ordinance 15.137 and Ordinance 19-077, the plaintiffs invested in properties in Jersey City to conduct short-term rental businesses. The Nekrilovs purchased two properties, which have monthly mortgage payments of $2,500 and $1,725. The Nekrilovs earned $9,500 and $5,183 per month, respectively, in short-term rental revenue, and allege that they would earn only $3,800 and $1,800 per month in long-term rental revenue. They also invested a total of $100,000 in renovating these properties. The Nekrilovs also entered into seventeen long-term leases with the intention of subleasing on a short-term basis. Tang and Jen purchased one property, which has a monthly mortgage payment of $3,300, and which Tang and Jen spent $40,000 to renovate and furnish. The property earned $4,500 per month in short-term rental revenue and would earn $2,600 in long-term rental revenue. Tang and Jen also entered into two long-term leases and spent $6,600 and $8,900 to furnish the properties. Suen purchased two properties, which have monthly mortgage payments of $2,500 and $3,500. Suen and his mother invested approximately $383,000 into renovating the properties, $40,000 into furnishing the properties, and $130,000 in other costs for the properties. Suen and his mother earned approximately $30,000 in monthly short-term rental revenues from the two properties." [Slip op. at 6-7].

While the Circuit Court rejected the owner's argument that their "forward-looking right to pursue their short-term rental businesses" was a cognizable property interest protected by the Fifth Amendment, it did recognize that the owner's use and enjoyment of its property and right to lease (either short or long term) were property rights protected by the Fifth Amendment. In that regard, "plaintiffs first allege that, as a result of Ordinance 19-077, they have lost all beneficial use of their purchased properties. The District Court held that because the properties retain numerous beneficial uses, they have not been rendered economically idle. We agree. The plaintiffs can lease the properties on a long-term basis, live at the properties, or sell the properties." Thus, no total taking was found to have occurred, and the takings' claim would thus rise or fall under *Penn Central*. "One whose property has not been deprived of all economically beneficial use may still be entitled to compensation if the government action constitutes a partial taking under the *Penn Central* factors."

And even then, "the Supreme Court "has required compensation only in cases in which the value of the property was reduced drastically. The plaintiffs have undeniably lost potential future profits as a result of Jersey City's change in policy. But the plaintiffs' inability to continue to operate their short-term rental businesses profitably does not equate to a "drastic[]" reduction in the value of the property so as to require compensation, especially as the properties retain multiple economically beneficial uses." Slip op. at 20. The property owners admitted that the long-term leases were paying "market" rent. The Third Circuit harkened back to the original regulatory takings case – "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

In the end "the plaintiffs may have relied on Ordinance 15.137 in deciding to invest in short-term rentals in Jersey City, but they failed to take into account the restrictions in place in the original ordinance and the City's strong interest in regulating residential housing. On balance, this factor weighs against the plaintiffs."

I'm not sure anything in the majority opinion will get the Supreme Court's attention.

But, Circuit Court Judge Bibas' concurring opinion might – I'll let you read the opinion – but here's a teaser: "regulatory-takings doctrine is a mess." (Bibas, Circuit Judge, concurring).

McKirdy, Riskin, Olson & DellaPelle, P.C. – Anthony F. Della Pelle, Joseph Grather, Allan Zhang, Michael Realbuto, Thomas Olson, Matthew Erickson and John H. Buonocore, Jr.

August 25 2022

Muni Bond Funds Finish Another Rough Month.

$3.4 BILLION

That's the amount investors withdrew from municipal bond funds in the week ended Aug. 31, closing out another rough month for bonds in general and munis in particular. Of the 10 weeks with the highest muni bond outflows since 1992, five occurred this year.

Rising rates remain a key culprit, but credit concerns are popping up as well. Some analysts believe public transportation ridership will never rebound to pre-pandemic levels, weakening transit bonds in cities like New York and San Francisco. Barclays Credit Research recommended earlier this month that defensive investors seek out insured munis.

The Wall Street Journal

By Heather Gillers

Sep 1, 2022

Proposed Changes to FINRA Expungement Rules: SIFMA Comment Letter

SIFMA provided comments to the U.S. Securities and Exchange Commission (SEC) on FINRA's proposed rule changes to the Code of Arbitration Procedure relating to requests to expunge customer dispute information from the Central Registration Depository (CRD) and FINRA BrokerCheck.

View the SIFMA Comment Letter.

Regulation Implementing the Adjustable Interest Rate LIBOR Act: SIFMA Comment Letter

SIFMA provided comments to the Federal Reserve Board on their proposed rule that would implement the Adjustable Interest Rate (LIBOR) Act.

Click here to view the SIFMA comment letter.

- In the Muni Market, Financial Disclosures DO Matter to Investors.
- S&P Mid-Year Review: Tender Option Bond Activity Reaches New Highs As Interest Rates Rise
- BDA National Fixed Income Conference.
- Florida Becomes Latest State to Propose Anti-ESG Legislation: Saul Ewing
- Pennsylvania Commonwealth Court Issues Decision in Ursinus College v. Prevailing Wage Appeals Board: Saul Ewing
- *Ursinus College v. Prevailing Wage Appeals Board* – Commonwealth Court holds that construction project undertaken by private, non-profit college and financed by bonds issued by public authority was not "public work" under Pennsylvania Prevailing Wage Act, although authority issued bonds and loaned funds to college under loan agreement.
- *Thompson v. St. Anthony Leased Housing Associates II, LP* – Supreme Court of Minnesota holds that residential tenant's allegations that landlord charged her rent in excess of limits established by Minnesota Bond Allocation Act were sufficient to plead injury-in-fact, as necessary for standing to bring claim against landlord for breach of contract, even though Act did not provide tenant with private right of action to enforce its rent limits.
- And finally, Florence's Only Fully Nude David is brought to us this week by *Club Madonna Inc. v. City of Miami Beach*, in which the City of Miami Beach enacted regulations concerning its "only fully nude strip club." What we find delightfully bewildering is the thought process behind the naming of the establishment in question. Is this a reference to the beloved pop icon? If so, fine, but

we'll see your pop icon and raise you a millennium of – you know – *actual* iconography. Can someone PLEASE explain to us what exactly it is about a painting of a beatific mom and her bizarrely unrealistic new-born that puts one in the mood to visit Miami's only fully nude strip club? On second thought, if that connection IS somehow immediately apparent to you, you are clearly a person from whom we definitely do not want to hear. But thanks for playing.

ZONING & PLANNING - CALIFORNIA

CV Amalgamated LLC v. City of Chula Vista

Court of Appeal, Fourth District, Division 1, California - August 12, 2022 - Cal.Rptr.3d - 2022 WL 3354984

Business petitioned for writ of mandate challenging city's denial of its application for a license to operate a retail cannabis store in the city.

The Superior Court denied the petition. Business appealed.

The Court of Appeal held that:

- City had ministerial duty to follow mandatory procedures for issuing the license;
- City acted in an arbitrary and capricious manner in rescoring business's application;
- Business did not have adequate remedy for city's failure to follow its procedures; and
- No parties needed to be joined prior to granting the relief sought.

City had ministerial duty to follow mandatory procedures for issuing license to operate a retail cannabis store in the city, so that its failure to follow those procedures when it rejected business's license application in first phase of two-phase licensing process for business's failure to score high enough in merit-based evaluation conducted by the city provided basis for issuance of writ of mandate, where neither the relevant cannabis ordinance nor the cannabis regulations permitted the city to disqualify an applicant during the first phase of the process for not scoring high enough, but rather, both the ordinance and the regulations required that city deem an applicant to be qualified if it met the stated minimum requirements, which did not include any merit-based scoring requirement.

City acted in an arbitrary and capricious manner in rescoring business's application for license to operate a retail cannabis store, following business's appeal alleging that initial scoring was unfair, by limiting its efforts to only one of four relevant categories in the discretionary merit-based evaluation due to alleged formatting and organization errors, thus providing a basis for issuance of writ of mandate requiring city to carry out discretionary duty to rescore all four categories of business's application, where reason provided for so limiting the rescoring, that only one category was impacted by the errors, was contradicted by evaluator's testimony that all four categories were impacted by the errors, which compelled conclusion that rescoring each of the four categories was warranted.

Business's claim for promissory estoppel against city, seeking recovery of expenses for application for license to operate a retail cannabis store that were lost when city allegedly wrongly rejected its application in breach of a purported promise, did not provide adequate legal remedy for city's failure to follow mandatory procedures for issuing licenses for cannabis retail businesses as would provide the court with discretion to deny business's petition for mandamus relief, because the remedy for promissory estoppel would not give business the relief it sought through traditional mandamus, namely, a chance to compete for and be awarded a license.

Other applicants for license to operate a retail cannabis store who scored higher than business on city's merit-based evaluation and advanced to second phase of two-phase licensing process were not indispensable parties that business had to join in proceedings on its petition for writ of mandate as relief for city's alleged improper denial of its application, since other applicants would not be prejudiced by any writ issued as relief to business, as relief that business sought did not include an order invalidating any licenses city may have issued to the other applicants.

ZONING & PLANNING - DISTRICT OF COLUMBIA

Lumen Eight Media Group, LLC v. District of Columbia

District of Columbia Court of Appeals - August 11, 2022 - A.3d - 2022 WL 3270077

District of Columbia brought action seeking injunctive relief against sign company and building owners alleging that defendants violated regulations that purportedly required defendants to obtain permits before erecting signs on private property that were located under building overhangs.

The Superior Court granted District's motion for summary judgment. Defendants appealed.

The Court of Appeals held that:

- Defendants did not forfeit their right to rely on Sign Regulation Act;
- Sign Regulation Act provision pertaining to mayor's ability to issue and amend regulations applied to dispute;
- Sign Regulation Act provision pertaining to mayor's ability to issue and amend regulations applied to rulemaking; and
- Emergency rule promulgated by mayor, by which mayor amended regulations pertaining to sign permitting requirements, was invalid.

Sign company and business owners did not forfeit their right to rely on Sign Regulation Act provision pertaining to mayor's ability to issue and amend regulations pertaining to displaying signs on public and private property, even though Court of Appeals raised issue sua sponte and parties based their arguments in trial court on a different statute; Court invited, and received, supplemental briefs from parties so that it was not procedurally unfair, question was too important to overlook as determining which provision applied was antecedent to and ultimately dispositive of whether trial court's judgment was able to stand, and it would have thwarted intent of legislature to rely on statute that did not apply simply because parties failed to identify correct one.

Sign Regulation Act provision pertaining to mayor's ability to issue and amend regulations pertaining to displaying signs on public and private property, and not Construction Code provision pertaining to mayor's ability to issue and amend regulations pertaining to Code, applied to dispute on whether sign company and businesses were required by regulations to obtain permits before erecting signs on private property under building overhangs and whether mayor was able to amend such regulations by promulgating emergency rule, despite contention provision of Act did not apply to interior signs and was titled "Outdoor Signs"; language of Act indicated that it applied to private property within public view, and emergency rule at issue was designed to clarify that provision.

Sign Regulation Act provision pertaining to mayor's ability to issue and amend regulations pertaining to display on signs of public and private property, and not Construction Code provision pertaining to mayor's ability to issue and amend regulations pertaining to Construction Code, applied to rulemaking by which mayor allegedly amended regulations governing permitting requirements for signs by promulgating emergency rule, for purposes of dispute on whether sign company and businesses were required to obtain permits before erecting signs on private property under building overhangs; while scope of Code included placing and maintenance of interior signs, Code provision pertaining to rule amendment said nothing specific about signs, and Act provision was enacted over 25 years after Code provision.

Emergency rule promulgated by mayor, by which mayor amended regulations pertaining to permitting requirements for display of signs on public and private property, did not receive the affirmative approval of the Council of the District of Columbia, and thus rule was invalid, for purposes of dispute on whether sign company and businesses were required to obtain permits before erecting signs on private property under building overhangs.

MUNICIPAL ORDINANCE - FLORIDA

Club Madonna Inc. v. City of Miami Beach

United States Court of Appeals, Eleventh Circuit - August 1, 2022 - 42 F.4th 1231

Fully-nude strip club filed § 1983 action against city raising First and Fourth Amendment challenges, along with preemption challenges, to city ordinance requiring nude strip clubs to follow a record-keeping and identification-checking regime to ensure that each performer was at least 18 years old.

The United States District Court for the Southern District of Florida granted city's motion to dismiss. Club appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. The District Court granted renewed motion to dismiss in part, after which the District Court adopted in part a report and recommendation of Jonathan Goodman, United States Magistrate Judge and granted summary judgment in part. Club appealed and city cross-appealed.

In a case of first impression, the Court of Appeals held that:

- Ordinance was a valid time, place, and manner restriction complying with First Amendment free speech guarantee;
- Ordinance's warrantless-search provision satisfied administrative-search exception to warrant requirement for closely-regulated industries;
- Immigration Reform and Control Act (IRCA) preempted ordinance section concerning verification of an individual's employment authorization;
- Ordinance's penalty scheme was not preempted by Florida statute setting forth penalties for criminal and noncriminal violations; and
- Ordinance's unlawful section on verification of an individual's employment authorization was severable.

City ordinance requiring nude strip clubs to follow a record-keeping and identification-checking regime to ensure that each performer was at least 18 years old was a valid time, place, and manner restriction complying with the First Amendment free speech guarantee; although the ordinance's requirements, including log in/log out procedure for workers and performers requiring two forms of identification, were significant and time-consuming, they were not substantially broader than necessary to achieve the ordinance's aim of preventing minors and victims of human trafficking from dancing nude on a public stage, and the paperwork process still left club with plenty of hours in the day and night for its dancers to perform.

ZONING & PLANNING - IDAHO

City of Ririe v. Gilgen

Supreme Court of Idaho, Boise, February 2022 Term - August 9, 2022 - P.3d - 2022 WL 3206113

City petitioned for judicial review of decision of county board of commissioners to grant applicant a conditional use permit that allowed her to place mobile home on her property located in city's area of impact and sought declaratory relief.

After county filed notice of non-objection, the Seventh Judicial District Court granted petition, remanded the matter, and denied applicant's motions for reconsideration. Applicant appealed, and city cross-appealed.

The Supreme Court held that:

- City was required to file separate declaratory judgment action in order to obtain declaratory relief;
- City was not "affected person" allowed to seek judicial review under Local Land Use Planning Act (LLUPA) of board's decision;
- Appropriate remedy for city to enforce county's compliance with area of impact agreement adopted pursuant to LLUPA was to file original civil action; and
- City acted without reasonable basis in fact or law, such that applicant, as prevailing party on appeal, would be awarded appellate attorney fees.

In order to obtain declaratory relief, city was required to file separate declaratory judgment action, instead of attempting to request such declaratory relief in its petition for judicial review of decision of county board of commissioners to grant applicant a conditional use permit that allowed her to place mobile home on her property located in city's area of impact; civil actions and administrative appeals were processed differently by the courts and governed by different standards.

Counties and city governments are considered "local governing bodies" rather than "agencies" for purposes of the Administrative Procedure Act (APA), which is intended to govern judicial review of decisions made by agencies, not local governing bodies.

City was not "affected person" allowed to seek judicial review under Local Land Use Planning Act (LLUPA) of decision of county board of commissioners to grant applicant a conditional use permit that allowed her to place mobile home on her property located within city's area of impact; city did not have bona fide interest in real property outside city limits as it had no jurisdiction over such property.

Appropriate remedy for city to enforce county's compliance with area of impact agreement adopted pursuant to Local Land Use Planning Act (LLUPA) was to file original civil action, not to file petition for judicial review of decision of county board of commissioners to grant applicant a conditional use permit that allowed her to place mobile home on her property located within city's area of impact; LLUPA did not allow city to petition for judicial review as city did not have bona fide interest in real property outside city limits, but LLUPA allowed governing board, defined as city council or board of county commissioners, to institute civil action to enforce compliance with any ordinance enacted pursuant to LLUPA.

City acted without reasonable basis in fact or law in petitioning for judicial review of decision of county board of commissioners to grant applicant a conditional use permit that allowed her to place mobile home on her property located in city's area of impact and in requesting declaratory relief in same petition, such that applicant, as prevailing party on appeal, would be awarded appellate attorney fees, although city defended position that was accepted by district court judge; Local Land Use Planning Act (LLUPA) did not authorize city to bring action as “affected person” for judicial review, and it was settled law that action for declaratory relief could not be combined with action for judicial review.

EMINENT DOMAIN - INDIANA

[Duke Energy Indiana, LLC v. Bellwether Properties, LLC]

Court of Appeals of Indiana - August 3, 2022 - N.E.3d - 2022 WL 3050699

Landowner brought action against electrical utility, asserting claim for inverse condemnation based on increase of required clearance around electrical lines, which increase extended clearance requirement beyond size of utility’s easement to maintain such lines on landowner’s property.

Utility filed motion to dismiss, asserting that landowner’s claim was barred by six-year statute of limitations. The Circuit Court, Monroe County, Michael Hoff, J., granted utility’s motion. Landowner appealed. The Court of Appeals reversed and remanded. Utility sought transfer, which was granted. The Supreme Court reversed. On remand, the Circuit Court denied electrical utility’s motion for summary judgment. Electrical utility filed an interlocutory appeal.

The Court of Appeals held that:

- Electrical utility’s alleged taking was regulatory, not physical, and
- Electrical utility’s enforcement of horizontal clearance regulations did not constitute as a compensable regulatory taking.

Electrical utility’s alleged taking, if valid, was regulatory in nature, rather than physical, after utility told landowner that it either had to redesign or move a proposed warehouse on its property based on utility’s enforcement of horizontal clearance regulations, which increased extended clearance requirement beyond size of utility’s easement to maintain electrical lines on landowner’s property; utility’s predecessor was the entity that installed transmission lines on landowner’s property, and enactment of clearance requirement did not result in utility to physically intrude or require landowner to allow another entity to access property, but rather, placed limits on landowners’ power to build on small portion of its land.

Electrical utility’s enforcement of horizontal clearance regulations, which increased utility’s clearance requirements and went beyond size of utility’s easement to maintain electrical lines on landowner’s property, did not constitute as a compensable regulatory taking after utility notified landowner that it either had redesign or move its proposed warehouse to comply with clearance regulations; impact of utility’s enforcement of clearance regulations was minimal, enforcement did not interfere with landowner’s reasonable investment-backed expectations of the land, and landowner could have reasonably avoided dispute by discovering clearance requirements prior to purchasing the land or when its architect designed its proposed warehouse.

LIABILITY - MARYLAND

[Hancock v. Mayor and City Council of Baltimore]

Court of Appeals of Maryland - August 15, 2022 - A.3d - 2022 WL 3350854

Estate of laborer who was employed by independent contractor and was buried alive while working at an excavation site filed a survivorship and wrongful death action against city which hired independent contractor to perform the excavation work and against subcontractor.

The Circuit Court granted city’s and subcontractor’s motions to dismiss, and estate appealed. The Court of Special Appeals affirmed. Estate filed a petition for writ of certiorari which was granted.

The Court of Appeals held that:

- As matter of first impression, one who hires independent contractor is not liable to an employee of that contractor for injuries caused by contractor’s negligence in performing the work for which it was hired;
- As matter of first impression, city which hired independent contractor to perform excavation work did not owe laborer, who was independent contractor’s employee, a duty in tort with respect to city’s retention of independent contractor;
- As matter of first impression, subcontractor did not owe laborer a duty in tort to warn him of danger that subcontractor allegedly perceived; and
- As matter of first impression, duty of contractor or subcontractor on construction job to exercise due care to provide for protection and safety of the employees of other contractors or subcontractors is owed with respect to conditions that contractor or subcontractor creates or over which it exercises control.

BONDS - MINNESOTA

[Thompson v. St. Anthony Leased Housing Associates II, LP]

Supreme Court of Minnesota - August 24, 2022 - N.W.2d - 2022 WL 3640466

Tenant brought putative class action against landlords for breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment, and violations of Uniform Deceptive Trade Practices Act and Consumer Fraud Act, alleging that landlords charged rent to rent-restricted tenants in apartment complex in excess of rate limits imposed by Minnesota Bond Allocation Act, which applied to privately-developed housing projects funded by municipal bond proceeds.

The District Court granted landlords’ motion to dismiss for failure to state a claim. Tenant appealed. The Court of Appeals affirmed. The Supreme Court granted tenant’s petition for further review.

The Supreme Court held that:

- Tenant had standing to bring claim against landlord for breach of contract based on rent increases in excess of amounts allowed by Bond Allocation Act, and
- Term “area fair market rent” in Bond Allocation Act meant fair market rent set for area by federal Department of Housing and Urban Development (HUD).

The Minnesota Bond Allocation Act does not provide a private cause of action to enforce its rent restrictions, and bond issuers have the sole enforcement authority.

Residential tenant's allegations that landlord charged her rent in excess of limits established by Minnesota Bond Allocation Act were sufficient to plead injury-in-fact, as necessary for standing to bring claim against landlord for breach of contract, even though Act did not provide tenant with private right of action to enforce its rent limits; tenant alleged that landlord promised in lease that any rent increases would be made in compliance with state and local laws, and that landlord's rent increases in excess of caused her economic injury.

Remedy provided by Minnesota Bond Allocation Act for developer's charging of excessive rent for tenants in housing project funded by municipal bond proceeds, namely statutory penalty payable to issuer, was not exclusive remedy for other parties that contracted with developer, and, thus, did not preclude tenant's claim against developer, as landlord, for violation of contractual promise not to increase rent beyond amounts permitted by Act.

Alleged failure by city, as issuer of municipal bond that funded development of housing project where tenant lived, to find that developer failed to comply with rent restrictions of Minnesota Bond Allocation Act and to assess statutory penalty did not preclude tenant's claim against developer, as landlord, for breach of contractual agreement not to increase rent beyond amounts authorized by Act; city's inaction did not govern whether developer violated lease by charging rent that exceeded statutory limit or whether tenant had standing to bring such claim against landlord.

Term "area fair market rent," as used in provision of Minnesota Bond Allocation Act requiring parties that received municipal bond proceeds for housing construction to offer at least 20% of units at rental rate that did not exceed "area fair market rent…as established by the federal Department of Housing and Urban Development" (HUD) had technical meaning of fair market rent figure set for area by HUD, not payment standard amount set by local public housing agency; Act's linking of rent restriction to rent figures set by HUD and mentioning of federal assistance programs indicated term had special meaning supplied by federal housing assistance law, payment standard was based on but did not equate to fair market rent, and HUD did not "establish," meaning generate, payment standards itself.

IMMUNITY - NORTH CAROLINA

Providence Volunteer Fire Department, Inc. v. Town of Weddington

Supreme Court of North Carolina - August 19, 2022 - S.E.2d - 2022 WL 3570915 - 2022-NCSC-100

Volunteer fire department brought action against town, its mayor, and rival fire department alleging breach of contract, fraud in inducement and actual fraud, deprivation of property and liberty without due process, and tortious interference with contract.

The Superior Court denied town's and mayor's motions to dismiss fraud-related claims, and they appealed. The Court of Appeals reversed and remanded. Fire department's request for discretionary review was granted.

The Supreme Court held that:

- Town was entitled to governmental immunity from liability for alleged fraud in connection with its sale and lease-back agreement involving fire station;
- As matter of first impression, legislative immunity is recognized bar to claims against North Carolina public officials; and

- Mayor was entitled to legislative immunity from liability for fraud-related claims arising from contracts' termination.

Activities in which town was engaged in course of its dealings with volunteer fire department were governmental, rather than proprietary, in nature, and thus town was entitled to governmental immunity from liability for alleged fraud in connection with its sale and lease-back agreement involving fire station, despite fire department's contention that transaction was proprietary in nature; fire protection services were traditionally provided by government—either directly or through contract with private entities—for purpose of protecting safety and well-being of its residents, town did not charge fee to its residents for fire protection services and did not make profit in connection with provision of such services, and agreement set out manner in which fire station would be provided.

Legislative immunity is recognized bar to claims against North Carolina public officials.

Local officials are entitled to legislative immunity from suit if (1) they were acting in legislative capacity at time of alleged incident; and (2) their acts were not illegal acts.

Mayor's actions in calling and setting agenda for town council meeting to vote to terminate town's contracts with volunteer fire department constituted legislative actions for which he was entitled to legislative immunity from liability for fraud-related claims arising from contracts' termination.

BANKRUPTCY - NORTH CAROLINA

York County v. Appaloosa Management, LP

United States District Court, D. South Carolina, Rock Hill Division - August 17, 2022 - B.R. - 2022 WL 3572450

County filed complaint in state court alleging that related entities directed the misappropriation of $21,000,000 of statutorily restricted public funds for expanding road to five lanes and instead utilized the funds on football franchise's headquarters and practice facility, in connection with mixed-use development that included sports and entertainment venues.

Entities removed the case to federal district court, seeking ultimate reference to bankruptcy court, based on developer's Chapter 11 filing in the United States Bankruptcy Court for the District of Delaware. County moved to remand.

The District Court held that:

- County's removed action was "related to" developer's Chapter 11 case, but
- Court lacked "arising in" jurisdiction over county's action.

County's removed action alleging that related entities directed the misappropriation of $21,000,000 of statutorily restricted public funds for expanding road to five lanes and instead utilized the funds on football franchise's headquarters and practice facility, in connection with mixed-use development that included sports and entertainment venues, was "related to" developer's Chapter 11 case, for purposes of bankruptcy jurisdiction, because recovery by county against related entities could affect the claim that county asserted in developer's bankruptcy case for the same amount, existence of debtor's indemnification clause could conceivably have an effect on the administration of the bankruptcy estate, and debtor's adversary proceeding against county overlapped significantly with county's claims.

District Court lacked “arising in” jurisdiction over county’s removed action alleging that related entities directed the misappropriation of $21,000,000 payment to Chapter 11 debtor-developer consisting of statutorily restricted public funds for expanding road to five lanes and instead utilized the funds on football franchise’s headquarters and practice facility, in connection with mixed-use development that included sports and entertainment venues, because all of county’s claims for civil conspiracy, negligence and negligence per se, interference with contractual relations, and negligent misrepresentation existed antecedent to debtor’s bankruptcy filing, and a claim that pre-dated Chapter 11 filing could not be said to have arisen within that case.

PUBLIC WORKS - PENNSYLVANIA

Ursinus College v. Prevailing Wage Appeals Board

Commonwealth Court of Pennsylvania - August 4, 2022 - A.3d - 2022 WL 3093121

Private, non-profit college sought review of decision by Pennsylvania Prevailing Wage Appeals Board which reversed the decision of the Department of Labor and Industry, Bureau of Labor Law Compliance, concluding that construction project undertaken by college and financed by bonds issued by public authority was “public work” under the Pennsylvania Prevailing Wage Act, entitling members of labor union to prevailing wages for project work already completed.

The Commonwealth Court held that project was not “public work” under Pennsylvania Prevailing Wage Act.

Construction project undertaken by private, non-profit college and financed by bonds issued by public authority was not “public work” under Pennsylvania Prevailing Wage Act, although authority issued bonds and loaned funds to college under loan agreement, where authority was obligated to transfer funds to trustee, transfer took place before college received any funds for project, authority did not hold such funds, funds college used to pay for project were disbursed by trustee, rather than authority, college purchased bonds with private funds, college bore risk for repaying bonds, and Act required work be paid for out of funds of public body, rather than considering if college would have received funds “but for” acts of authority.

EMINENT DOMAIN - TEXAS

State v. LBJ/Brookhaven Investors, L.P.

Court of Appeals of Texas, Dallas - August 2, 2022 - S.W.3d - 2022 WL 3053893

Former owners of commercial property filed suit against State, Department of Transportation, Transportation Commission, Department’s Executive Director, and Commission’s Chairman, seeking to enforce their right of repurchase as to parcel of land along freeway that owners contended were taken in eminent domain proceedings and were no longer necessary to the project or public use.

The 134th District Court denied the State’s plea to the jurisdiction. State appealed.

The Court of Appeals held that:

- State’s failure to formally amend its condemnation petition to specifically reference parcel of land bordering its right of way did not deprive trial court of jurisdiction to render agreed judgment affecting parcel;

- State acquired parcel by eminent domain, for purposes of eminent domain right of repurchase statute; and
- Eminent domain statutes allow State to be sued in cases involving claims for property acquired by eminent domain, including issues involving right of repurchase statute.

State's failure to formally amend its condemnation petition to specifically reference parcel of land bordering State's right of way that was not included in State's original condemnation petition did not deprive trial court of jurisdiction to render agreed judgment in condemnation proceedings, and thus judgment was not void as to parcel; both sides were not only aware of the specific property that was being condemned, but they reached an agreement as to that property.

Agreed judgment entered in condemnation proceedings regarding state highway project unambiguously reflected that State acquired parcel of land bordering its right of way that were not included in its original condemnation proceedings by eminent domain, rather than by later-filed special warranty deed, for purposes of determining whether eminent domain right of repurchase statute applied to parcel; judgment provided that State was "condemning and acquiring" property described in exhibits that included parcel, decreed that State recover fee simple title to property described in exhibits, ordered State to pay property owners full compensation for condemnation, and, upon payment, released and discharged State of obligation to pay compensation for taking of property.

Statute setting district court's authority in eminent domain proceedings allows State to be sued in cases involving claims for property acquired by eminent domain, and gives district court authority over "all issues," not just condemnation and damages; these issues include those involving right of repurchase statute, which itself provides that district court may determine all issues in any suit regarding repurchase of real property interest acquired through eminent domain by former property owner or owner's heirs, successors, or assigns.

S&P Mid-Year Review: Tender Option Bond Activity Reaches New Highs As Interest Rates Rise

S&P Global Ratings is providing a recap of rated tender option bond (TOB) activity in the first half of 2022.

New Issuance Soars As Interest Rates Rise

TOB issuance surged during the first six months of 2022, largely due to rising interest rates. Some issuers took advantage of the higher rates by collapsing existing low-yield TOB trusts and creating new ones. Add-on activity also increased as issuers added more underlying bonds and issued more TOB certificates to existing trusts.

New issuance increased approximately 307% year over year to 273 new trusts rated by S&P Global Ratings as of June 2022, compared with 67 new TOBs rated as of June 2021 (see chart 1a). We rated 101 new trusts in May–a new monthly high. The top four liquidity providers for the 273 new trusts were JPMorgan Chase Bank N.A. (76 TOBs), Barclays Bank PLC (67), Bank of America N.A. (35), and Royal Bank of Canada (32).

Par issuance reached a high of approximately $5.5 billion in June, primarily due to the dramatic rise in second-quarter issuance. Total issuance tripled to $4.2 billion in second-quarter 2022 from $1.3

billion in the previous quarter, versus $1.6 billion in second-quarter 2021 and $1.0 billion in first-quarter 2021 (see chart 1b).

Continue reading. **[Free registration required.]**

22 Aug, 2022

Texas Bans Local, State Government Entities from Doing Business with Firms that 'Boycott' Fossil Fuels.

Texas Comptroller Glenn Hegar singled out financial firms under a 2021 state law that prohibits most state entities from contracting with companies that have reduced or cut investments in the oil and gas industry.

Texas banned 10 financial firms from doing business with the state after Comptroller Glenn Hegar said Wednesday that they did not support the oil and gas industry.

Hegar, a Republican running for reelection in November, banned BlackRock Inc., and other banks and investment firms — as well as some investment funds within large banks such as Goldman Sachs and JP Morgan — from entering into most contracts with state and local entities after Hegar's office said the firms "boycott" the fossil fuel sector.

Hegar sent inquiries to hundreds of financial companies earlier this year requesting information about whether they were avoiding investments in the oil and gas industry in favor of renewable energy companies. The survey was a result of a new Texas law that went into effect in September and prohibits most state agencies, as well as local governments, from contracting with firms that have cut ties with carbon-emitting energy companies.

Continue reading.

The Texas Tribune

By Mitchell Ferman

Aug 25, 2022

UBS Left Off Texas Muni Deal After It's Named Energy Boycotter.

UBS has been dropped from the underwriting ranks of a municipal-bond deal that Laredo, Texas, plans to sell next week after state Comptroller Glenn Hegar included the bank on a list of firms he deems "boycott" the fossil-fuel industry.

The decision to remove the Zurich-based bank from the underwriting syndicate for the roughly $119 million revenue-debt transaction came after Hegar released the list on Wednesday, according to Noé Hinojosa, Jr., the chairman and president of Estrada Hinojosa, the financial adviser on the deal. Wells Fargo & Co. took UBS's spot, he said.

There was "concern" over whether the transaction would close if UBS remained on it, according to

Hinojosa. In Texas, the attorney general's office must approve most municipal-bond deals before they can close, and the inclusion of UBS on Hegar's list may have hindered that clearance.

The comptroller sent inquiries to more than 150 companies in March and April, requesting information on whether they were shunning the oil and gas industry in favor of sustainable investing and financing goals.

UBS was the only US muni underwriter included on the final list of 10 companies, which the comptroller published in accordance with a law that took effect in the state about a year ago. The measure limits Texas governments from entering into certain contracts with firms that have curbed ties with carbon-emitting energy companies.

"We firmly disagree with the comptroller's decision to include UBS on this list, which is not substantive and will be harmful to Texas issuers and their constituents," a UBS spokesperson said in an email Friday. "We are assessing the announcement, but the fact that our parent entity has been listed does not necessarily preclude a subsidiary from being a contracting party."

UBS is the 18th-largest manager of Texas municipal-bond deals this year, credited with $477.2 million of transactions, or about 1.4% of the market, according to data compiled by Bloomberg. In the nationwide muni market, the firm ranks 16th.

Bloomberg Markets

By Danielle Moran

August 26, 2022

[JPMorgan Eyes Return to Texas Munis After Escaping GOP's ESG Ire.]

- **Cloud lifts after firm not included on energy-boycotter list**
- **First step would be to file a standing letter with Texas AG**

JPMorgan Chase & Co., which has mostly been absent from the business of underwriting Texas municipal bonds for the past year, plans to revive its work with the state and its local governments soon.

The firm, the No. 2 underwriter in the $4 trillion market for US municipal debt, joined a small group of major banks in stepping back from Texas after two new GOP-backed laws there took effect there on Sept. 1, 2021. The measures target Wall Street for what local officials said were restrictive policies related to the firearms and energy industries.

Wednesday, however, brought a key development that opens the door for JPMorgan to ramp up its muni business in Texas, one of the three most lucrative US public-finance markets. In a nutshell: Texas Comptroller Glenn Hegar, wrapping up a months-long inquiry mandated by the new law, didn't include the bank among the 10 finance firms he deems boycott the oil and gas industry.

It stands to be a big win for the New York-based bank, which was the largest muni underwriter on the list of more than 150 firms that were caught up in Hegar's probe.

With that cloud lifted, JPMorgan intends to begin bidding on public contracts again, including municipal underwriting, according to a person familiar with the matter. To begin underwriting muni deals in Texas, the bank first has to file a letter verifying its compliance with the firearms and energy laws with the Texas attorney general's office, the person said. The exact timing of that filing is to be determined.

The bank would likely resume underwriting for Texas and its localities by bidding on what's known as competitive bond deals, where banks buy the debt via an auction, according to the person.

No Cuts

JPMorgan didn't cut any public-finance jobs in Texas after the laws went into effect, and bankers kept sending financing pitches to municipalities there to maintain relationships with clients, the person said.

The bank's return is also potentially a boon for Texas municipalities, which haven't been able to work with some of the biggest banks — with the broadest network of investor contacts — on their bond deals.

The absence of large banks from the Texas underwriting market because of the two new laws has resulted in "large adverse effects for borrowers," according to a study by a University of Pennsylvania professor and an economist at the Federal Reserve.

Bank of America Corp., the No. 1 US muni underwriter, and Goldman Sachs Group Inc., ranked sixth, haven't handled any deals by Texas or its cities since September 2021.

The Texas gun law says its governments can't work with companies unless they verify that they don't "discriminate" against firearms entities. JPMorgan doesn't finance companies that make military-style weapons for civilians.

Citigroup Inc. also suspended muni-bond work after the law took effect in 2021, but it was able to revive its underwriting work in November. The bank continues to underwrite bond deals and is the seventh-biggest underwriter of Texas muni deals this year, after ranking first in 2020, data compiled by Bloomberg show.

JPMorgan Takes First Step to Revive Texas Muni-Bond Business

JPMorgan has long argued that it can comply with the firearms law. In September 2021, JPMorgan said its business practices should permit it to certify compliance with the firearms law. But it said the legal risk from the "ambiguous" law prevented it from bidding on most business with Texas public entities.

In May, Foley & Lardner LLP, a law firm representing JPMorgan, sent a letter to officials with the Texas attorney general's office stating it believes the bank can verify compliance with the laws, marking a key step for the bank to return.

"JPMC's risk-based framework does not discriminate against or prevent JPMC from doing business with any firearm entity or firearm trade association 'based solely on its status as a firearm entity or firearm trade association' without a traditional business purpose," the letter said.

Bloomberg Markets

By Amanda Albright and Danielle Moran

August 26, 2022

BlackRock, UBS Among Firms Named Energy-Industry Boycotters by Texas.

- **State comptroller names 10 companies after months-long inquiry**
- **Others include BNP Paribas, Credit Suisse and Danske Bank**

Texas is taking steps that could cost BlackRock Inc., UBS Group AG and eight other finance firms business with the state after finding them to be hostile to the energy industry.

Glenn Hegar, the Republican state comptroller, on Wednesday named the firms he considers to "boycott" the fossil fuel sector. The move ends roughly six months of suspense that led Texas municipal-bond issuers to avoid banks whose status was unclear amid the office's probe into companies' energy policies. Governmental entities should use the list as a "filtration system" when entering contracts, Hegar said in an interview.

The comptroller sent inquiries to more than 150 companies in March and April, requesting information on whether they were shunning the oil and gas industry in favor of sustainable investing and financing goals. The survey was triggered by a GOP-backed state law that took effect on Sept. 1, 2021, and which limits Texas governments from entering into certain contracts with firms that have curbed ties with carbon-emitting energy companies. Texas is the nation's top producer of crude and natural gas.

Continue reading.

Bloomberg Mqrkets

By Amanda Albright, Shelly Hagan, and Danielle Moran

August 24, 2022

Pennsylvania Commonwealth Court Issues Decision in Ursinus College v. Prevailing Wage Appeals Board: Saul Ewing

On August 4th, the Pennsylvania Commonwealth Court (the "Court") issued its decision in *Ursinus College v. Prevailing Wage Appeals Board*. The Court reversed a decision by the Prevailing Wage Appeals Board (the "Board") in which the Board found that a construction project financed with tax-exempt bonds issued by a municipal authority for the benefit of Ursinus College (the "College") was a "public work" subject to the Pennsylvania Prevailing Wage Act (the "Act") and ordered the College to retroactively pay the applicable prevailing wage rate to the project workers.

What You Need to Know:

- The Court held that a private project funded via conduit financing was not public work under the Act when the economic reality of the transaction showed it was a private business deal.
- The Act will not apply to a project so long as no government entity either owns the project, bears any risk in the transaction, or actually holds the funds at any point.

In 2016, the College, a Pennsylvania private, non-profit college entered into an agreement with a municipal authority (the "Authority") for the financing of part of a construction project for the College. Under the terms of the transaction, the Authority issued the bonds and lent the proceeds to the College, but never held or disbursed the funds. Instead, a trustee was appointed to hold and disburse the funds to the College, collect the College's repayments, and then pay the bondholders directly. The Authority had assigned to the trustee all of its rights, title, and interest in its loan agreement with the College and bore no risk or obligations for the repayment of the bonds.

Shortly after the Pennsylvania Bureau of Labor Law Compliance determined that the project was not public work, the International Brotherhood of Electrical Workers, Local No. 98 ("IBEW") brought a grievance under the Act. IBEW argued that the project was public work, and therefore the workers on the project should have received prevailing wage. As previously summarized by the Pennsylvania Supreme Court, a project is public work under the Act if it meets four elements: *"(1) there must be certain work; (2) such work must be under contract; (3) such work must be paid for in whole or in part with public funds; and (4) the estimated total cost of the project must exceed $25,000."* This case hinged on the third element, whether the College project had been paid in whole or in part with public funds.

The Board found that the project was public work under the Act, because the College *"would not have had this funding stream available **but for** the existence of the Authority and its coordination of the funding through its statutory powers as a public body"* (emphasis added). The Board retroactively awarded prevailing wage to the workers of the College's project.

On appeal, the Court reversed the Board's decision and held that courts must look at the economic reality of the transaction when determining if a project is paid in whole or in part with public funds. In order to make such assessment, courts will look at the risk allocation among the participants to the conduit financing deal. On one hand, a project is not paid in whole or in part with public funds when no public entity bears any risk in the transaction. On the other hand, a project is funded with public funds if the government entity has any ownership interest in the project, if it has any repayment obligation or bears any risk under the bonds, or if it actually holds the funds at some point in the transaction.

The parties can still apply for reargument with the Court or file a petition for allocatur with the Pennsylvania Supreme Court, and we will update this alert if any new development arises.

August 23, 2022

by Louis Couture, George Magnatta, Joshua Pasker

Saul Ewing Arnstein & Lehr LLP

Florida Becomes Latest State to Propose Anti-ESG Legislation: Saul Ewing

On July 27, 2022, Florida Governor Ron DeSantis announced legislative proposals and initiatives that would prevent State Board of Administration (SBA) fund managers from considering environmental social and governance (ESG) factors when investing the state's money. Instead, the proposed legislation would require SBA fund managers to only consider maximizing the return on investment for Florida's retirees. The proposed legislation would also amend Florida's Deceptive and Unfair Trade Practices statute to prohibit discriminatory practices by large financial institutions based on ESG social credit score metrics, with violations considered to be deceptive and unfair trade practices punishable by law. The announcement indicated that the legislation would be proposed in the 2023 Legislative Session.

What You Need to Know

- Florida's Governor announced proposed legislation that would prevent state fund managers from considering ESG factors when investing state money, and prohibit discriminatory practices by financial institutions based on ESG social credit score metrics.
- Florida joins a growing list of mostly conservative states that have proposed or enacted anti-ESG legislation aimed at the ESG policies of financial institutions.
- Anti-ESG legislation at the state level may impact municipal bond markets and increase borrowing costs if they require or otherwise induce certain financial institutions to withdraw from those markets.

Gov. DeSantis stated that the proposed legislation and initiatives will "protect[] Floridians from woke capital" in response to "the corporate elite us[ing] their economic power to impose policies on the country that they could not achieve at the ballot box." Specifically, the proposed legislation will:

- Prohibit financial institutions from discriminating against customers for their religious, political, or social beliefs;
- Prohibit SBA fund managers from considering ESG factors when investing the state's money; and
- Require SBA fund managers to only consider maximizing the return on investment on behalf of Florida's retirees.

Florida Joins Growing List of States Proposing Anti-ESG Legislation

Florida joins a list of states that have proposed or enacted anti-ESG legislation, but is one of the largest states to propose such legislation, with considerable assets that would be impacted. Indeed, more than a dozen states have proposed or enacted legislation aimed at financial institutions which utilize ESG policies that would appear to threaten their livelihoods or run contrary to prevailing political values in the state. Most of those states are conservative, such as Texas, Oklahoma and Kentucky, but "purple" states such as Ohio and Arizona have also enacted anti-ESG measures.

For example, in 2021, Texas passed a law that bans its municipalities from doing business with banks that have ESG policies against fossil fuels and firearms, as a means of protecting Texas' reliance on those industries. As a result, Texas cities can no longer use banks with such ESG policies as underwriters for municipal bonds (although there are exceptions).

Unintended Consequences of Anti-ESG Legislation

After Texas passed the law, five of the largest underwriters exited the municipal bond market: JPMorgan Chase, Goldman Sachs, Citigroup, Bank of America, and Fidelity. Those five institutions used to underwrite 35 percent of the debt in the market. The gap that they left in the market, the decreased competition as a result of their departure, and the loss of historic relationships between various municipalities with those institutions has increased borrowing costs. Indeed, a recent study conducted by Wharton analyzed data from the first eight months of the Texas law and estimated that Texas cities will pay an additional $303 million to $532 million in interest on $32 billion in bonds.

As states (especially conservative ones) continue to consider and propose anti-ESG legislation, financial institutions may be forced to decide whether to withdraw from those markets as well, or otherwise evaluate their level and manner of participation. Should that happen, there may be similar increases in borrowing costs as seen in Texas due to decreased competition in the market and loss of historic relationships with lending partners.

by Sean T. O'Neill

August 22, 2022

Saul Ewing Arnstein & Lehr LLP

[Cities Brace for This Season's Colliding Climate Disasters.]

May to October has become known as the "danger season" — when the US is most at risk of experiencing back-to-back climate disasters like heat waves, wildfires, drought and storms.

As summer in the US approaches peak wildfire and hurricane seasons, with above-normal activity predicted for the latter, experts worry that persistent heat waves can pack a deadly one-two punch as they coincide with extreme storms and severe droughts.

Such a threat played out in August 2020, when a heat wave blanketed Louisiana right after Hurricane Laura hit, leaving residents in 100-degree Fahrenheit weather without power. Of the 31 storm-related deaths reported, eight were "heat-related" and nine were due to carbon monoxide poisoning, likely from a generator. Then in October, as parishes were barely recovering in the sweltering heat, Hurricane Delta came barreling up the Gulf Coast.

These days, disasters seldom happen in isolation, even as most response and aid programs still treat them as one-off events. Events are overlapping, and hitting cities one right after another. The period between May and October, dubbed "danger season" by the Union of Concerned Scientists (UCS), is when extreme weather hazards are most likely to collide. Senior scientist Juan Declet-Barreto at UCS worries that the slow start to this year's Atlantic hurricane season could mean a pile-up of severe storms over the next two months.

[Continue reading.]

Bloomberg CityLab

By Linda Poon

August 25, 2022

[S&P Credit FAQ: How Do U.S. Pension/OPEB Credit Analysis Guidelines Stand Up Amid High Inflation And Lower 2022 Market Returns?]

Table of Contents

Pension and other postemployment benefit (OPEB) obligations remain a focus of S&P Global Ratings' U.S. public finance (USPF) credit analysis, and with the recent equity market returns widely missing target rates of return, volatility within pension assumptions is on investors' minds in 2022.

Since S&P Global Ratings published "Guidance: Assessing U.S. Public Finance Pension And Other Postemployment Benefit Obligations For GO Debt, Local Government GO Ratings, And State Ratings," on Oct. 7, 2019, its guidance is materially unchanged. However, amid the current high inflation and low market returns, we answers the most frequently asked questions from investors and other market participants about this guidance.

Continue reading.

23 Aug, 2022

Bond Sales Get Too Expensive Just When Public Pensions Need Them.

- **Municipal pension debt sales fall 70% from 2021 pace**
- **Returns hit by stock drop as rate rises make borrowing costly**

US cities and states have backed away from selling bonds to cover pension obligations because of rising borrowing costs, increasing their long-term burden of unfunded pension gaps.

So far this year, municipal governments sold just $2.7 billion of bonds in which proceeds would at least in part help finance retirement systems, an almost 70% drop from the same period a year ago, according to data compiled by Bloomberg. At the same time, an index of 10-year, AAA benchmark yields has risen to about 2.5% from near 1% in January.

“The market now makes it more difficult to justify” selling pension bonds, Pat Luby, municipal strategist at Creditsights Inc., said in an interview. “It’s not impossible, but it’s definitely more difficult to do.”

Continue reading.

Bloomberg Markets

By Hadriana Lowenkron

August 23, 2022

Fitch: US Water Utilities Withstanding Inflationary Pressures

Fitch Ratings-New York-23 August 2022: U.S. water utilities have fared remarkably well post-coronavirus and are withstanding the effects of inflation on operations and capital spending, according to Fitch Ratings’ latest annual peer review for the sector.

Operating costs are up across the board after a decline in fiscal 2020, but year-over-year operating revenue growth largely kept pace in fiscal 2021. Capex-to-depreciation also increased for retail and wholesale issuers in 2021, likely as a result of greater needs and higher pricing for labor and materials. The five-year average median ratios for retail systems are above 150% for the third year in a row, whereas the ratio for wholesale systems totaled 170% in 2021. Leverage also fell slightly for retail systems and increased for wholesale systems.

Liquidity for water utilities remains robust with solid COFO levels and current days cash on hand well over 550 days, which should buffer the effects of even higher inflation through 2022 year-end. “Despite some minor bumps, water utilities are positioned quite well to absorb higher costs in 2022 and rebound heading into 2023 as the rate of inflation shows signs of slowing," said Managing Director Dennis Pidherny.

Fitch's U.S. Water and Sewer: Peer Review is a point-in-time assessment of Fitch-rated public water and sewer utilities. It assists market participants in making their own comparisons among the recent financial performance of wholesale and retail water and sewer systems. It is accompanied by the 2022 Water and Sewer Fitch Analytical Comparative Tool (FACT), an interactive tool that provides enhanced trend analysis and peer comparison tables. The statistics reflect rating actions taken through July 2022 and historical financial data through Dec. 31, 2021.

The full report, "2022 U.S. Water and Sewer: Peer Review," is available at www.fitchratings.com

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Implementing Federal Funding for Utilities.

Why It's Important to Think Strategically, Creatively and Holistically When Working with ARPA, IIJA Funds

Utilities are faced with a rare and remarkable opportunity to impact the present-day situation of their users and rate payers while also altering the long-term future of their entire communities.

With the American Rescue Plan (ARP) and the Infrastructure, Investment and Jobs Act (Infrastructure Act) allocating billions of dollars to upgrade aging utility infrastructure and improve utility system resilience (as well as various grant programs that create additional funding opportunities), utilities simply cannot afford to sit this one out.

The ARP was enacted in March 2021 and allocated $350 billion of non-competitive funding to states, counties, cities, tribes and territories for economic relief in the wake of the COVID-19 pandemic. In early 2022, the U.S. Treasury issued the Final Rule for state and local governments to address their pandemic response needs and promote long-term recovery.

The Final Rule, in essence, set the wheels in motion for utilities to begin planning, preparing and spending, if they haven't already.

The Infrastructure Act which was signed into law in November 2021 created $1.2 trillion of both reauthorized spending as well as new spending programs specifically to address much needed upgrades to our nation's infrastructure grid. Although more than 65 percent of these funds will go towards addressing public transportation needs, almost $30 billion will go towards water and wastewater needs, which will be passed down to the states to provide funding at the local level over the next five years.

However, when you consider that we're looking at the largest investment in infrastructure in U.S. history — and that so much contradictory information is available online — it is understandable that some utility leaders find themselves confused, overwhelmed, or even paralyzed by the endless possibilities.

What Should Utilities Be Doing?

Advice regarding how to manage and spend ARP funds combined with Infrastructure Act dollars could lead this conversation down a very nuanced and complicated path, and certainly recommendations would vary from company to company. But in general, we recommend three simple strategies: Think creatively, think regionally and think holistically.

Creatively speaking, if money were no object, how would you spend that money? Where would you want your community to be in the future? And not just in three years, but in 15, 20 or even 50 years? Think in terms of economic growth and aging infrastructure and allow your brain to think creatively, almost as if money was a non-factor. This is a once-in-a-lifetime opportunity — or at least we hope it is! You need to treat this process as if you may never have a better chance to solve utility issues that have lingered in your community for years.

In terms of thinking regionally, speak with (and perhaps even partner with) governments from neighboring cities and counties. Engage in dialogue around everyone's plans for the region, as the impact of the money in this case could easily spread beyond the walls of your town. The long-term wellness of regional utilities and the economy of the entire region can both be positively impacted by these funds. Seek input from business stakeholders, property owners, taxpayers, utility customers, economic developers and other governmental officials. Having a diverse group of decision-makers and a far-reaching vision for the money will allow you to ensure you spend the funds in a way that has a broad, forward-thinking, regional impact.

Finally, it is important to approach this process holistically. Even though you may be focused on water on a day-to-day basis, look at things from the perspective of your entire community. Awareness of other projects will save time, energy and money. Perhaps the streets department is going to be redoing several roads in a particular neighborhood. To avoid a re-dig, that would be the best time to replace those water, sewer and stormwater lines and perhaps consider installing broadband in an area that is in need of expanded broadband services.

Confusion is Understandable; Hesitation is Not

Although it's been well over a year since the ARP was passed and more than six months since the Final Rule was released, many entities still do not know how to spend their available funds — and there is nothing wrong with that. For starters, many entities waited until the release of the Final Rule to fully explore how to spend their money.

Municipalities generally are aware of the non-competitive funds available from the ARP. However, competitive money is often a different story. Sometimes municipalities don't believe they can qualify for certain available competitive funds or may be intimidated by the task. In other cases, entities simply cannot devote the necessary time or personnel to research the opportunity and prepare a competitive grant application. There are even cases where they don't even know about the available

opportunities.
In the larger picture, the spending of ARP funds is a process that requires significant planning, budgeting and collaboration. Additionally, some of the competitive funds available are still being created and rolled out. When you add that all up, it makes sense that an entity would not want to rush into applying for ARP funds.

That said, the time has arrived for action.

Regarding the ARP funding, Infrastructure Investment and Jobs Act funding and additional competitive dollars, there needs to be a “measured urgency.” These programs are highly competitive and will not be around forever, so as soon as you’re ready, act quickly and purposefully. Ensure in advance you can meet the deadlines and other requirements associated with the grant program.

Additionally, from a timing standpoint, these federal dollars likely will have a real financial impact on rate payers. With water utilities, the more immediately you can access these dollars — the “free money” if you will — the greater and quicker direct impact it could have on what your customers pay in monthly user rates.

Next Steps You Can Take

As a first step, assess your local infrastructure to determine your needs and the extent of the required solutions. One effective way to do this is to create an asset management plan to identify all the existing infrastructure – both above and below ground – as well as the condition it is in and the estimated cost to replace it. Oftentimes state and federal competitive programs require a preliminary engineering report or asset management plan as part of the application process.

Additionally, consider your economic development strategy — where and how your community is growing, where and how you want it to grow and what kind of infrastructure is needed to attract businesses and industries. You will want to identify and align resources and develop a strategic spending plan. Convene a core group of specialists across all areas. That way when you secure the funding, you are “shovel ready” to act promptly, rather than waiting six months to design the project.

Finally, monitor and evaluate progress. Ongoing compliance should be a continued focus throughout every stage of the process. Communities with limited time, resources or knowledge may find it helpful to connect with a professional services firm that can help them think strategically, regionally and holistically about their ARP funds and assist with grant applications for competitive dollars.

Water Finance & Management

By Jeff Rowe

AU 22, 2022

Jeffrey P. Rowe, CPA, is a partner with Baker Tilly Municipal Advisors. He joined Baker Tilly in 1998 and is a partner in its public sector practice group. He specializes in serving local governments and public utilities. His experience includes providing accounting, financial consulting, utility rate-making and municipal advisory services.

Baseload- Current Topics in the Power and Utilities Capital Markets: Hunton Andrews Kurth

Read the publication.

Hunton Andrews Kurth LLP

August 24 2022

S&P U.S. Not-For-Profit Health Care Small Stand-Alone Hospital Median Financial Ratios--2021

View the ratios.

24 Aug, 2022

S&P U.S. Not-For-Profit Health Care Stand-Alone Hospital Median Financial Ratios--2021

View the ratios.

24 Aug, 2022

S&P U.S. Not-For-Profit Health Care System Median Financial Ratios--2021

View the ratios.

24 Aug, 2022

S&P U.S. Not-For-Profit Health Care Children’s Hospital Median Financial Ratios--2021

View the ratios.

24 Aug, 2022

S&P U.S. Not-For-Profit Acute Health Care Speculative Grade Median Financial Ratios--2021

[View the ratios.]

24 Aug, 2022

[S&P U.S. Not-For-Profit Acute Health Care 2021 Medians: Peak Performance Highlights Cushion As Sector Encounters A Challenging Period]

Key Takeaways

- **Fiscal 2021 medians are the strongest in nearly a decade.** Despite significant operational and financial volatility over the past two fiscal years, overall financial performance and balance sheet medians are generally the strongest we have seen over the past decade.
- **COVID-19 relief funding provided significant support.** Financial performance and unrestricted reserves were supported by the receipt and recognition of considerable provider relief funds. Without this support, performance would have been considerably weaker, albeit still positive.
- **Net patient service revenue rebounds.** Steady volume recovery contributed to net patient service revenue materially rebounding in 2021 after a decline in 2020, while total operating revenue continued to grow.
- **Strengthening balance sheets lend stability.** Almost all median balance sheet ratios improved with another healthy year of investment performance coupled with management actions to preserve funds during the pandemic and receipt of material government support.
- **Expense and macroeconomic pressures are expected to affect future performance.** Wage and related inflationary pressures began to escalate in the second half of 2021 and likely will cause a drag on performance for the remainder of 2022 and going into 2023 for many organizations.

[Continue reading.]

24 Aug, 2022

[Inflation Reduction Act Boasts $1.5B for Planting Neighborhood-Cooling Trees.]

The massive measure offers a five-fold increase in funding tree planting nationwide, especially in low-income communities that are typically hotter in summers.

With a recent study predicting that more of the nation will be suffering through 100-degree days 30 years from now, the Biden administration is giving a major boost to cities trying to deal with the extreme heat ahead by planting more trees and creating more shade.

Included in the Inflation Reduction Act President Biden signed into law last week are $1.5 billion in grants the federal government will be sending to states, local governments and nonprofits over the next decade to plant trees.

Working out to an average of $150 million a year, Biden’s climate, health-care and taxes measure will mean a five-fold increase for the U.S. Agriculture Department’s Urban and Community Forestry Program over the $32 million the program is receiving this fiscal year.

Continue reading.

Route Fifty

By Kery Murakami

AUGUST 26, 2022

Guide to Public Funding for Broadband Projects in Ohio: Squire Patton Boggs

Over the last three decades, accessible and affordable high-speed internet (often called "broadband") has increased in importance for the health, safety and economic wellbeing of communities. Municipalities that are interested in expanding broadband to their communities have several options in both how to build out broadband networks and how to finance such expansion. This paper explains the basics of broadband connectivity and outlines two methods of broadband expansion: (1) municipal owned network and (2) public-private partnerships.1

Basics of Broadband

Broadband is a general term that refers to high-speed internet access. The Federal Communications Commission (FCC) sets the speeds that qualify as adequate broadband. Since 2015, that speed has been 25 megabits per second (Mbps) download and 3 Mbps upload often referenced as "25/3 Mbps."2 As of 2022, 488,327 households in Ohio lack access to 10/1 Mbps broadband, which is currently considered the "bare minimum of connectivity."3 In addition, 37% of Ohioans lack access to 25/3 Mbps broadband.4

Why Fiber is Favored

Several avenues exist to deliver high-speed broadband, including fiber, DSL/cable and wireless networks. Current federal and state programs are incentivizing fiber networks over other delivery methods.5 Fiber, short for fiber optic cables, consists of bundles of glass or plastic strands that carry data at the speed of light. Fiber presents several benefits over other types of internet service. First, fiber more easily allows for higher speeds than other methods because fiber transmits data at the speed of light, the data travels faster than it would on copper cables.6 Fiber cables can carry much more data than a copper cable of the same size.7 Additionally, fiber networks can transmit data for much longer distances before needing to be amplified than traditional copper wires.8 Importantly, fiber cables are also "futureproof" due to fiber's ability to handle huge amounts of information; fiber does not corrode or deteriorate like copper wires.9 All of these qualities make fiber the optimal infrastructure for broadband expansion, despite fiber being more expensive than traditional cables. Although fiber easily offers speeds of 1 gigabits per second (Gbps),10 many consumers with fiber internet service will not be able to access that speed due to bottlenecks within other non-fiber parts of the broadband system.

Continue reading.

Squire Patton Boggs – Jessica Ice and Jacob Semus

August 19 2022

TAX - KANSAS

[Dodge City Cooperative Exchange v. Board of County Commissioners of Gray County]

Court of Appeals of Kansas - July 22, 2022 - P.3d - 2022 WL 2898814

Taxpayer filed petition for judicial review of Board of Tax Appeals decision affirming county's determination that equipment associated with grain storage bins were taxable fixtures rather than personal property.

The District Court reversed, and county appealed.

The Court of Appeals held that:

- County continued to have burden to prove in trial de novo that tax classification was correct;
- Pieces of equipment attached to grain storage bins were not "fixtures" for tax classification purposes; and
- Taxpayer, which only challenged tax assessments for two years, was only entitled to refunds for those two years.

On trial de novo in the district court, county continued to have burden to prove that classification for tax purposes of various equipment associated with grain storage bins was correct; as county had burden before the Board of Tax Appeals, on trial de novo county retained that burden.

Various pieces of equipment attached to grain storage bins were not "fixtures" for tax classification purposes, although equipment was large and bolted to the storage bins, where equipment could be easily removed, and removal would not damage the bins and would not be unduly complicated or costly, and similar pieces of equipment had been removed and placed on different bins.

Taxpayer which challenged only two years of tax assessments, on grounds that pieces of equipment attached to grain storage bins were not fixtures, was only entitled to refunds for those two years and could not recover refunds for taxes collected after those years; at time of appeal to the Board of Tax Appeals, taxpayer could not challenge future assessments, and there was no indication that taxpayer attempted to challenge those future assessments when they were made by exhausting its administrative remedies.

[In the Muni Market, Financial Disclosures DO Matter to Investors.]

The usefulness of municipal bond issuers' financial disclosures is a source of considerable debate. Our paper, "*The Information Content of Municipal Financial Statements: Large-Sample Evidence*," provides evidence that disclosure matters to municipal bond investors, particularly the retail investors who dominate the market. Using the entire universe of annual financial disclosures from 2009 to 2020, collected by the Municipal Securities Rulemaking Board—412,947 in all—we find that trading activity in the secondary market for municipal bonds increases after disclosures are filed. We find that trading activity increases by 2 percent to 3 percent around filings of annual financial statements, a small but meaningful increase.

Both institutional and retail trades increase around disclosure filing, but the effect is pronounced for retail investors, for whom the reports are more likely to provide new information. Moreover, trading increases more after timelier disclosures, consistent with regulators' views that untimely disclosures are less likely to provide new information. We also examine variation in investors' responsiveness to disclosure, based on the content of the disclosures. In general, disclosures that indicate the bond is risky are associated with a pronounced response.

Our results contrast with earlier research and provide the first large-scale evidence that participants in the U.S. market for municipal bonds perceive financial disclosures to have informational value.

Download the full paper.

The Brookings Institution

by Christine Cuny, Ken Li, Anya Nakhmurina, and Edward Watts

August 23, 2022

MSRB Elects New Board Leadership and Announces New Members for FY 2023 at Quarterly Meeting.

Washington, DC – The municipal market's self-regulatory organization (SRO) met July 27-28, 2022 for its final quarterly Board of Directors meeting of Fiscal Year 2022. The Municipal Securities Rulemaking Board (MSRB) elected new officers and announced four new members who will join the Board in FY 2023.

Also at its meeting, the Board discussed current and forthcoming initiatives to advance its mission of protecting and strengthening the $4 trillion market that enables access to capital, economic growth, and societal progress in tens of thousands of communities across the country.

"The work of an SRO is never more important than at a time of profound evolution and modernization of financial markets," said MSRB Chair Patrick Brett. "I am proud and grateful to have served alongside a dedicated Board of experts steeped in the characteristics of our unique market, who have not shied from advancing an ambitious agenda. With engagement from a broad universe of market stakeholders, the MSRB has taken meaningful steps to enhance the efficiency and transparency of municipal market structure, to deepen our own and the broader market's understanding of how market practices are evolving, and to create opportunities for collaboration that will yield powerful new technology platforms and data analytics capabilities."

Board Leadership and New Members for FY 2023

Brett's term as Chair and Board member ends September 30, 2022. The Board announced today that it has elected public member Meredith L. Hathorn, Managing Partner, Foley & Judell, L.L.P. in Baton Rouge, LA, to serve as FY 2023 Chair of the Board. Public member Carol Kostik, the retired former deputy comptroller for public finance for the City of New York, will serve as Vice Chair. Officer terms are one year. The Board also announced the incoming class of four new Board members whose terms will begin October 1, 2022.

Chair-elect Hathorn, the FY 2022 Vice Chair and head of the Board's Nominating Committee said, "Each year, we cast a wide net to identify a new class of market experts to join us on the Board. We thank each applicant for their willingness to give back to our market, and we could not be more pleased to welcome four new members who each bring a distinct perspective, a wealth of experience and an outstanding commitment to overseeing the execution of the MSRB's long-term strategic goals."

New public members joining the MSRB Board in Fiscal Year 2023 are institutional investor representative David F. Belton, Director, American Family Insurance; and municipal issuer representative Horatio Porter, Chief Financial Officer, North Texas Tollway Authority. Joining the Board as regulated members are: bank representative Patrick O. Haskell, Managing Director and Head of Municipal Securities and Co-Head of Fixed Income Retail Capital Markets, Morgan Stanley; and municipal advisor representative Jill Jaworski, Managing Director and Partner, PFM Financial Advisors. The new Board members were selected from more than 70 applicants this year.

For FY 2023, the Board will have 15 members, including eight independent public members and seven members from MSRB-regulated broker-dealers, banks and municipal advisors. The size of the Board was reduced as part of a series of governance enhancements that also tightened standards of independence for public members and established a lifetime service limit for Board members. To implement the transition plan to a smaller Board, the terms of a current public member on the Board, Donna Simonetti, and one regulated member, Francis "Frank" Fairman, have been extended one year. Board member Daniel Kiley's term also has been extended one year to complete the final year of a vacancy created by the 2021 resignation of a regulated representative on the Board.

Market Regulation

The Board discussed the status of the ongoing retrospective rule review to holistically consider its rules and interpretive guidance and identify opportunities to streamline, update and promote consistency with rules of other regulators. The Board authorized staff to prepare a new request for comment on MSRB Rule G-47 to seek feedback on a proposal to codify interpretive guidance and specify certain additional information that may be material and require time of trade disclosures to customers. The MSRB plans to engage with stakeholders prior to the release of the request for comment.

In coordination with the Securities and Exchange Commission (SEC) and Financial Industry Regulatory Authority (FINRA), the MSRB is preparing to issue a request for comment in the coming week on proposed amendments to shorten MSRB Rule G-14 's time of trade reporting requirements as part of an initiative to enhance post-trade transparency across fixed income markets.

Market Transparency

The Board received a demonstration of continued work to develop the future-state MSRB.org website. The MSRB website is being redesigned to make MSRB rules, compliance resources, educational materials and other information easier and more intuitive to find, and to complement the ongoing work to modernize the Electronic Municipal Market Access (EMMA®) website and related market transparency systems.

Market Structure and Data

The Board continued its ongoing discussions about market structure, including the potential implications for the MSRB's rules of the SEC's proposal to bring more Alternative Trading Systems (ATSs) under the regulatory umbrella. Additionally, the Board discussed working with staff to develop coordinated proposals with fellow regulators on the collection of pre-trade data in the fixed income markets. The Board also discussed potential new opportunities to support the market's use of structured data by leveraging EMMA Labs, the MSRB's innovation sandbox, to advance transparency and the quality and comparability of data in the municipal securities market.

“A common theme in our long-term strategic plan is the objective of advancing market efficiency, improving price transparency, and enhancing overall market liquidity, especially in light of the opportunities presented by evolving technology and market practices across the fixed income markets,” said MSRB CEO Mark Kim.

Public Trust

The Board approved a $45 million operating budget to fund the operations of the MSRB for FY 2023, beginning October 1, 2022. A budget summary detailing the MSRB’s projected expenses, revenues and reserve levels will be published at the beginning of the fiscal year. The Board recently proposed amendments to its fee setting process to ensure the MSRB collects only the revenue needed to fund its operations without accumulating excess reserves. Based on comments received on its proposal, the MSRB has advanced a revised proposal for filing with the SEC. The proposed amendments will be available for further public comment and would become operative on October 1, 2022.

Additionally, the Board discussed releasing a summary report in the coming weeks on comments received in response to its request for information on environmental, social and governance (ESG) practices in the municipal securities market, published in December 2021.

About the New MSRB Board Members

David Belton is Director at American Family Insurance, where he provides credit research and portfolio management for the company’s municipal bond holdings, both tax-exempt and taxable. Prior to joining American Family, Mr. Belton was Senior Vice President and Head of Municipal Bond Research at Standish Mellon Asset Management, where he was also portfolio manager of several Dreyfus municipal bond funds. Mr. Belton began his career at Van Kampen Merritt and subsequently held positions at Stein Roe & Farnham and Federated Investors. He has been active in the National Federation of Municipal Analysts at both the local and national levels. Mr. Belton holds a bachelor’s degree in political science from Haverford College and an MBA from the University of Chicago. He is a Chartered Financial Analyst.

Patrick O. Haskell *is Managing Director and Head of Municipal Securities and Co-Head of Fixed Income Retail Capital Markets at Morgan Stanley. Prior to this role, Mr. Haskell was Head of Credit Complex Trading, Americas, which included the Securitized Products Group, Corporate Credit and Municipal Securities. Prior to joining Morgan Stanley, Mr. Haskell was Chairman and CEO of diversified water technology company Ecosphere Technologies. Mr. Haskell began his career in municipal bond sales at Credit Suisse First Boston and went on to become Head of U.S. Government Bond Trading before joining HSBC as a Managing Director and Head of North American Rates Sales and Trading. He previously served as Board Chair of Tradeweb and as Chairman of the Primary Dealer Committee of SIFMA. He currently serves as the Board Chair for Boy’s Hope/Girl’s Hope NYC. Mr. Haskell earned a bachelor’s degree in economics from Union College.*

Jill Jaworski is Managing Director and Partner at PFM Financial Advisors, where she manages the Chicago financial advisory practice, serving a range of clients in Chicago and the Midwest, as well as transit and transportation clients nationally with a focus on the South and Mid-Atlantic regions. Ms. Jaworski began her career as an analyst in public finance investment banking at First Albany Capital, eventually rising to Vice President. She also worked at Jefferies & Company prior to joining PFM Financial Advisors. Ms. Jaworski holds a bachelor’s degree in political science from the University of Chicago.

Horatio Porter *is Chief Financial Officer and Assistant Executive Director of Finance at the North Texas Tollway Authority, where he is responsible for executing the company’s financial strategies. In* *this role, he leads the accounting, business diversity, procurement and treasury functions. Mr. Porter was previously Chief Financial Officer for the City of Fort Worth and an Assistant Vice President at AmeriCredit, Corp. (now GM Financial). He is a certified public accountant and holds a bachelor's degree in accounting and a master's of business administration in finance from Texas Christian University.*

Date: July 29, 2022

Contact: Leah Szarek, Chief External Relations Officer
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lszarek@msrb.org

Jay Powell, Munis, And ETFs.

Robert Teeter, Head of Investment Policy & Strategy Group at Silvercrest Asset Management, discusses market reaction to Jay Powell's speech, the economy, and investing amid inflation. Cleveland Fed President Loretta Mester speaks with Bloomberg's Michael McKee from Jackson Hole about the economy and interest rates. Joe Mysak, Editor of the Bloomberg Brief: Municipal Markets, discusses the latest news from the municipal bond market. Steve Matthews, US Economy Reporter with Bloomberg News, joins the show to discuss Jay Powell's speech at Jackson Hole and outlook for the Fed and its inflation fight. Hosted by Paul Sweeney and Kriti Gupta.

Listen to audio.

Bloomberg

Aug 26, 2022

SEC Staff Identifies Compliance Deficiencies Uncovered in Muni Advisor Examinations: Fried Frank

The SEC Division of Examinations identified common compliance deficiencies found during examinations of municipal advisors.

In a Risk Alert, SEC staff listed deficiencies related to registration, recordkeeping, supervision and disclosures. Highlighted areas included:

- **Registration:** Incomplete, inaccurate filings; failure to amend promptly; failure to pay fees;
- **Recordkeeping:** Failure to keep electronic communications, including emails sent from personal email addresses and text messages; poor financial records; failure to certify compliance as required under MSRB Rule G-44 ("Supervisory and Compliance Obligations of Municipal Advisors"); failure to keep written agreements;
- **Supervision:** Failure to have adequate written supervisory procedures; failure to conduct annual reviews of compliance; and
- **Disclosures:** Inadequate disclosure of conflicts; poor documentation of advisory relationships.

SEC staff said the deficiencies in the report were similar to those identified in its 2017 Risk Alert, a reminder that those areas continue to be the most vulnerable (*see* previous coverage).

The SEC staff encouraged municipal advisors to review the deficiencies identified in the alert and consider implementing programs to improve compliance.

Fried Frank Harris Shriver & Jacobson LLP

August 23 2022

Massachusetts Enacts Important Energy Legislation: Day Pitney

On August 11, Massachusetts Gov. Charlie Baker signed H. 5060, An Act Driving Clean Energy and Offshore Wind (the Act), published as Chapter 179 of the Acts of 2022. The Act is a significant piece of legislation aimed at moving Massachusetts toward its goal of net-zero greenhouse gas (GHG) emissions by 2050 through the promotion of offshore wind and solar power, battery storage, and the electrification of the transportation and building sectors.

Offshore Wind

Much of the Act focuses on offshore wind, with several significant provisions aimed at advancing the offshore wind industry and supporting the procurement of offshore wind energy. First, the Act codifies the goal of procuring 5,600 megawatts (MW) of offshore wind generation no later than June 30, 2027. The Act allows for a solicitation of offshore wind generation to be coordinated and issued jointly with other New England states. Individual solicitations under the Act must seek proposals for at least 400 MW. The Act directs the Department of Energy Resources (DOER) to develop a staggered procurement schedule so that procurements occur within at least two years of each other.

Second, the Act makes offshore wind development more attractive by removing the price cap required for project developers submitting bids in response to solicitations for offshore wind generation. The cap would have required that the price under each offshore wind power purchase agreement be less than the price paid in the preceding procurement.

Continue reading.

Day Pitney Alert

August 18, 2022

Day Pitney Co-author(s) Paul N. Belval, Eric K. Runge, Margaret Czepiel

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BDA National Fixed Income Conference.

Charlotte, NC | Nov. 3-4, 2022

Featured Topics

- Regulation of the US Bond Markets – The Agendas at FINRA and the MSRB, A Fireside Chat with Robert Cook of FINRA and Mark Kim of MSRB

- Mid-Term Elections and the Potential Impact on the Bond Market
- ESG, Climate Disclosure, and the Impact on the Muni Market
- Secondary Market Pricing, Evaluations, and Best Execution
- Covid and the Hybrid Workforce – The Challenges and the Opportunities for Sell-Side Dealers
- Blockchain and the US Bond Markets – a Revolution in Waiting?
- New Liquidity Providers – Market Structure Impact

Click over to the Agenda for more information!

Click here to register.

Hemingway Fans to Get New Concourse at Key West Airport.

Covid relief funds, state grant cover $113 million project
'Sun Also Rises' author called Key West home from 1931 to 1939

Future pilgrims to Ernest Hemingway's home and museum in Key West may find it a little easier to get there thanks to $36.7 million of municipal bonds.

Monroe County, Florida is issuing revenue bonds next week to help finance a new airport terminal at Key West International. The new concourse will be 48,805 square feet, and is scheduled to open in late 2025.

Key West International is recovering now after, like all airports, it was hard-hit by the pandemic. Traffic in April of 2020 was 3% of its level in the same month a year earlier. But business in fiscal 2021 was a-booming there, rising to a record level of 659,321 enplanements, or passengers boarding aircraft.

Continue reading.

Bloomberg

By Joseph Mysak Jr

August 24, 2022

Why Is Chicago's Rail Extension Funding Considered Controversial?

The Chicago Transit Authority is hoping to finally make good on a promise to expand a subway line to the southern edge of the city. First it needs the City Council to agree to a plan for raising billions of dollars to support the project.

By the end of the decade, Chicago's Red Line train could finally extend past its current terminus at 95th Street and into the far South Side, connecting some of the city's poorest communities to its sprawling transit network and fulfilling a mayoral promise made more than half a century ago.

The project, known as the Red Line Extension (RLE), has been in active planning by the Chicago Transit Authority since at least 2006. It would add four new stations and 5.6 miles of elevated and ground-level track to one of the busiest routes on Chicago's "L" system. It's an expansion of urban railway infrastructure on a rare scale in an age of funding crises and shrinking ridership for public transit agencies. But local leaders say it's a long-overdue investment that could cut travel time from the far South Side to the Loop by as much as 30 minutes while providing a host of economic benefits to underserved communities during and after construction.

The CTA completed the environmental review process for the project earlier this month, and is hoping to move into the engineering phase by next year. It's seeking more than $2 billion in federal funds, with the city and CTA required to put up about $1.6 billion of their own. To raise the local funds, the authority is proposing a new twist on an old tool called tax increment financing (TIF), which has been used extensively to fund economic development in Chicago. And despite some concerns about the proposal raised by several of the city's aldermen this summer, the project's planners say they're confident the Red Line Extension will move forward.

Continue reading.

governing.com

Aug. 25, 2022 • Jared Brey

CDFA Update: The Inflation Reduction Act - What You Need to Know

Wednesday, August 31, 2022 | 4:00 PM – 5:00 PM Eastern

Recently, President Biden signed the Inflation Reduction Act of 2022, historic legislation that appropriates billions of dollars for federal loan and grant programs to fight climate change by investing in green resources. Join CDFA and special guest speakers on Wednesday, August 31, from 4:00-5:00 PM, as they discuss how the Act will impact you and the communities you serve!

Click here to learn more and to register.

Fatally Flawed? Illinois Municipal League's Model Streaming Subscription Tax - McDermott Will & Emery

The Illinois Municipal League (IML) represents the interests of 219 home rule municipalities in Illinois.[1] The IML recently released a revised draft model, "Municipal Streaming Tax Ordinance," (the model) for use by the home rule municipalities in imposing an "amusement tax" on, inter alia, music and video streaming services and online gaming.[2] If the subscriber's residential street address is within the corporate limits of the municipality, the subscription fee would be subject to the tax.[3] However, the tax proposed by the model has at least two fatal flaws: it is barred by the Internet Tax Freedom Act (ITFA) as a discriminatory tax on electronic commerce and is an unconstitutional extraterritorial tax under the home rule article of the Illinois Constitution.[4]

NATURE OF THE STREAMING TAX

The model proposes a tax on the privilege of viewing an amusement, including electronic amusements that either "take place within the" municipality or are delivered to subscribers "with a primary place of use within the jurisdictional boundaries of" the municipality.[5] The model incorporates the definition of "place of primary use" from the Illinois Mobile Telecommunications Sourcing Conformity Act.[6] That statute requires sourcing to the subscriber's "residential street address."[7] The streaming tax operates like a familiar sales tax in that it is imposed on the subscriber but collected by the streaming provider and remitted to the municipality.[8] The model tax would also be imposed on "paid television programming" (sat TV), but not paid radio programming (sat radio), transmitted by satellite.[9] The tax is not imposed on transactions that confer "the rights for permanent use of an electronic amusement" on the customer.[10]

Continue reading.

McDermott Will & Emery – Stephen P. Kranz, Mark Nebergall, Catherine A. Battin and Jonathan C. Hague

August 24 2022

- Disclosure Update: GFOA Webinar
- What Does the Inflation Reduction Act Do for State and Local Government?
- Inflation Reduction Act Incentives for Energy Sector.
- Biden Signs Climate Bill With Transformative Changes to Clean Energy Tax Incentives: Latham & Watkins
- Expansion of Clean Energy Loans Is 'Sleeping Giant' of Climate Bill.
- Wayfair: The Sequel – Baker McKenzie
- Potentially disruptive California tax case here.
- And finally, Profoundly Unclear On The Concept is brought to us this week by *In re Application of Icebreaker Windpower, Inc.*, in which the Supreme Court of Ohio demonstrated an astonishing confusion regarding pre-school level geology/hydrology/whatever when it repeatedly stated that the wind farm in question was to be constructed on "submerged land in Lake Erie." How in the holy name of all that is aquatic could land *in* [emphasis angrily added] Lake Erie be anything other than submerged? Land *on* [super *supra* angry] Lake Erie would be 1) miraculous, and b) ultimately a bleeping island. *Aquaman 3 – Revenge of the Lake Bottom* coming soon to a theater near you.

STATE MANDATES - CALIFORNIA

Coast Community College District v. Commission on State Mandates

Supreme Court of California - August 15, 2022 - P.3d - 2022 WL 3349232

Community college districts petitioned for writ of mandate challenging decision of Commission on State Mandates that funding entitlement regulations did not impose a state mandate under state constitutional provision requiring the State to reimburse local governments for state-mandated new programs or higher level of service.

The Superior Court denied petition and entered judgment. Districts appealed. The Court of Appeal reversed in part. Commissioner petitioned for review.

The Supreme Court held that funding entitlement regulations did not impose a state mandate under a legal compulsion theory.

Regulations specifying various conditions that community college districts were required to satisfy to avoid the possibility of having state aid reduced or withheld did not legally compel districts to comply, and thus regulations did not impose a state mandate under a legal compulsion theory for purposes of a local government's constitutional right to reimbursement for a state-mandated new program or higher level of service; fact that the standards set forth in regulations, including matriculation, hiring of faculty, and selecting curriculum, related to districts' core functions did not in itself establish that districts had a mandatory legal obligation to adopt those standards, and California Community Colleges Chancellor had discretion to pursue remedial measures for any noncompliance.

PUBLIC UTILITIES - FEDERAL

Consolidated Edison Company of New York, Inc. v. Federal Energy Regulatory Commission

United States Court of Appeals, District of Columbia Circuit - August 9, 2022 - F.4th - 2022 WL 3205886

Protesting entities separately petitioned for review of the Federal Energy Regulatory Commission's (FERC) orders that approved regional transmission organization's cost allocations for upgrades to transmission owner's facilities.

After consolidation, the Court of Appeals held that:

- The FERC failed to reasonably explain why a "flow-based" method called the "solution-based distribution-factor analysis" (DFAX), which assigned costs based on how much each utility used a facility over time, was permissible to be used to allocate the costs of the upgrades;
- The "de minimis" threshold used in the DFAX violated the Federal Power Act's cost-causation principle and caused undue discrimination;
- The FERC reasonably explained its decision that netting the flows to each delivery point in a zone to calculate total flow in a zone did not violate the Federal Power Act's cost-causation principle and did not cause undue discrimination;
- It was reasonable to use a model of the flow of electricity that assumed that each zone was at peak demand;
- The FERC reasonably read the tariff as requiring an appropriate substitute proxy for the DFAX method;
- Responsibility of public utility outside of transmission organization's region to pay costs associated with the upgrades ended upon termination of its power exchange transmission service, or "wheeling," agreement with transmission owner; and
- The FERC reasonably came to and adequately explained conclusion that the overall cost allocation for entities outside the transmission organization's region was not unjust or unreasonable.

When approving regional transmission organization's cost allocations for upgrades to transmission owner's facilities, which upgrades were "non-flow-based" projects, the Federal Energy Regulatory Commission (FERC) failed to reasonably explain why a "flow-based" method called the "solution-based distribution-factor analysis" (DFAX), which assigned costs based on how much each utility used a facility over time, was permissible to be used to allocate the costs of the upgrades; when evaluating a separate project that also conferred non-flow-based benefits, the FERC had determined that using DFAX was not warranted, and although the FERC claimed that the upgrade projects involved resolving short-circuit issues in a way that made those projects like flow-based projects, the FERC conceded that, like the stability issue with the separate project, short-circuit problems were not directly caused by flow overloads on a facility.

When reviewing the Federal Energy Regulatory Commission's (FERC) orders that approved regional transmission organization's cost allocations for upgrades to transmission owner's facilities, the Court of Appeals had jurisdiction to consider argument that the FERC acted arbitrarily in treating the upgrade projects differently from a separate project when determining the appropriateness of the method used to assign costs; even though the protesting utilities failed to raise the argument when applying for rehearing of an initial FERC order, the FERC did not change its position as to the separate project until after the application for rehearing of the initial order, so the protesting utilities had a reasonable ground for failing to raise the argument.

The "de minimis" threshold used in the "flow-based" method called the "solution-based distribution-factor analysis" (DFAX) to allocate costs for upgrades to transmission owner's facilities violated the Federal Power Act's cost-causation principle and caused undue discrimination; under the threshold, if the "distribution factor," which was computed by dividing a zone's use of a facility by the zone's total load, was below 1%, then the zone would be assigned no costs, but such a threshold operated as a too-big-to-pay rule that bordered on the absurd.

Federal Energy Regulatory Commission (FERC) reasonably explained its decision that netting the flows to each delivery point in a zone to calculate total flow in a zone, which was a calculation process done as part of the "flow-based" method called the "solution-based distribution-factor analysis" (DFAX) to allocate costs for upgrades to transmission owner's facilities, did not violate the Federal Power Act's cost-causation principle and did not cause undue discrimination; under "netting," receipt of electricity in a negative direction offset the receipt of electricity in a positive direction, but since counterflows increased capacity, it was reasonable to treat them as benefits that the zones could confer on the facilities.

When deciding on protesting entities' petitions for review of the Federal Energy Regulatory Commission's (FERC) orders that approved regional transmission organization's cost allocations for upgrades to transmission owner's facilities, the Court of Appeals lacked jurisdiction to consider certain arguments as to why netting the flows to each delivery point in a zone to calculate total flow in a zone violate the Federal Power Act's cost-causation principle and caused undue discrimination; protesting utilities did not raise such argument in their applications for rehearing.

When deciding whether to approve regional transmission organization's cost allocations for upgrades to transmission owner's facilities, it was reasonable for the Federal Energy Regulatory Commission's (FERC) to use a model of the flow of electricity that assumed that each zone was at peak demand; despite argument that the assumption overestimated the merchant transmission facilities' use of the transmission facilities, the assumption was reasonable since transmission owner had to be able to meet peak load to guarantee system reliability.

When deciding whether to approve regional transmission organization's cost allocations for upgrades to transmission owner's facilities, the Federal Energy Regulatory Commission (FERC) reasonably read the tariff as requiring an appropriate substitute proxy for the "solution-based distribution-factor analysis" (DFAX) method to allocate costs of upgrades to transmission owner's facilities only when the modeled flows were not consistent with the normal expected flow results that an engineer would expect to see; despite argument that the tariff required a departure from the DFAX method if it violated the Federal Power Act's cost-causation principle, such an approach did not comport with requirement of FERC that costs be assigned ex ante.

Public utility's responsibility to pay costs associated with upgrades to transmission owner's facilities ended upon termination of its power exchange transmission service, or "wheeling," agreement with transmission owner, and thus transmission organization for region that did not include utility could not allocate such costs to utility after the termination; post-wheeling-agreement settlement that clarified the parties' rights and obligations made clear that utility had no liability for transmission enhancement charges after termination of term of service.

When reviewing Federal Energy Regulatory Commission's (FERC) orders that approved regional transmission organization's cost allocations for upgrades to transmission owner's facilities, the Court of Appeals lacked jurisdiction to consider intervenor's argument that the FERC's decision to allow merchant transmission facility to avoid cost allocations for one of the upgrade projects was arbitrary; such an argument appeared nowhere in intervenor's requests for rehearing before the FERC, which generally challenged the FERC's handling of cost allocation.

When deciding whether to approve regional transmission organization's cost allocations for upgrades to transmission owner's facilities, the Federal Energy Regulatory Commission (FERC) reasonably came to and adequately explained conclusion that the overall cost allocation for entities outside the transmission organization's region was not unjust or unreasonable; the FERC recognized that transmission organization was upgrade project's planner, and the FERC relied on transmission organization's statement that the project would still be needed in region even if there were no flows on the transmission facilities interconnecting the two regions at issue.

CONTRACTS - ILLINOIS

PML Development LLC v. Village of Hawthorn Woods

Appellate Court of Illinois, Second District - June 29, 2022 - N.E.3d - 2022 IL App (2d) 200779 - 2022 WL 2336455

Developer brought breach-of-contract action against village, alleging that village did not comply with agreement under which developer was authorized to fill and grade property in exchange for donating it, after filling and grading, to village. Village counterclaimed, alleging that developer breached agreement by failing to pay taxes on property.

Following a bench trial, the Circuit Court found that both parties had breached, but that village had breached first, and awarded developer much, but not all, of the damages it sought. Village appealed, and developer cross-appealed the damages award.

The Appellate Court held that:

- Trial court's finding that village had materially breached contract was not against the manifest weight of the evidence;
- Village violated its contractual obligation to act in good faith;
- Developer's decision to proceed under contract after village's breach meant that developer was not excused from its contractual obligations by village's breach;
- Village did not prevent developer from performing its contractual obligation to convey property to village;
- Developer's failure to pay taxes on property was misconduct that rendered developer's hands unclean and precluded developer from recovering under doctrine of unjust enrichment; and
- Developer's own material breach of contract, through its failure to pay property taxes, precluded developer's breach-of-contract claim against village.

EMINENT DOMAIN - INDIANA

Nordin v. Town of Syracuse

Court of Appeals of Indiana - July 14, 2022 - N.E.3d - 2022 WL 2721041

Property owners brought action against town for negligence, based on flooding of their cottage when a town worker accidentally turned on a water valve.

The Circuit Court granted summary judgment in favor of town. Property owners appealed.

The Court of Appeals held that:

- The Circuit Court erred in measuring damages based on difference between cottage's pre-flooding and post-flooding market value;
- Evidence supported the Circuit Court's determination as to cottage's pre-flooding market value;
- Genuine issue of material fact existed as to what repairs were necessary to restore cottage; and
- There was no evidence that costs associated with repairing cottage would have exceeded half of cottage's fair market value.

Trial court erred in measuring damages for flooding of a cottage based on difference between cottage's fair market value prior to flooding and after flooding, rather than simply cottage's pre-flooding market value, in property owners' negligence action against town which accidentally caused flooding; cottage could not be repaired and was rendered useless.

Evidence supported trial court's determination as to fair market value of cottage prior to flooding accidentally caused by town, for purposes of ruling on damages in property owners' negligence action; owners contended that town failed to show that pre-flooding property-tax assessment of cottage bore any resemblance to market value, but they cited no authority saying that tax assessment could not be evidence of market value, owners failed to explain how estimated costs of repairing cottage were reflective of pre-flooding market value, and it was undisputed that restored or rebuilt cottage would be significantly nicer and more valuable than old, unoccupied, and deteriorating structure which owner's purchased.

Genuine issue of material fact existed as to what repairs were necessary to restore cottage which was damaged when town accidentally caused flooding, precluding grant of town's motion for summary judgment on issue of loss of use in property owners' negligence action.

There was no evidence that costs associated with repairing a flooded cottage would have exceeded half of cottage's fair market value, precluding grant of town's motion for summary judgment on issue of loss of use in property owners' negligence action.

MUNICIPAL ORDINANCE - KANSAS

City of Wichita v. Trotter

Supreme Court of Kansas - August 12, 2022 - P.3d - 2022 WL 3330383

City charged defendant with violating municipal ordinances by operating an unlicensed after-hours establishment and operating an unlicensed entertainment establishment.

The Wichita Municipal Court found defendant guilty and ordered defendant to pay $200 fine and serve 12 months on nonreporting probation for after-hours violation, with underlying 90-day jail sentence, and ordered defendant to pay $200 fine for entertainment-licensing violation. Defendant appealed. On de novo review, the District Court dismissed the charges. City appealed. The Court of Appeals reversed and remanded with directions. Defendant petitioned for review, which was granted.

The Supreme Court held that:

- Defendant had standing to assert a First Amendment challenge;
- Defendant lacked standing to assert a Fourth Amendment challenge; and
- Licensing ordinances were overbroad in violation of First Amendment.

City ordinances requiring licenses for operation of after-hours establishments and criminalizing the operation of such establishments without a license were overbroad in violation of First Amendment right of assembly; although city had legitimate government interest in regulating late-night commercial activity, plain language of ordinances intruded into non-commercial gatherings during the hours from midnight until 6 a.m., including the right of assembly inside and around private homes.

ZONING & PLANNING - NORTH CAROLINA

[Schooldev East, LLC v. Town of Wake Forest]()

Court of Appeals of North Carolina - July 19, 2022 - S.E.2d - 2022-NCCOA-494 - 2022 WL 2812335

After town planning board denied applicant's applications for major site plan and major subdivision approval to build a charter school, applicant filed a petition for writ of certiorari.

The Superior Court granted writ and affirmed the board's decision, and applicant appealed.

The Court of Appeals held that:

- Applicant's appeal from superior court's decision was not moot;
- Superior court erroneously exercised the whole record test in determining the preliminary legal question concerning the sufficiency of applicant's evidence;
- Term "street improvements" did not include sidewalk improvements, as that term was used in statute providing that city could only require "street improvements" related to schools that were required for safe ingress and egress to municipal street system;
- Statute providing that city could only require street improvements related to schools that were required for safe ingress and egress to the municipal street system did not prohibit towns from regulating pedestrian and bicycle connectivity; and
- Applicant failed to meet its burden of production to show that it satisfied town ordinance so as to establish prima facie case for entitlement to permits.

Court of Appeals had jurisdiction to address applicant's appeal from superior court's order entered upon review of a quasi-judicial decision by a municipality; town planning board denied applicant's applications for major site plan and major subdivision approval to build a charter school, and after certiorari was granted, superior court affirmed board's decision.

Applicant's appeal from trial court's decision affirming town planning board's denial of applications for major site plan and major subdivision approval to build charter school was not moot, even though applicant had allegedly renounced its legal right to “operate” charter school after filing its notice of appeal; applicant applied only for development permits under town’s unified development ordinance (UDO), and it was a separate entity, namely charter school, that sought charter applications which would allow it to “operate” school, the questions originally in controversy between applicant and town were not moot, and decision on the existing controversy would have practical effect on applicant’s ability to obtain the required development permits.

Superior court properly applied de novo standard of review in interpreting statute governing limitation on city requirements for street improvements related to schools and in reaching its decision that statute did not prohibit municipalities from regulating pedestrian and bicycle connectivity in relation to proposed new schools.

When reviewing town planning board’s denial of applications for major site plan and major subdivision approval to build a charter school, superior court erroneously exercised the whole record test in determining the preliminary legal question concerning the sufficiency of applicant’s evidence; instead, superior court should have applied de novo review to determine the initial legal issue of whether applicant had presented competent, material, and substantial evidence in support of its applications.

On review of town zoning board’s decision, it was not prejudicial error when superior court erroneously exercised the whole record test, as opposed to de novo review, in determining the preliminary legal question concerning the sufficiency of applicant’s evidence in support of its applications for major site plan and major subdivision approval to build a charter school, given that applicant failed to meet its burden of production to show it was entitled to the requested permits.

The Court of Appeals would review de novo whether statute governing limitation on city requirements for street improvements related to schools was properly interpreted in context of applicant’s zoning applications for major site plan and major subdivision approval to build a charter school.

Term “street improvements” did not include sidewalk improvements, as that term was used in statute providing that city could only require “street improvements” related to schools that were required for safe ingress and egress to the municipal street system and that were physically connected to a driveway on the school site.

Statute providing that city could only require “street improvements” related to schools that were required for safe ingress and egress to the municipal street system and that were physically connected to a driveway on the school site did not prohibit towns from regulating pedestrian and bicycle connectivity in relation to proposed new schools; statutory term “street improvements” did not include sidewalk improvements.

Statute providing that charter school’s specific location would not be prescribed or limited by a local board or other authority except a zoning authority did not prevent town from considering community plan policies with respect to schools and corresponding regulations, as town zoning board was acting as a zoning authority when denying applications for major site plan and major subdivision approval to build a charter school.

Town’s community plan policy stating that public school locations should serve to reinforce desirable growth patterns rather than promoting sprawl was solely advisory, and thus, it was irrelevant to applications for major site plan and major subdivision approval to build a charter school and was not a proper basis for town zoning board to deny applicant’s site plan application; community plan policy was a policy statement applicable to the planning of a new school location, and policy was not implemented by a zoning regulation.

Town's community plan policy providing that school campuses should be designed to allow safe pedestrian access from adjacent neighborhoods was a policy of the town's comprehensive plan to be implemented by a zoning regulation and could be changed at any time, and standing by itself, community plan policy was only advisory and did not have the force of law; however, the policy was implemented by town's unified development ordinance (UDO) requiring applicant for school to demonstrate how its plan would achieve walking and bicycle accessibility by schoolchildren to schools.

Applicant's failure to satisfy town's unified development ordinance (UDO), requiring applicant for school to demonstrate how its plan would achieve walking and bicycle accessibility by schoolchildren to schools, was a proper basis on which town denied applications for major site plan and major subdivision approval to build charter school.

Town's unified development ordinance (UDO) that was intended to regulate the development of land to be used for educational uses and required the provision of off-premise sidewalks and multi-use trails or paths to allow for accessibility by students to schools was a subdivision ordinance because it concerned a component of essential infrastructure for an elementary and secondary school within town's planning jurisdiction, and thus, superior court properly considered the ordinance in denying applicant's subdivision plan application in connection with charter school.

Applicant failed to show that it was not required to comply with town's unified development ordinance (UDO) that was intended to regulate the development of land to be used for educational uses in order to satisfy conditions for approval of its applications for major site plan and major subdivision approval to build a charter school.

Town zoning board made ultimate decision as to whether applicant presented competent, material, and substantial evidence in support of its applications for major site plan and major subdivision approval to build a charter school and whether applicant met requirements of town unified ordinance that was intended to regulate the development of land to be used for educational uses.

Applicant failed to meet its burden of production to show that it met town unified development ordinance (UDO) requiring the provision of off-premise sidewalks and multi-use trails or paths to allow for accessibility by students to schools in order to establish a prima facie case for entitlement to permits for major site plan and major subdivision approval to build a charter school; applicant demonstrated that it would provide pedestrian connectivity to only one residential neighborhood through park located to the south of the proposed school.

Town's local zoning ordinances requiring pedestrian connectivity and accessibility for schoolchildren to school were not preempted by statute providing that city could only require street improvements related to schools that were required for safe ingress and egress to the municipal street system and that were physically connected to a driveway on the school site.

EMINENT DOMAIN - NORTH DAKOTA

Northwest Landowners Association v. State

Supreme Court of North Dakota - August 4, 2022 - N.W.2d - 2022 WL 3096724 - 2022 ND 150

Landowners association brought action against State seeking a declaration that senate bill relating to subsurface pore space violated the state and federal takings clauses, and oil and gas company intervened as a defendant.

The District Court granted summary judgment for association. State and company appealed.

The Supreme Court held that:

- Portions of senate bill were a facially unconstitutional per se taking based on physical invasion of property;
- Unconstitutional portions of senate bill were severable from the remainder;
- Trial court acted within its discretion in denying further discovery as to value of pore space before ruling on summary judgment motion; and
- Association was entitled to attorney's fees as prevailing party pursuant to § 1988.

Portions of senate bill relating to subsurface pore space, allowing a third-party oil and gas operator to use subsurface pore space, eliminating the right to compensation for "use of or lost value" to a surface owner's pore space, and stating that injection or migration of substances into pore space for disposal operations, by itself, did not constitute trespass, nuisance, or other tort, constituted a per se taking that facially violated state and federal takings clauses based on physical invasion of property; those portions allowed oil and gas operators to physically invade a landowner's property by injecting substances into the landowner's pore space, restricted landowners from having any control over the timing, extent, or nature of the invasion, and prohibited the right to compensation for use of pore space.

The dominant mineral estate principle, arising from a severance of mineral rights from the surface creating an implied easement in favor of a mineral owner to use the surface estate as reasonably necessary to find and develop minerals, did not save portions of senate bill relating to subsurface pore space from facially violating state and federal takings clauses as a per se taking via physical invasion of property, where portions authorized subsurface disposal of waste by third-party oil and gas operators beyond scope of any implied easement and also barred surface owners from bringing a tort action for a trespass from disposal operations that were beyond scope of any implied easement.

Portions of senate bill relating to subsurface pore space, granting a broad authorization to third-party oil and gas operators to physically occupy landowners' pore space and barring demands for compensation or tort actions to secure rights, was an exercise of the State's police power which was limited by the state and federal takings clauses as a physical invasion of property, despite argument that landowners took title to pore space with an expectation that their title was limited by police power; landowners' takings claims were not premised on a regulation of what they could do with their property, and they did not take title subject to possibility that their property could be actually occupied or taken away without just compensation.

Facially unconstitutional provisions of senate bill relating to subsurface pore space, granting a broad authorization to third-party oil and gas operators to physically occupy landowners' pore space and barring demands for compensation or tort actions to secure rights in violation of state and federal takings clauses, were severable from remaining provisions, which included sections designating use of carbon dioxide as acceptable for enhanced recovery of oil, gas, and other minerals, granting North Dakota Industrial Commission (NDIC) authority to adopt and enforce rules and orders, and limiting application of certain other provisions in the context of existing contracts; remaining provisions were sufficiently distinct to operate independently from the unconstitutional provisions.

Landowners association's failure to expressly plead §§ 1983 and 1988 in its complaint seeking a declaration that a state senate bill relating to subsurface pore space was facially unconstitutional did not preclude an award of attorney fees to association as a prevailing party pursuant to § 1988 upon trial court's determination that the senate bill was a facially unconstitutional taking; attorney's fees could be awarded under § 1988 even if complaint did not expressly plead §§ 1983 and 1988, and complaint alleged a deprivation of a property right in violation of the Fifth and Fourteenth Amendments.

Landowners association that prevailed on its challenge to state senate bill relating to subsurface pore space as being a facially unconstitutional taking was entitled to attorney's fee pursuant to § 1988, despite argument that association lacked standing to assert its members' rights under § 1983; all that was required under § 1988 to award fees was that association prevail on a claim within scope of § 1983.

PUBLIC UTILITIES - OHIO

In re Application of Icebreaker Windpower, Inc.

Supreme Court of Ohio - August 10, 2022 - N.E.3d - 2022 WL 3220040 - 2022-Ohio-2742

Residents sought judicial review of decision of Ohio Power Siting Board granting certificate of environmental compatibility and public need for six-turbine wind-powered electric-generation facility to be built on submerged land in Lake Erie.

The Supreme Court held that:

- Evidence supported Board's determinations as to probable environmental impact on migrating birds and bats and steps for reducing such impact;
- Board properly determined that conditions on its grant of certificate were sufficient to protect birds and bats and ensure that facility represented minimum adverse environmental impact; and
- Board lacked jurisdiction to consider contention that proposed construction of facility violated public-trust doctrine.

Evidence supported Ohio Power Siting Board's determinations as to probable environmental impact with respect to migrating birds and bats and steps for reducing such impact, as relevant to request for certificate of environmental compatibility and public need for six-turbine wind-powered electric-generation facility to be built on submerged land in Lake Erie; Board cited studies that monitored birds and bats flying in vicinity of project site, Board cited evidence showing that small scale of project and location between eight and ten miles offshore severely reduced impact that facility would have on birds and bats, and Board cited radar studies showing that most migrating birds were expected to fly above rotor-swept zone of turbines.

Ohio Power Siting Board properly determined that conditions on its grant of certificate of environmental compatibility and public need for six-turbine wind-powered electric-generation facility to be built on submerged land in Lake Erie were sufficient to protect birds and bats and ensure that facility represented minimum adverse environmental impact; Board found that moving facility farther from shore and small scale of project minimized several potential adverse environmental impacts on wildlife, Board required certificate applicant to submit radar-monitoring plan prior to construction, and Board required applicant to install fully functioning collision-monitoring technology prior to operation.

Ohio Power Siting Board lacked jurisdiction to consider residents' contention that proposed construction of six-turbine wind-powered electric-generation facility to be built on submerged land in Lake Erie violated public-trust doctrine and, therefore, that project would not serve public interest, convenience, and necessity, so as to preclude certificate of environmental compatibility and public need; statutory provision setting forth condition that facility serve public interest, convenience, and necessity did not include language giving Board authority to make public-trust determinations concerning Lake Erie, nor did provision make mention of any obligation of state to hold waters and submerged land of Lake Erie in trust for people of Ohio.

ZONING & PLANNING - PENNSYLVANIA

In re Charlestown Outdoor, LLC

Supreme Court of Pennsylvania - August 16, 2022 - A.3d - 2022 WL 3364248

Property owner appealed decision of township zoning board, which denied property owner's challenge to validity of township's zoning ordinance that permitted construction of billboards in zoning district.

The Court of Common Pleas affirmed the zoning board's decision finding that the ordinance was not de facto exclusionary. Property owner appealed. The Commonwealth Court affirmed. Property owner's petition for allowance of appeal was granted.

The Supreme Court held that:

- Zoning ordinance was not the source of the exclusion, and thus ordinance was not de facto exclusionary, and
- Municipalities have no duty to review and revise zoning ordinances or to rezone for a particular use where a property owner's use is limited by third parties, including through governmental regulations beyond the municipality's control.

Ordinance that permitted billboards in zoning district did not impose conditions that rendered use impossible, rather, following construction of turnpike ramp subsequent to enactment of ordinance, it was Department of Transportation (PennDOT) regulation that precluded billboards in zoning district, and thus because zoning ordinance was not the source of the exclusion, ordinance was not de facto exclusionary in property owner's challenge to ordinance; ordinance permitted use on land that was rendered unusable for that purpose by intervening actions of a third party, other than setback provision, nothing in ordinance restricted placement of billboards in zoning district, and neither severing ordinance restrictions nor allowing property owner to erect a billboard were available as remedies.

Municipalities have no duty to review and revise their zoning ordinances or to rezone for a particular use where a property owner's use is limited by third parties, including through governmental regulations beyond the municipality's control.

To the extent that a de facto exclusion challenger to a zoning ordinance is successful, that success is limited to obtaining the opportunity to acquire and develop property in the zone where the use is permitted; if the defect asserted cannot be cured by severing restrictive provisions of ordinance, then the case stands in the same posture as one involving de jure exclusion, and the sole remedy is to allow use somewhere, and a successful litigant must receive that benefit in form of at least partial approval of a proposal.

[What Does the Inflation Reduction Act Do for State and Local Government?]

The most significant climate legislation ever enacted by Congress has become law, without the word "climate" in its title. Here's how it can benefit state and local energy and climate programs.

At a White House ceremony on Tuesday, President Biden signed the Inflation Reduction Act (IRA) into law, fulfilling one of the key promises of his campaign by committing unprecedented federal resources to the fight against climate change.

Biden called it "one of the most significant laws in our history," proof that America's soul is vibrant and its future bright. "The bill I'm about to sign is not just about today," he said. "It's about tomorrow, it's about delivering progress and prosperity to American families." The passage of the bill demonstrates that democracy still works, said Biden, not only for the privileged but for all Americans.

The IRA allocates $369 billion over 10 years for energy security and climate relief, $64 billion for extending the Affordable Care Act and $4 billion to address the water crisis in the western states. It is the largest federal investment in climate action in the country's history.

Continue reading.

governing.com

by Carl Smith

Aug. 17, 2022

U.S. Inflation Reduction Act Emphasizes Affordability; Credit Implications Across Sectors Are Mixed - S&P

View the S&P Report.

18 Aug, 2022

$550M in Federal Preparedness Grants Prioritize Security for State and Local Governments.

The grant programs target six "critical areas," including cybersecurity, information sharing and election security.

The Department of Homeland Security announced final funding allocations for state and local governments to bolster their preparedness, including against cyberattacks.

A total of $550 million will go to seven competitive preparedness programs in Fiscal Year 2022. In a statement, DHS Secretary Alejandro Mayorkas said cybersecurity is one of "six critical areas" prioritized by the grants, alongside protecting soft targets and crowded places, intelligence and information sharing, combating domestic violent extremism, community preparedness and resilience as well as election security.

Included in the funding is $93 million for the Transit Security Grant Program, which provides funds for public transportation agencies to protect themselves from acts of terrorism. In the Notice of Funding Opportunity for the program, DHS and the Federal Emergency Management Agency said the need to enhance cybersecurity is a major area of concern.

Continue reading.

Route Fifty

By Chris Teale

AUGUST 19, 2022

Inflation Reduction Act Incentives for Energy Sector.

President Biden signed the Inflation Reduction Act of 2022 (HR 5376) (the Act) into law on August 16, 2022. This update provides a high level overview of the Act's incentives for the energy sector. We have published a separate update regarding the Act's energy storage incentives.

The Act provides $750 billion for a range of issues, including $400 billion for energy and climate. The Act–a slimmed down version of the Build Back Better bill–also makes substantial policy changes. It should have an immediate effect on the wind and solar industries, as well as other energy projects. The Act contains numerous tax credits, rebates, and other incentives.

Renewable Energy The following incentives are provided (note that the details are particularly important, because the Investment Tax Credit (ITC) and the Production Tax Credit (PTC) have additional strings attached, as well as bonuses, as further described below).

Continue reading.

Buchalter – Gwenneth O'Hara, Nora Sheriff and Christopher Parker

August 17 2022

Expansion of Clean Energy Loans Is 'Sleeping Giant' of Climate Bill.

The bill President Biden signed into law recently will greatly expand government loans and loan guarantees for clean energy and automotive projects and businesses.

Tucked into the Inflation Reduction Act that President Biden signed last week is a major expansion of federal loan programs that could help the fight against climate change by channeling more money to clean energy and converting plants that run on fossil fuels to nuclear or renewable energy.

The law authorizes as much as $350 billion in additional federal loans and loan guarantees for energy and automotive projects and businesses. The money, which will be disbursed by the Energy Department, is in addition to the better-known provisions of the law that offer incentives for the likes of electric cars, solar panels, batteries and heat pumps.

The aid could breathe life into futuristic technologies that banks might find too risky to lend to or into projects that are just short of the money they need to get going.

Continue reading.

The New York Times

By Ivan Penn

Aug. 22, 2022

Fitch: Inflation Reduction Act May Spur Public Power Renewable Spending.

Fitch Ratings-Austin/New York-16 August 2022: The introduction of direct pay tax credits through the Inflation Reduction Act (IRA) is expected to spur greater direct investment in clean energy projects across the public power sector, Fitch Ratings says. Public power systems steadily added production from renewable energy projects, including wind and solar projects, to their energy mix over the last decade but energy is typically purchased from private developers. The ability to monetize production tax credits pursuant to the IRA will improve the economics of direct ownership and could help reverse a trend of declining investment in the sector.

In recent years, the rate of capital investment lagged historical levels at most of the wholesale public power systems rated by Fitch. Our 2022 US Public Power Peer Review reported that the median ratio of capital investment to depreciation was only 77% in 2021. This marked the sixth time in the last eight years that the ratio was below 100%, indicating that systems are depreciating their assets faster than they are reinvesting.

Fitch believes that this trend is due, in part, to the inability of tax-exempt enterprises to take direct advantage of production tax credits and other subsidies related to renewable energy projects. Public and cooperatively owned power systems instead added renewable energy to their power supply through purchase power agreements with private developers able to capitalize on tax subsidies. Wind and solar projects accounted for 13.8% of total US generating capacity in 2020 but only 0.9% and 0.5% of the total capacity owned by public power systems and electric cooperatives, respectively, according to the American Public Power Association.

Systems may continue to add new renewable purchase power agreements when economic but direct pay tax credits will lower the cost of alternative ownership, particularly for systems that prefer project design and operating control. When factoring power purchase agreements, wind and solar capacity available to public power systems increased to more than 9,300MWs in 2020 from roughly 1,050MWs.

Higher capital spending will drive increased borrowing but is unlikely to materially weaken credit quality, as Fitch’s rating methodology factors purchase power obligations in its financial metrics and analysis, limiting the effect on leverage. This approach improves the comparability between systems that purchase and own resources and buffers the effect of debt-funded capital spending on projects that displace purchase power costs.

The expanded options for project ownership and financing made possible by the IRA are likely to provide the greatest benefit to systems operating in one of the 24 states or US territories that have adopted renewable energy portfolio standards for clean energy goals that apply to publicly- and cooperatively-owned systems. Although new project development is likely to be obstructed in the near term by inflationary pressures and supply chain constraints, delaying the delivery of solar panels and wind turbines, market conditions should improve in time for utilities to meet more stringent goals and targets set to take effect in 2025 through 2030.

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The above article originally appeared as a post on the Fitch Wire credit market commentary page. The original article can be accessed at www.fitchratings.com. All opinions expressed are those of Fitch Ratings.

New Semiconductor Law Aims to Create 'Silicon Valleys' Across US.

$10 billion in funding will go to support 20 research hubs with a third of them set to be in small or rural communities.

Little noticed in the bipartisan CHIPS semiconductor bill President Biden signed into law earlier this month are funds aimed at transforming where innovation happens in the U.S. Rather than sending money to traditional technology centers like Silicon Valley in Northern California, Seattle or Boston, the law will create technology hubs in many places, including small and rural places.

Most notably, the $54.2 billion bipartisan bill passed by Congress last month contains $39.4 billion in subsidies to try to restore the nation's standing in the production of chips—which are used in everything from automobiles to washing machines—by encouraging companies to make them in the U.S. The law has bolstered the hopes of cities around the country—like Lafayette, Indiana, and Columbus, Ohio—because it will create jobs in their communities.

But also significant, said Mark Muro, a senior fellow at Brookings Metro, is that the law provides $10 billion over five years to create 20 regional technology and innovation hubs. And, it says they cannot be in places "that are now leading technology centers."

Continue reading.

Route Fifty

By Kery Murakami

AUGUST 19, 2022

ARPA Impact Report: An Analysis of How Counties are Addressing National Issues With Local Investments

America's nearly 40,000 county elected officials and 3.6 million county employees are on the frontlines of the nation's response to the coronavirus pandemic. As the country emerges from the pandemic and grapples with the toll it has taken on our citizens, counties are responding and rebuilding. At the same time, many counties are still confronting significant workforce shortage pressures at a time with growing, critical resident needs.

With American Rescue Plan funds, counties are strengthening America's workforce, addressing the nation's behavioral health crisis, expanding broadband access, improving housing affordability and building prosperous communities for the next generation.

DOWNLOAD

NATIONAL ASSOCIATION OF COUNTIES

By TERYN ZMUDA, SARAH EDWARDS, JONATHAN HARRIS

Jul. 18, 2022

Sustainable Fitch: Social and Political Issues Increasingly Shape Financial Market Shifts

Fitch Ratings-Hong Kong-15 August 2022: Social, economic and political factors are increasingly driving developments in the sustainable finance market, says Sustainable Fitch in a new report. The expansion of sustainability-focused regulation has also continued, despite rising political resistance in key markets.

Regulatory and policy actions under the Biden Administration in the U.S. to address environmental, social and governance issues, such as the U.S. Securities and Exchange Commission's proposed climate disclosure rule and the U.S. National Action Plan on Business Conduct, have begun to generate scepticism from other stakeholders and in localities where the fossil-fuel sector is still a large employer and economic contributor. However, financial incentives for green technology and clean energy have attracted interest from many of the same regions, indicating that efforts to ease the carbon transition may alleviate political concerns.

Sustainable Fitch's analysis of climate-related credit risk indicates that key sectors, including agriculture, mining and metals, and real estate and property, are likely to face significant demand and regulatory changes by 2050 as a result of the global 'net-zero' carbon emissions transition. Sectors that are less vulnerable to climate transition risks, such as telecommunications and technology, are likely to face greater social risks, such as data privacy and customer welfare.

The Asia-Pacific region saw greater sustainable finance regulatory and policy activity in 2Q22, including the Australian Labor Party's victory in the May federal election. The Party has more ambitious climate policy and carbon emission reduction targets. The government of Singapore also released its green bond framework in May and announced plans to issue its first sovereign green bond by August. Meanwhile, the EU-China Common Ground Taxonomy was updated in June 2022 to identify where countries aligned on green activities to boost the document's usability by market participants.

More details are in the full report "ESG Credit Quarterly: 2Q22" at www.fitchratings.com.

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S&P U.S. State Ratings And Outlooks: Current List

View the current list.

19 Aug, 2022

S&P U.S. Public Finance Rating Activity, July 2022

View the S&P Activity Report.

15 Aug, 2022

How Federal Infrastructure Funds Can Build More Accessible Transit Systems.

COMMENTARY | By taking significant steps towards increasing accessibility, public transit systems will better incorporate equity and social mobility into their operations.

According to the Centers for Disease Control and Prevention, as many as 61 million Americans live with some form of disability. Among those millions, one in five is blind or has a mobility disability. As such, nearly 30 million Americans travel less due to limited mobility, yet they disproportionately rely on public transit to get around.

Too often, investments in public transit have ignored the needs of its wide variety of riders. For example, most cities almost completely ignored wheelchair users until the late 1960s and early '70s. After demonstrations by disabled WW II veterans, Congress adopted the Architectural Barriers Act—a precursor to the 1990 Americans with Disabilities Act. Today, ramps and curb cuts are ubiquitous in cities and towns of all sizes—and they benefit a range of users beyond those in a wheelchair like the young, the old, people pushing strollers and the temporarily disabled.

For transit, the bipartisan infrastructure law signed into law by President Biden in November provides a once-in-a-generation opportunity to right this wrong by funding projects that will improve accessibility to public transit. It's critical that policymakers and transit agencies get it right and prioritize projects that incorporate the concept of universal design to create inherently accessible transit and better serve all riders.

Continue reading.

Route Fifty

By Aline Frantzen

AUGUST 22, 2022

Why Local Governments Trail Private Employers in Hiring.

Slower wage gains and less nimble hiring processes create challenges for many states and municipalities trying to fill job vacancies

U.S. employers have added jobs at a historically robust pace since emerging from the pandemic recession, with a notable exception: state and local governments.

The nation lost about 22 million jobs in March and April 2020, or 14% of the total, when the Covid-19 pandemic first hit the U.S. economy. Total payrolls started growing in May of that year, and by July of this year the overall labor market had more jobs than in February 2020, according to the Labor Department.

Meanwhile, state and local public employers—such as schools, hospitals, libraries and law enforcement agencies—lost about 1.5 million jobs in March through June 2020, or about 7.4% of the total. These payrolls started rising in July that year, and by last month they had 605,000 fewer filled jobs on their payrolls, or 3% less, than in February 2020.

Continue reading.

The Wall Street Journal

By Bryan Mena

Aug. 15, 2022

S&P U.S. Not-For-Profit Health Care Rating Actions, July 2022

S&P Global Ratings affirmed 17 ratings without revising the outlooks and took eight actions in the U.S. not-for-profit health care sector in July 2022. There were two new sales in July. The eight rating and outlook actions consist of the following:

- Two downgrades on standalone hospitals;
- Two upgrades on standalone hospitals; and
- Four unfavorable outlook revisions on two standalone hospitals and two health systems (all to negative from stable).

The table below summarizes S&P Global Ratings' monthly bond rating actions for U.S. not-for-profit health care providers in July. We based the credit rating affirmations and rating actions on several factors within enterprise and financial profiles, including business position, utilization, financial performance, debt levels, bond-issuance activity, physician relationships, and the external regulatory and reimbursement environment. This also incorporates our stable sector view and our assessment of COVID-19, staffing and inflationary pressures, economic developments, and investment market volatility.

Continue reading.

11 Aug, 2022

Fitch Ratings Revises U.S. NFP Hospitals Sector Outlook to 'Deteriorating'

Fitch Ratings-Austin/Chicago-16 August 2022: More severe-than-expected macro headwinds have prompted Fitch Ratings to revise its sector outlook for U.S. not-for-profit hospitals and health systems to 'deteriorating', as detailed in Fitch's new report.

The biggest sector impediment has been labor, and broader macro inflationary pressures are rendering the sector even more vulnerable to future stress, according to Senior Director Kevin Holloran. Investment losses have contributed to a rockier 2022 to date than anticipated for hospitals, and operating metrics are down significantly compared to last year.

“While severe volume disruption to operations appears to be waning, elevated expense pressure remains pronounced,” said Holloran. “Even if macro inflation cools, labor expenses may be reset at a permanently higher level for the rest of 2022 and likely well beyond.”

Where this will be the most felt is nurses, which were already in high demand pre-pandemic with Covid only exacerbating a glaring shortage of nursing staff.

As a result, many NFP health providers will violate debt service coverage covenants in 2022. As to what that scenario means for hospitals in the coming months, “We may be in a period of elevated downgrades and Negative Outlook pressure for the rest of 2022 and into 2023,” said Holloran.

“Fitch Ratings 2022 Mid-Year Outlook: U.S. Not-For-Profit Hospitals and Health Systems” is available at www.fitchratings.com.

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Fitch: Deceptively Strong Medians Likely Coming to an End for U.S. NFP Hospitals

Fitch Ratings-Austin-18 August 2022: U.S. not-for-profit hospitals saw another strong year of mostly across the board median improvements, though it appears almost certain to be a high-point for the sector with Fitch Ratings projecting declines for next year and beyond in its latest annual sector report.

2022 medians (using audited 2021 data) showed a 20% increase in cash to adjusted debt to 249% for ‘AA’ rated hospitals, compared to an 8% increase for ‘BBB’ health systems to 102%. That said, “the deceptively strong numerical improvements over prior years’ medians are less a sign of sector resiliency and more a cautionary calm before the storm,” said Senior Director Kevin Holloran. “Additional expenses, primarily labor, have become part of the permanent fabric of hospital operations, that when combined with ongoing incremental challenges will exert tremendous pressure on providers through calendar 2022 and beyond."

Fitch expects to see hospital medians reverse course this time next year due to a conflagration of events, including the very challenged operational start to calendar 2022, additional Omicron sub-variants and inflationary pressures. Staffing, or an adequate lack thereof, is particularly troubling. Clinical and non-clinical shortages will continue into 2023 and likely longer in some markets, with high growth markets being better able to mitigate staffing shortages.

"We are likely two years before some level of "normal" returns to the sector," said Holloran. "For many hospitals, their "value journey" will be on temporary hold until expenses stabilize and become more predictable.'

'2022 Median Ratios: Not-for-Profit Hospitals and Healthcare Systems' is available at 'www.fitchratings.com'.

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Hospital Finances are Deteriorating, Fitch Says.

Rising labor and supply costs will land many nonprofit hospitals in violation of debt covenants to bondholders this year, according to an analysis released Tuesday by Fitch Ratings.

Salaries for nurses are particularly competitive, with Covid-19 driving up demand. Labor costs and other inflation pressures are squeezing budgets at senior-living facilities as well.

Many hospitals are operating with slimmer margins than last year, Fitch found, with lower-rated hospitals hit particularly hard and hospitals rated triple-B, slightly higher than junk-bond status, operating with negative margins. That could lead some institutions to run afoul of promises to bondholders about how much of a financial cushion they will maintain.

Continue reading.

The Wall Street Journal

By Heather Gillers

Aug 16, 2022

Western U.S. Drought: Declining Supply, Rising Challenges - S&P

Prudent supply and demand management, solid financial margins, and rate-setting capacity will be critical to rating stability.

Download the S&P Report.

Aug 16, 2022

Public Finance Impact of the Inflation Reduction Act's New Corporate Alternative Minimum Tax: Holland & Knight

President Joe Biden signed into law the Inflation Reduction Act (the IRA) on Aug. 16, 2022. The IRA (H.R. 5376, 117th Congress) includes a variety of legislation concerning energy, climate change, federal income tax, healthcare and deficit reduction matters. Notably for those in the public finance sector, the IRA includes a new limited corporate alternative minimum tax that is effective for tax years ending after Dec. 31, 2022, which could impact the demand for tax-exempt municipal bonds. The corporate alternative minimum tax had previously been repealed in 2017 as part of the Tax Cuts and Jobs Act.

The IRA creates a new revenue-generating 15 percent corporate alternative minimum tax (the Corporate AMT) (also known as the book minimum tax), which, when effective, applies to an "applicable corporation," namely, a domestic corporation with average "adjusted financial statement income" (AFSI) in excess of $1 billion over a three-taxable-year period or a foreign-parented corporation with a three-taxable-year average annual AFSI of $100 million or more if they are part of a foreign-parented multinational group with an average AFSI exceeding $1 billion. An applicable corporation does not include an S Corporation, a real estate investment trust or a regulated investment company. A corporation that is determined not to be an "applicable corporation" will remain exempt from the corporate alternative minimum tax consistent with its repeal in 2017 as part of the Tax Cuts and Jobs Act.

While the Corporate AMT is projected to generate $220 billion of tax revenue over 10 years, it is expected that the Corporate AMT, the applicability of which could be expanded in the future, will have very limited immediate impact in terms of the number of corporate taxpayers affected. The U.S. Congress Joint Committee on Taxation has estimated that 150 companies (most of which are in the manufacturing sector) will be affected by the new Corporate AMT. With regard to the public finance sector, the affected taxpayers are banks, insurance companies, and property and casualty insurers, which are often purchasers of tax-exempt municipal bonds. It is also expected that tax disclosure language in offering statements and tax opinion language will have to be revised in order to account for the enactment of the Corporate AMT. Further, bond purchase agreements should be reviewed to determine whether this change will affect any of the so-called "outs" under such agreements.

Holland & Knight attorneys are working with borrowers, issuers, underwriters and lenders to address the impact of the Corporate AMT. If you have any questions regarding this alert, please contact one of the bond attorneys on Holland & Knight's Public Finance Team.

For an in-depth summary of the full IRA legislation, see Holland & Knight's previous alert, "The Inflation Reduction Act: Summary of the Budget Reconciliation Act," Aug. 8, 2022.

Holland & Knight Alert

by Faust Bowerman | Michael L. Wiener | Vlad Popik

AUGUST 19, 2022

[Inflation Reduction Act: Tax Implications for Public Finance Transactions - Kutak Rock]

On August 16, 2022, President Biden signed into law the Inflation Reduction Act (H.R. 5376, 117th Congress) (the “IRA”). The enactment of the IRA caps a tumultuous period of many months of negotiations involving the original Build Back Better Act (the “BBBA”) on which the IRA is based. The BBBA did not progress beyond approval in the House of Representatives in November 2021. The IRA is considered a “light” version of the BBBA with many original provisions scaled back significantly or removed altogether in an effort to ensure passage. Nevertheless, the IRA represents a significant federal investment to address climate change and curb inflation.

Key provisions of the IRA relate to energy (including tax credits), healthcare, tax reform and deficit reduction. *Unfortunately, the IRA falls short of including any tax-exempt financing tools.* Communities relying on public financing have been requesting, among other things: a provision to protect direct pay subsidy bonds from continued federal sequestration; an expansion of volume cap for exempt facility bonds especially to satisfy the demand for affordable low-income housing; a reduction in the 50% bond financing requirement to unlock 4% low-income housing tax credits; and an update and increase to the $10 million bank qualified provision for small issuers. *The IRA includes none of the requested provisions.*

Relevant to the public finance community, however, is the reintroduction by the IRA of a corporate alternative minimum tax (the “AMT”). As a reminder, the AMT for corporations had been eliminated by the 2017 legislation commonly referred to as the Tax Cuts and Jobs Act. The new corporate AMT imposes a 15% alternative minimum tax on annual adjusted financial statement income of “applicable corporations.” Corporations that do not fall within the category of “applicable corporations” will continue to be exempt from the AMT altogether. “Applicable corporations” generally include domestic corporations (including banks but excluding Subchapter S corporations, regulated investment companies, real estate investment trusts, and businesses owned by private equity) with profits of more than $1 billion, and certain foreign-parented multinational corporations with profits of more than $100 million, over a specified three-year period, effective beginning in the 2023 taxable year.

From the perspective of tax-exempt legal documentation, the reintroduction (albeit in limited form) of the corporate AMT may require adjustments to offering statements, tax opinions and tax covenants going forward. We have already been working closely with our clients to discuss the new AMT provision and draft necessary documentation changes, including revised tax disclosure for official statements.

Within Kutak Rock LLP, there are several working groups who are also assisting clients with the application of energy, tax credit and healthcare provisions of the IRA. The firm’s National Public Finance Tax Group would be happy to assist with efforts to coordinate with these working groups.

Please also note that in certain cases the use of tax-exempt financing for IRA-assisted projects can impact the availability of IRA tax credits or subsidies for such projects.

Please reach out to any member of the Kutak Rock LLP National Public Finance Tax Group if you have questions about the IRA and its impact on tax exempt bond financings. Questions, comments or corrections to this client alert may be addressed to the attorneys listed below.

This client alert was prepared for the general informational use of the clients and attorneys of Kutak Rock LLP and reflects our understanding of the matters set forth herein as of the time of its release. The views on the topics presented may change as our experience with the matters discussed herein deepens.

August 16, 2022

Tax Implications of the Inflation Reduction Act: Cooley

On August 7, 2022, the US Senate passed the Inflation Reduction Act (House Resolution 5376), which contains tax, climate and healthcare provisions. The legislation is widely expected to be passed by the House of Representatives without changes and signed into law by President Joseph R. Biden shortly thereafter. The Inflation Reduction Act contains a number of revisions to the Internal Revenue Code (the "Code"), including a 15% corporate alternative minimum tax and a 1% excise tax on corporate stock repurchases. Despite earlier proposals, the legislation does not contain any changes to the tax treatment of carried interest or the cap on deductions for state and local taxes.

This alert highlights a few key provisions of the Inflation Reduction Act that may be applicable to Cooley clients.

Corporate alternative minimum tax

In tax years beginning after December 31, 2022, the Inflation Reduction Act imposes a 15% alternative minimum tax (the "Corporate AMT") on US corporations with financial accounting profits exceeding a certain threshold. This provision is expected to impact large corporations that have previously reported high income on their financial statements but have significantly reduced – or even eliminated – their cash tax liability as a result of certain attributes or book-tax differences, such as companies with significant stock-based compensation. Very few corporations are expected to be subject to the Corporate AMT as currently proposed. In an analysis of an earlier version of the proposal, the Joint Committee on Taxation estimated that about 150 taxpayers would be subject to the tax each year.

The Corporate AMT would generally apply to US corporations – excluding S corporations, regulated investment companies and real estate investment trusts – with an average of more than $1 billion of annual adjusted financial statement income (AFSI) during a three-year measurement period. The Corporate AMT would also apply to a US corporation (including, for these purposes, a trade or business engaged in by a foreign corporation within the US) in a foreign-parented multinational group if, over the three-year measurement period, the US corporation's average annual AFSI is at least $100 million and the multinational group's average annual AFSI exceeds $1 billion. A corporation's AFSI is the net income or loss set forth on the corporation's applicable financial statement (generally a Securities and Exchange Commission Form 10-K or other audited financial statement) for the taxable year, subject to certain adjustments to reflect accelerated tax depreciation and certain other items. The provision was amended with the intention that otherwise unrelated companies under common ownership of an investment fund will not have their AFSI aggregated for purposes of the $1 billion threshold.

In some cases, the Corporate AMT may simply accelerate taxes, as payments made under the Corporate AMT can be used as a credit in future years when a corporation's regular tax liability exceeds its liability under the Corporate AMT. In other cases, the Corporate AMT may permanently increase overall tax liability. For example, taxpayers with significant net operating losses from tax years prior to 2020 may realize a permanent increase in tax liability because the Inflation Reduction Act precludes carryforwards for financial statement net operating losses arising in such years.

Excise tax on corporate stock repurchases

For publicly traded US corporations and certain US subsidiaries of publicly traded non-US corporations, the Inflation Reduction Act imposes a 1% excise tax on the fair market value of any stock that is repurchased by the corporation or its "specified affiliate" (generally, corporations or partnerships of which the corporation owns more than 50%) during the tax year. The taxable amount is reduced by the fair market value of any stock issued by the repurchasing corporation during the taxable year, including the fair market value of any stock issued or provided to employees of the corporation or a specified affiliate. The excise tax is subject to several exceptions (the contours of which are uncertain), including carve-outs for repurchases that are part of a tax-free reorganization, contributions to employee retirement or stock ownership plans, repurchases that are treated as dividends, and corporations that repurchase stock with a total value of no more than $1 million during a taxable year. The excise tax applies to repurchases of stock after December 31, 2022.

While the excise tax only applies to repurchases of stock after December 31, 2022, corporations may already have shares outstanding that are subject to repurchase rights, including redeemable preferred stock and stock issued in the initial public offering of special purpose acquisition companies (SPACs). The excise tax could also be triggered in transactions not conventionally viewed as stock repurchases, including:

- Mergers or other reorganizations involving cash payments to the target's shareholders to the extent that such payments are funded with the target's cash or debt incurred or assumed by the target in the transaction.
- Payments of cash in lieu of fractional shares.
- Payments to dissenters.
- Divisive reorganizations that use a "split-off" structure.

In addition, the Secretary of the Treasury is authorized to define "repurchase" to include "economically similar" transactions. Unless the fair market value of stock treated as repurchased in a tax year is less than the fair market value of stock issued by the covered corporation in that tax year, or another exception applies, such transactions could expose a covered corporation to the excise tax.

Other tax provisions

Other notable tax-related provisions in the Inflation Reduction Act include:

- A two-year extension (to tax years beginning before January 1, 2029) of the loss limitation rules applicable to noncorporate taxpayers under Section 461(l) of the Internal Revenue Code.
- An increase in the research tax credit available to offset the payroll taxes of qualified small businesses under Section 41(h) of the Internal Revenue Code.
- An increase in IRS funding of approximately $80 billion over 10 years, with nearly $46 billion for enforcement efforts such as "digital asset monitoring and compliance activities."

- A new excise tax on drug producers who fail to comply with new drug pricing requirements.
- The reinstatement of a Superfund excise tax on crude oil and certain imported petroleum products at a rate of 16.4 cents per barrel (indexed to inflation) beginning January 1, 2023.
- The permanent extension of an excise tax on coal from US mines.
- Climate- and energy-related taxes, tax credits and other incentives.

Cooley Alert

August 11, 2022

ESG Fixed Income Space Evolving, Maturing.

It’s been a rough year for fixed income investors, but there are some bright spots in the world of exchange traded funds, including ongoing adoption and maturation of bond ETFs.

That includes bond ETFs focusing on environmental, social, and governance (ESG) investing — a space long viewed as fertile growth territory for fund issuers. Broadly speaking, inflows to ESG ETFs are decent this year, though well off their prior highs, and that’s impressive when considering that these funds are usually heavy on growth stocks, which struggled in the first half of the year.

Regarding ESG bond ETFs, there’s still plenty of room for growth, but these products come with some advantages relative to actively managed rivals that could propel long-term adoption.

“US-listed fixed income ETFs have a median expense ratio of 0.29%, versus mutual funds’ 0.61%. While many ETFs are index based, this lower-cost profile carries over to actively managed ETFs that have a median expense ratio of 0.40%, versus 0.63% for actively managed bond mutual fund strategies,” noted State Street Global Advisors (SSGA).

There are other benefits associated with fixed income ETFs, ESG and otherwise.

“ETFs offer structural advantages, compared to a single security or individual bond exposure. With individual bonds, broker-dealers collect commissions on bonds they sell or buy through markups and markdowns, which are bundled into the quoted price to investors on both sides of the transaction,” added SSGA.

Those benefits are particularly meaningful for investors looking for the combination of ESG and fixed income exposure because owing to the still-nascent status of this asset class, looking for individual bonds with adequate ESG standing can be a taxing endeavor for many advisors and investors. Fixed income ETFs ease that burden and can provide much needed liquidity, too.

“ETFs’ robust secondary market allows investors to tap into market liquidity more easily than they can with single-CUSIP bond holdings,” concluded SSGA. “This enables them to reallocate portfolios quickly across asset classes or meet investor redemptions by selling an ETF position into the market without having to sell single-CUSIP bonds. Fixed income ETFs are also more liquid than mutual funds, as ETFs trade intraday and mutual funds are typically transacted end of day.”

For investors seeking the marriage of ESG and municipal bonds with the ETF wrapper, the SPDR Nuveen Municipal Bond ESG ETF (MBNE) is an idea to consider. Those desiring a bit more income by way of corporate bond exposure can evaluate the SPDR Bloomberg SASB Corporate Bond ESG Select ETF (RBND).

ETF Trends

editor@etftrends.com

AUG 17, 2022

[Corporate and Municipal CUSIP Request Volumes Sink in July.]

NORWALK, Conn., Aug. 18, 2022 (GLOBE NEWSWIRE) — CUSIP Global Services (CGS) today announced the release of its CUSIP Issuance Trends Report for July 2022. The report, which tracks the issuance of new security identifiers as an early indicator of debt and capital markets activity over the next quarter, found a significant monthly decrease in request volume for new corporate and municipal identifiers.

North American corporate requests totaled 5,253 in July 2022, which is down 9.6% on a monthly basis. On a year-over-year basis, corporate requests were up 8.5%. July volumes were driven by an 11.7% decrease in requests for new U.S. corporate equity identifiers and a 33.3% decline in request volume for new U.S. corporate debt identifiers. Short-term certificates of deposit (CDs) identifiers continued their seven-month growth streak, rising 1.9% in July. Longer-term CDs, with maturities of one year or longer, saw an 8.0% decline in new CUSIP request volume this month.

Municipal request volume also declined in July. The aggregate total of identifier requests for new municipal securities – including municipal bonds, long-term and short-term notes, and commercial paper – fell 23.6% versus June totals. On a year-over-year basis, overall municipal volumes were down 17.3%. New York led state-level municipal request volume with a total of 164 new CUSIP requests in July, followed by Texas with 144 and California with 65.

“We’re seeing a combination of rising interest rates and the seasonality of new security issuance rear their heads this month’s CUSIP Issuance Trends report,” said Gerard Faulkner, Director of Operations for CGS. “July is a notoriously slow month for new issuance – particularly in the municipal and equity space – and that is definitely a factor in this month’s numbers, but it’s likely not the only factor. As the 7-month growth trend we’ve been seeing in long-term CDs will attest, interest rates do have an effect on new issuance volumes.”

Requests for international equity and debt CUSIPs were also down in July. Requests for international equity CUSIPs fell 33.7% this month, while international debt CUSIP requests fell 20.0%. On an annualized basis, international equity CUSIP requests were down 40.9% and international debt CUSIP requests were down 30.3%.

To view the full CUSIP Issuance Trends report for July, click here.

[Municipal Borrowing at Three-Year Low.]

State and local governments are pulling back on bond sales, issuing $250 billion so far this year compared to $287 billion during the same period last year, according to a report by Citigroup.

The biggest reason? Rising interest rates have discouraged refinancing, cutting year-to-date taxable debt issuance to $44 billion from $79 billion last year. (Most municipal bonds pay tax-exempt interest, but early refinancings are not eligible for a federal tax exemption.)

One example: New York state is planning to sell $8.6 billion in bonds in its current fiscal year, down from $11.8 billion last year, according to state documents.

Tax-exempt bond issuance is down slightly this year too. Many cities and counties already flush with stimulus cash may have less need for borrowing. Others, facing rising costs from inflation, may be scaling back their ambitions.

The Wall Street Journal

By Heather Gillers

Aug 15, 2022

Summer 2022 MSRB Update.

The MSRB discusses market perspectives on ESG, new board leadership and members plus more in the latest MSRB Update.

View the MSRB Update.

The Muni Markets In 2022 (Bloomberg Audio)

Eric Kazatsky, Senior US Municipals Strategist with Bloomberg Intelligence, discusses the latest news from the municipal bond market. Hosted by Paul Sweeney and Matt Miller.

Listen to audio.

Bloomberg

Aug 19, 2022

Yields 'Definitely' Going Higher: Kayne's Friedricks

Kim Friedricks, Kayne Anderson Rudnick managing director of fixed income, discusses the outlook for Federal Reserve monetary policy and its potential impact on the muni market with Taylor Riggs and Sonali Basak on “Bloomberg Markets: The Close.”

Watch video.

Bloomberg Markets: The Close

August 17th, 2022

Fortress-Backed Brightline Rail Sells $770 Million of Debt at Steep Yields.

- **Brightline needs funds to finish critical extension to Orlando**
- **Debt backed by government payments still to be finalized**

Brightline Holdings, the rail company backed by Fortress Investment Group, sold $770 million of unrated tax-free debt with hefty premiums for investors as it raises cash critical for the expansion of its underperforming Florida system.

The securities, subject to a mandatory put in October 2023, priced with a 7.25% coupon at 98 cents on the dollar, according to pricing wires viewed by Bloomberg. The primary collateral is funds from Miami-Dade and Broward counties in exchange for using the rail line for their commuter services. Those agreements are expected to be finalized next year.

Continue reading.

Bloomberg

By Romy Varghese

August 17, 2022

Mesirow's First Female CEO Is Keen to Grow Muni-Bond Business.

- **The firm is the 24th-biggest muni underwriter so far this year**
- **Banks are reckoning with a drop in state and local debt sales**

Natalie Brown, the new chief executive officer of Mesirow Financial Holdings Inc., said the firm is looking to expand its presence in the $4 trillion municipal-bond market.

The Chicago-based financial services firm has hired seven municipal-market specialists since 2021, including four bankers. It is ranked as the 24th-biggest underwriter of long-term state and local debt so far in 2022, up one slot from last year, according to data compiled by Bloomberg.

"We will certainly continue to strategically add headcount in public finance, and in municipal sales and trading," she said in an interview on Bloomberg Intelligence's muni podcast hosted by Eric Kazatsky.

Continue reading.

Bloomberg Markets

By Amanda Albright

August 15, 2022

College of Business Professor Presents Paper on Discrimination in Municipal Borrowing at Brookings Institute Conference

Matthew Wynter, a research professor in the Stony Brook University College of Business, presented his paper, "Black Tax: Evidence of Racial Discrimination in Municipal Borrowing Costs," at the Brookings Institute 2022 Municipal Finance Conference, held online July 18-20.

The paper, co-authored with Ashleigh Eldemire Poindexter of the University of Tennessee and Kimberly Luchtenberg of American University, shows that municipalities with higher proportions of Black residents pay higher borrowing costs to issue rated bonds compared to other cities and counties that issue within the same state and year. These higher costs are unexplained by credit risk, more pronounced in states with higher levels of racial resentment, and robust to state-tax incentives to hold municipal bonds.

In time-series tests using political election periods during which racial resentment has been shown to intensify, the research finds that the differences in borrowing costs also increase. Collectively, the findings illustrate that racial bias can increase borrowing costs, especially where racial resentment is severe.

The Brookings conference is considered the best municipal finance conference in the field, is highly selective, and attended by academics, policy makers, and market participants.

Wynter also had another paper on minority and low-income homeownership accepted by the Review of Corporate Finance Studies. "Does homeownership reduce wealth disparities for low-income and minority households?" uses restricted data from the U.S. Department of Housing and Urban Development's (HUD) Housing Choice Voucher (HCV) program to study the wealth effects of homeownership for low-income households.

The paper looks at whether becoming a homeowner effects the wealth of low-income White and minority households differently. HUD's HCV program provides low-income households with housing assistance for rental and mortgage payments. To identify whether homeownership affects wealth, the paper compares a household's wealth as a renter to its own wealth of as homeowner, and uses variation in the wealth outcomes amongst households to measure the effect of homeownership on racial disparities in wealth. In using this differences-in-differences approach, the research controls for the many unobservable and confounding differences within households that are likely to affect wealth accumulation, while also allowing wealth outcomes to vary by race.

Using this empirical approach, the paper establishes that low-income households that receive assistance in owning a home experience increased wealth relative to their tenure as renters. However, these wealth gains are not present among low-income minority households. The findings provide evidence that homeownership is a driver of wealth formation for low-income households and that homeownership does not inherently reduce racial disparities in wealth.

Wynter conducts research that focuses on behavioral and international finance. His research has been presented at finance and economics conferences around the world, including the Brookings Institution, the American Economic Association, and the China International Conference in Finance. His research has been published in the Review of Corporate Finance Studies, World Economy, and the Journal of Management, Policy, and Practice.

August 19, 2022

Pension Veteran Tears Into Public Funds for 'Bogus Benchmarking'

- **Fund managers benefit as public employees, taxpayers foot bill**
- **Critic says public pensions underperform by $60 billion a year**

Richard Ennis knows a thing or two about how US public pension systems work. For half a century, he's managed money for some funds and advised untold others at EnnisKnupp, a consulting firm he co-founded. He's also the former editor of the Financial Analysts Journal and recipient of lifetime achievement awards for his work.

Now semi-retired, Ennis doesn't pull punches: To him, the benchmarks that many public funds use to grade their investment performance raise questions about their integrity. "Bogus benchmarking is the single biggest problem in the field of institutional investing," he said.

In his most recent broadside, in the April issue of the Journal of Portfolio Management, Ennis wrote that the public officials who manage $4 trillion for 26 million working and retired teachers, cops, and other public employees routinely set their benchmarks too low and in many cases receive bonuses for their accomplishments.

Continue reading.

Bloomberg Businessweek

By Neil Weinberg

August 17, 2022

Biden Signs Climate Bill With Transformative Changes to Clean Energy Tax Incentives: Latham & Watkins

Key Points:

- Wind and solar tax credits receive a multi-year extension at full rates, and solar projects are eligible for the production tax credit.
- New tax credits are available for emerging technologies, including energy storage and clean hydrogen.
- Carbon capture tax credit rules are simplified and expanded.
- New manufacturing tax credits are available to support and grow the clean energy supply chain in the US.
- Most tax credits may be converted to cash payments from the Treasury Department under a new direct pay program or sold in the market under new tax credit transfer procedures.

Continue reading.

Latham & Watkins LLP – James H. Cole, Enrique Rene de Vera, Eli M. Katz, Ben A. Cheatham, Andrea Herman, Michael J. Rowe and Michael Syku

August 16 2022

Wayfair: The Sequel - Baker McKenzie

A new lawsuit filed by Wayfair, LLC in Jefferson County Court (Colorado) seeks to address a question left open by the U.S. Supreme Court's landmark 2018 *Wayfair* decision that permits states to impose a sales or use tax collection obligation based on an economic nexus threshold: Does this decision apply to locally-administered sales or use taxes? While many localities have asserted that the same economic nexus standards should apply at the state and local levels, the devil is in the details as there are thousands of local taxing jurisdictions, many of which do not have uniform laws or centralized administration.

To briefly recap the *Wayfair* landscape, the U.S. Supreme Court blessed the brightline economic nexus standard used by South Dakota, stating that a tax "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). In concluding that South Dakota's law did not impose an undue burden on interstate commerce, the Court cited to three key features of the South Dakota tax system: (1) the economic nexus standard at issue included a safe harbor that required considerable business in the state; (2) the economic nexus standard was not applied retroactively; and (3) most notably, South Dakota had adopted the Streamlined Sales and Use Tax Agreement ("SSUTA"), which requires a single point of state-level administration for all state and local sales and use taxes along with other simplification measures. In this most recent Wayfair filing, Wayfair asks the court whether the City of Lakewood's locally administered sales tax should be invalidated because of its excessive burdens.

The taxpayer alleges that the City of Lakewood improperly assessed it roughly $600,000 in sales tax for the period May 2018 through June 2021, along with penalties and interest. As discussed in an earlier SALT Savvy blog post, Colorado state law provides for the local administration of local sales taxes in over 70 home-rule counties and municipalities. Further exacerbating the issue, the state has done little to require the simplification of theses local taxes. While the state offers a centralized single remittance portal that home-rule localities may use, the portal is optional and the City of Lakewood is not yet part of the program, though they have taken the preliminary step of signing the agreement to join the program. Due to this inaction, Wayfair's lawsuit also includes an affirmative claim against the Executive Director of the Colorado Department of Revenue alleging that the state failed to provide adequate safeguards and support to mitigate the burdens of Colorado's local tax system on out-of-state businesses.

Some within Colorado's state and local governments appear to recognize the compliance burdens and the concomitant litigation risk that could arise from them. For example, the Colorado Municipal League ("CML"), a non-profit, nonpartisan organization representing the cities and towns of Colorado stated that "part of the reason South Dakota did not overburden interstate commerce was due to an easy way for businesses to remit to all taxing jurisdictions." In response, the CML developed a Model Ordinance on Economic Nexus and Marketplace Facilitators ("Model Ordinance") with standardized definitions "as part of a sales tax simplification effort," because the CML acknowledged that "various home rule municipalities giving the same term different meanings is a source of complexity in our tax system for businesses that operate in multiple municipalities." However this standardized statutory language has not been adopted by all home rule jurisdictions in the state. As of the writing of this publication, 270 cities and towns of Colorado are members of the CML, out of a total of 272, indicating widespread local support for the organization's purpose. But as of 2021, only about 43 out of the 70 home rule jurisdictions had adopted the Model Ordinance.

As noted above, Colorado itself also established an optional single point of remittance portal with a uniform remittance form for use by home rule localities. Additionally, in April the state enacted a law that prohibits localities from imposing local license fees on retailers without a physical presence or with only an incidental physical presence within the locality as long as the retailer has a standard state retail license. Moreover, the bill summary states, "[t]he department is required to consult with local taxing jurisdictions when determining what information to collect and how to make the information collected available to local taxing jurisdictions and making and testing modifications. The department is also required to consult with retailers and address any reasonable concerns they may have." It remains to be seen if this positive step in the right direction will lead to changes sufficient to overcome the serious Commerce Clause concerns with respect to the administration and collection of local taxes in Colorado.

The situation in Colorado is analogous to the situation in Louisiana. In a November 2021 suit filed by Halstead Bead Inc. in the Eastern District of Louisiana, the taxpayer likewise alleged that Louisiana's decentralized sales tax system violates the Commerce Clause of the U.S. Constitution. However, that case was dismissed on procedural grounds.

As illustrated in prior U.S. Supreme Court precedent, *Pike v. Bruce Church*, and reaffirmed by the Court in *Wayfair*, navigating such complex, overlapping, and competing obligations between and amongst local jurisdictions can create an undue burden on and discriminates against interstate commerce, thereby violating the Commerce Clause of the U.S. Constitution. *Pike v. Bruce Church*, 90 S. Ct. 844 (1970). The Colorado complaint alleges that neither Lakewood, nor the Colorado Department of Revenue, took reasonable steps to mitigate such burdens and that therefore requiring Wayfair to collect and remit the local tax is unconstitutional.

The problems of decentralized tax collection are not unique to Colorado and Louisiana. Other states have recently placed themselves in similar situations through their economic nexus and/or marketplace facilitator laws that apply to general sales and use taxes or other locally administered taxes (e.g., hotel occupancy taxes). For example, North Carolina, West Virginia, and Wisconsin require marketplace facilitators to individually register with each locality in the state for certain tax types once that marketplace facilitator has met or exceeded the state-level economic nexus threshold. These requirements are subject to the same balancing test that will be reviewed in Colorado.

We will continue to monitor this lawsuit and further developments on this issue.

Baker McKenzie – Lindsay LaCava, Mike Shaikh, David Pope and Rob Galloway

August 16 2022

Collateral Damage: Inaccurate US Tax Reporting Can Give Rise to Customer Damages: Mayer Brown

Financial institutions, corporations, and other payors of income are keenly aware that the Internal Revenue Service ("IRS") will impose tax penalties on them if they issue inaccurate tax information returns to either the IRS or customers. A recent case, however, points out that inaccurate reporting may have another, less obvious, downside: liability to the customer who received the inaccurate information. On June 30, 2022, a United States district court in New Jersey allowed a brokerage customer to proceed to seek damages from a brokerage that provided inaccurate tax reporting to the customer.1 While the opinion did not decide whether the brokerage was liable for damages, it has allowed the customer to continue its lawsuit.

In Goodman, the brokerage customer (the "plaintiff") purchased a number of taxable municipal bonds at a premium to the face amount of the bonds. The plaintiff held the bonds in a brokerage account. When a taxpayer purchases bonds for an amount greater than their face value (i.e., at a premium), U.S. tax law permits the taxpayer to amortize the premium over the remaining life of the bond. The premium amortization reduces the taxpayer's taxable income.2 Treasury Regulations contain certain presumption rules relating to a broker's IRS Form 1099 reporting obligations when a customer holds instruments that were purchased at a premium in an account with that broker.3 In Goodman, the plaintiff alleged that the broker incorrectly reported the amount of amortized bond premium on the plaintiff's IRS Forms 1099 for tax years 2015 – 2018. The plaintiff alleged that the misreporting caused the plaintiff to overpay U.S. federal income taxes in those years. The plaintiff brought contract and tort claims on behalf of himself and similarly situated individuals. In response, the broker filed a motion to dismiss.

The court looked to the underlying agreements governing the relationship between the plaintiff and broker in determining whether the plaintiff had a claim against the broker. While nothing in the account agreements specifically addressed the broker's tax reporting policies related to municipal bonds, the agreements did contain provisions relating to specific tax forms, including, for example, the electronic delivery of IRS Forms 1099. The court further noted that the broker also has a Form 1099 guide that it provides to clients. The guide, consistent with the Treasury Regulations, stated that the broker would report a gross amount for both the interest paid to the holder and the premium amortization for the year unless a holder requests otherwise.

The broker sought to have the litigation dismissed. The court denied the broker's motion to dismiss based on the possibility that the client had two potentially viable claims: (i) breach of contract and (ii) negligence. The court found it plausible that the broker violated implied terms of the agreements, providing the plaintiff a breach of contract claim. The court held that the agreements clearly contemplate that the broker would provide the plaintiff with tax forms, including IRS Form 1099. The court explained a promise to provide the client with tax forms, to be meaningful, implies that the forms be accurate to the best of the broker's knowledge. Second, it implies the broker would follow its own stated policies (i.e., the Form 1099 guide) when providing tax forms, even if those stated policies were not themselves part of the account agreements.4

The court held, with respect to the negligence claim, the threshold question is whether the broker had a state law duty to accurately report tax information on the forms it provided to the plaintiff. The court, recognizing this is a fact-intensive inquiry, denied the broker's motion to dismiss and found it appropriate to allow the parties to proceed to discovery. (We note that this claim could be rejected in a future motion for summary judgment made by the broker.)

Takeaways

Tax reporting has never been as complicated as it is today. Basis reporting, wash sale reporting, and a host of other relatively new reporting requirements substantially increase the likelihood that payors inadvertently misreport information. The Goodman opinion highlights the need to carefully review existing client/customer documentation to see what, if anything, is agreed or promised to clients, customers, or payees in terms of information reporting. At the very least, taxpayers should consider whether such documentation should contain an acknowledgement by the client/customer/payee that the broker is not liable for inadvertent tax reporting errors.

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1 Goodman v. UBS Fin. Servs., Inc., No. Civ. No. 21-18123 (KM) (MAH), 2022 BL 228030 (D.N.J. June 30, 2022).

2 See Internal Revenue Code section 171.

3 Treasury Regulation section 1.6045-1(n)(5).

4 The court's opinion provided the following: "A client who wonders how his or her income will be reported would naturally look for answers in the materials provided by [the broker] and would expect [the broker] to follow those policies. Here, [the broker] 1099 Guide stated 'unless you notified [the broker] in writing in accordance with Regulations section 1.6045-1(n)(5) that you did not want to amortize the premium under section 171, we will report a gross amount for both the interest paid to you and the premium amortization for the year.' The contract implies, therefore, that the Form 1099 that [the broker] was contractually and legally obligated to provide to clients such as [the plaintiff] would 'report a gross amount for both the interest paid to you and the premium amortization for the year.' [The plaintiff] alleges that the Form 1099s provided to him did not report the premium amortization for that year and therefore has plausibly alleged a breach of contract."

Mayer Brown – Jared B. Goldberger, Mark H. Leeds and Amit S. Neuman

August 15 2022

TAX - CALIFORNIA

Zolly v. City of Oakland

Supreme Court of California - August 11, 2022 - P.3d - 2022 WL 3270058

Solid waste disposal customers brought action to challenge constitutionality of franchise fees which city charged waste management entities, a portion of which was redesignated as a solid waste management fee.

The Superior Court sustained city's demurrer, and taxpayers appealed. The First District Court of Appeal affirmed in part and reversed in part, holding, among other things, that customers adequately alleged city's challenged fees did not bear reasonable relationship to franchises' values. The Supreme Court granted city's petition for review.

The Supreme Court held that:

- Customers alleged adequate injury-in-fact to support standing;
- Voluntary franchise fees were levies, charges, or exactions "imposed by" city within meaning of constitutional definition of "tax";
- Customers adequately alleged that waste disposal franchise did not constitute local government property; and
- Customers adequately alleged that franchise fees did not constitute charges imposed for use of local government property.

Alleged economic injury caused to solid waste disposal customers by franchise fees which city charged to waste management entities constituted injury-in-fact that conferred standing upon customers to challenge city's fees under constitutional provision governing taxes, even though customers were not obligated to pay charges related to franchise fees directly to city, where customers alleged that fees caused their waste collection rates to increase every month.

Fees that city required waste management entities to pay in exchange for waste disposal franchise rights within city, pursuant to contractual negotiations, were levies, charges, or exactions imposed by local government, as necessary to constitute "tax" within meaning of California Constitution, even if negotiations were voluntary rather than coerced; term "impose" meant "establish," without any coercive connotation, as indicated by constitutional provision's use of term "imposed" in context of voluntary charges.

Waste disposal customers adequately alleged that solid waste disposal franchise did not constitute "local government property" within meaning of constitutional exemption from definition of "tax" for charges imposed to enter or use local government property or to purchase, rent, or lease local government property, supporting customers' claim against city for violation of constitutional requirements for approval of taxes; term "local government property" in constitutional article governing voter approval of local tax levies referred to physical objects under control of local government, such as streets, franchise did not exist as local government's property before it vested in franchise owner, and fees were not paid for city's property interest in antecedent right to grant franchise.

Waste disposal customers adequately alleged that fees franchisees paid to city for waste disposal franchises did not constitute "charges imposed for use of local government property" within meaning of Constitution's exemption of such charges from definition of "tax," as necessary to support customers' claim against city for violation of constitutional requirements for voter approval of special taxes, even though ordinances stated franchises included right to use public streets or other public places; entities did not pay fees in exchange for specific use of government property that they would not have otherwise enjoyed, and provision exempted only fees paid as consideration for specific use of government property, such as park entrance fee, as indicated by statutory language "imposed for."

Wells Fargo Issues $2 Billion Inclusive Communities and Climate Bond.

Wells Fargo has announced the issuance of its second Inclusive Communities and Climate Bond, a $2 billion bond that will finance projects and programs supporting housing affordability, economic opportunity, renewable energy, and clean transportation.

Five broker-dealers whose owners include people of color, women, and service-disabled veterans joined Wells Fargo Securities, LLC to serve as bookrunners for the issuance. They, along with 19 additional broker-dealers whose owners are also from underrepresented groups, will receive 75% of the underwriting fees from the transaction. BurgherGray LLP, a minority-owned law firm, was retained as issuer's co-counsel for the offering, together with Faegre Drinker Biddle & Reath LLP. Gibson, Dunn & Crutcher LLP served as underwriters' counsel.

The transaction priced on Aug. 8, 2022. Unless redeemed, the notes will pay interest semi-annually at a fixed rate of 4.54% until Aug. 15, 2025, and then pay quarterly interest based on SOFR + 1.56% until the stated maturity date of Aug. 15, 2026.

Continue reading.

ENVIRONMENTAL + ENERGY LEADER

BY EMILY HOLBROOK

AUGUST 16, 2022

S&P: California’s Structural Balance Hinges On The State's Ability To Restrain Ongoing Expenses

Key Takeaways

- California’s adopted fiscal 2023 budget projects long-term structural balance by using an expected multibillion-dollar surge in one-time revenues primarily for one-time expenditures.
- The state’s multiyear forecast anticipates maintaining what we view as very strong reserves.
- Worry that the Gann expenditure limitation would hamstring state budget balance is temporarily alleviated by statutory definition changes as to what the limit includes and recent high inflation, which provides greater cap room under the formula.
- The state’s true financial picture is somewhat obscured by lack of a fiscal 2021 financial audit.

Continue reading.

11 Aug, 2022

Fitch Ratings Adds Several New Analysts to its U.S. Public Finance Group.

Fitch Ratings-New York-16 August 2022: Fitch Ratings has announced the appointment of several new analysts in its U.S. Public Finance group. The new analysts will be based in different Fitch offices throughout the country covering various municipal sub-sectors.

Joining Fitch’s San Francisco office are Senior Directors Pascal St. Gerard, Fitch’s new Western Regional Manager, and Karen Fitzgerald, who becomes Fitch’s new Sector Head for Community Development & Social Lending. St. Gerard comes to Fitch following a 13-year stint with Charles Schwab as a Senior Municipal Analyst and has also been with Moody’s during his career. Fitzgerald spent over two decades with S&P Global Ratings, including time as an Analytical Leader in the U.S. Public Finance Housing and Structured Securities group.

Directors Akiko Mitsui (U.S. Education & Non-Profits) and Tammy Gamerman (U.S. State Governments) will be based in Fitch’s New York office. Mitsui’s 20-plus year career includes 16 years with Vanguard and prior experience with Harvard Business School and Fuji Bank. Prior to Fitch, Tammy monitored and analyzed New York City finances as the Director of Budget Research for the Office of the New York City Comptroller.

Lastly, Fitch adds to its Austin office Directors Brian Williamson (Not-for-Profit Healthcare Team) and Lauren Wynn (U.S. local government ratings group). Williamson’s career includes time at S&P Global Ratings while Wynn joins Fitch from the City of Austin, where she most recently served as a manager of the city's capital improvement and bond program.

'Rating agency credit analysis and thought leadership are highly valued by market participants within U.S. public finance,' said Ann Flynn, Fitch's Global Business Development Head for Public Finance and Infrastructure. 'We're pleased to enhance our team's capabilities with these experienced analysts who will provide valued credit analysis and perspectives,' said Arlene Bohner, Fitch's Analytical Head of U.S. Public Finance.

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Additional information is available on www.fitchratings.com

[Outflows Slow From Municipal Bond Funds.]

Investors are slowing down after dumping muni bond holdings at record speeds in the first half of 2022.

Outflows from municipal bond flows fell to $229 million for the week ended Wednesday from $635 million last week, according to data from Refinitiv Lipper. Mutual and exchange traded funds have had a couple of weeks since the beginning of June when they received more than $1 billion in inflows. Earlier this year, these funds lost more than $30B over 15 consecutive weeks of outflows as rising rates drove down the market value of their portfolios.

Those investors may view the Fed minutes released Thursday as more reason to chill, with expectations of a smaller rate increase rising and predictions of a bigger rate increase falling after the release.

The Wall Street Journal

By Heather Gillers

Aug 19, 2022

[Disclosure Update: GFOA Webinar]

September 23, 2022 | 1-3 p.m. ET

Issuers of municipal securities have numerous disclosure responsibilities related to their bond transactions. This includes mandated filings of annual financial information and material event notices in the MSRB's EMMA system, and other types of voluntary disclosures. Industry experts will discuss these issues as well as recent SEC activities related to disclosure. A review of GFOA's best practices and the importance of developing and maintaining disclosure policies and procedures will also be addressed.

[Click here] to learn more and to register.

Future Returns: Finding an Inflation Hedge in Municipal Bonds

For wealthy investors, municipal bonds issued to build hospitals, roads, and schools, have often been a no-brainer, offering good yields free of taxes.

But the market backdrop for muni bonds "hasn't been as attractive as investors would have liked for the better part of 10 years," says Jonathan Mondillo, head of North American fixed income for abrdn, a U.K.-based investment firm. Interest rates kept falling during that period and yield spreads between municipals and other types of fixed-income securities compressed, providing fewer advantages.

With the Federal Reserve sharply raising short-term rates to combat inflation (the latest was a 0.75 percentage point increase in July), yields on municipal bonds are two to two-and-a-half percentage points higher, in general, than at the beginning of the year, and investors are starting to tip-toe back into the sector. Cash flows into municipal bond funds and ETFs have been turning slightly positive in August after experiencing outflows all year, according to Refinitiv, which tracks fund flows.

Continue reading.

Barron's

By Abby Schultz

Aug. 16, 2022

Puerto Rico's Bankruptcy: Where Do Things Stand Today?

In 2016, Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), which created the Puerto Rico Financial Oversight and Management Board to restructure the Commonwealth's unsustainable burden of more than $72 billion in debt and more than $55 billion in unfunded pension liabilities. The board oversaw a bankruptcy process that culminated in March 2022, when a federal court confirmed a plan that reduced Puerto Rico's debt by 80%. Still, the work of putting the Commonwealth on a sustainable fiscal path remains incomplete. At our annual Municipal Finance Conference in July 2022, four experts weighed in on the effects of PROMESA and the challenges that remain: Natalie Jaresko, former executive director of the oversight board; Sergio Marxuach, policy director at the Center for a New Economy; David Skeel, chairman of the oversight board and professor of corporate law at the University of Pennsylvania Carey Law School; and John Ceffalio, senior research analyst for Municipals at CreditSights. The panel was moderated by Michelle Kaske of Bloomberg.

You can watch a video of the panel here. Here are a few highlights.

Continue reading.

The Brookings Institution

by Lorae Stojanovic and David Wessel

August 17, 2022

[Buy These 3 Municipal Bond Funds for Steady Returns.]

Municipal bonds, or "muni bonds," comprises debt securities issued by various states, cities, counties and other governmental entities to raise money to build roads, schools and a host of other projects for the public good. These municipal securities regularly pay interest payments, usually semi-annually, and pay the original investment or principal amount at the time of maturity. Interest paid on such bonds is generally exempted from federal taxes making them especially attractive to people in higher income tax brackets.

Thus, risk-averse investors looking to earn a regular tax-free income may consider municipal bonds mutual funds. These mutual funds are believed to provide regular income while protecting the capital invested. While mutual funds from this category seek to provide dividends more frequently than other bonds, they offer greater stability than those primarily focusing on equity and alternative securities.

Continue reading.

Zacks Equity Research

August 18, 2022

- MSRB Publishes Summary of Responses to its Request for Information on ESG Practices in the Municipal Securities Market.
- Cases concerning the taxation of commercial wind facilities here and here.
- Interesting case concerning special assessments for shoreline fortification project here.
- CDFA Federal Financing Webinar Series: Funding Community Energy Needs with the Department of Energy.
- Jefferies' Pitch on Big Texas Muni Deal: No Gun, Oil Policies That Raise GOP Ire.
- And finally, Setting The Scene is brought to us this week by *Nunez v. City of Redondo Beach*, in which Monica Nunez went kersplat after tripping on a minor sidewalk defect. In the ensuing litigation, "Nunez's deposition established that when she fell it was sunny, not dark or gloomy, she had nothing in her hands and was 'normal walking, … looking ahead.'" Gloomy? Have you been to Redondo Beach? Gloom thin on the ground. Gloom thin in the air. Not just thin, downright anorexic, the gloom. And what the hell is "normal walking?" Is there an *ab*normal walking? Might there be a Ministry of such walks?

SPECIAL ASSESSMENTS - CALIFORNIA

Broad Beach Geologic Hazard Abatement District v. 31506 Victoria Point LLC

Court of Appeal, Second District, Division 4, California - August 2, 2022 - Cal.Rptr.3d - 2022 WL 3053306

Property owners, including trust, filed petition for writ of mandate, seeking to set aside special assessment to fund shoreline fortification project as violative of state constitutional limitations on assessments.

The Superior Court entered judgment invalidating assessment, but subsequently denied property owners' motions for attorney fees under private attorney general statute. District appealed from judgment and property owners appealed from order denying attorney fees.

The Court of Appeal held that:

- Project would create general benefit of improved public beach;
- State agency's requirement that city district ensure public access to beach did not render beach cost of project rather than general benefit;
- District was required to apportion special benefits that revetment would confer on parcels behind it;
- District was required to assess county-owned parcels specially benefited by project;
- Possibility of new assessment in future did not render financial benefits from litigation so uncertain as to warrant attorney fees;
- Trial court properly considered litigation benefits to property owners who joined litigation after petition was first filed in considering attorney fee award; and
- Trust had adequate financial motivation to participate in litigation absent award of attorney fees.

Shore fortification project would create wider, sandy beach that would benefit public in general, and, thus, constitutional provision governing assessments required city district to separate project's special benefits to certain parcels from general benefit, including beach, and include only portion of cost of project representing special benefits in special assessment used to fund project, even if general benefits did not impose additional costs and district did not subjectively intend to widen beach for recreational purposes; allowing any special benefit that also provided general benefits to support assessment for entire cost of project would be inconsistent with constitutional separation and quantification requirements, which depended on real-world effects rather than agency intent.

Coastal Commission's requirement that city district ensure public access to beach that would be enlarged and enhanced as a result of shore fortification project did not render enhanced public beach a cost of such project rather than general benefit, and, thus, did not exempt district from constitutional requirement of separating such general benefit from project's special benefit of protecting particular properties and include only costs attributable to special benefit when imposing special assessment on those properties; provision of wide, sandy beach was central to revetment project, not mere condition for approval or required consideration by agency, and Commission's action to ensure project would not cut off public's beach access did not transform project's general benefits into costs.

Revetment was integral part of city district's proposed shoreline fortification project, and, thus, constitutional article governing assessments required district, when imposing assessment to fund project, to apportion special benefits that revetment would confer by providing additional protection to parcels behind it so that assessment would be proportional to those parcels' relative special benefits, even though property owners constructed existing, temporary revetment and agreed to fund its relocation; State Lands Commission required district to pay for existing revetment's unauthorized use of state lands, district persuaded Coastal Commission to keep revetment, and Coastal Commission's conditions of approval required district to relocate revetment and mitigate its environmental impact.

Shoreline fortification project would provide special benefit of protection to county-owned parcels that contained stairs providing public access to beach, and, thus, constitutional article governing special assessments required city district to impose project-funding assessment against such parcels, even if project would not change stairs' function; project would protect shoreline, including stairs and parcels, by adding sand and maintaining revetment, each parcel encompassed large area, and constitution did not permit district to treat county parcels more favorably than it did privately-owned parcels that also received special benefit from project, such as by exempting county parcels from assessment or funding benefits to county parcels through in-kind contributions from homeowners.

LIABILITY - CALIFORNIA

Nunez v. City of Redondo Beach

Court of Appeal, Second District, Division 3, California - July 27, 2022 - Cal.Rptr.3d - 2022 WL 2965453 - 2022 Daily Journal D.A.R. 8078

Pedestrian filed a negligence lawsuit against city after she tripped on an elevated sidewalk slab and injured her left knee and right arm.

The Superior Court granted city summary judgment and pedestrian appealed.

The Court of Appeal held that city's policy to repair sidewalk tripping hazards greater than a half-inch did not create a triable issue of fact as to the triviality of sidewalk offset.

City's policy to repair sidewalk tripping hazards greater than a half-inch did not create a triable issue of fact as to the triviality of sidewalk offset, in pedestrian's negligence lawsuit against city after she tripped on an elevated sidewalk slab; minor defects to the alignment of city's sidewalk inevitably occur, and the continued existence of such nonalignments without warning or repair was not unreasonable and did not preclude the trial court from finding the sidewalk defect was trivial.

SCHOOL FINANCE - MISSISSIPPI

Wayne County School District v. Quitman School District

Supreme Court of Mississippi - July 28, 2022 - So.3d - 2022 WL 2980866

School district filed suit against neighboring school district seeking to recover pro rata distribution of funds arising from their shared trust property.

The Chancery Court entered judgment for plaintiff school district. Both sides appealed.

The Supreme Court, en banc, held that statute governing schools' division of revenue collected from shared townships was a condition precedent, not a statute of limitations.

Statute governing the manner in which revenue from shared townships was to be administered to school districts, which stated that "any school district failing to timely provide the list to the superintendent of the custodial school district shall forfeit its right to such funds" was not a statute of limitations that established a time limit for bringing a lawsuit; rather, it was a condition precedent school districts were required to fulfill.

EMINENT DOMAIN - NORTH CAROLINA

County of Moore v. Acres

Court of Appeals of North Carolina - July 5, 2022 - S.E.2d - 2022-NCCOA-446 - 2022 WL

2432952

County brought action against landowners, alleging that landowners had encroached on county's purported easement to access sewer and water mains on property by constructing fence and planting trees in easement area, and seeking injunctive and declaratory relief.

The Superior Court granted landowners' motion for summary judgment, and denied county's cross-motion for partial summary judgment on the issue of the county's ownership of the lines and easement. County appealed.

The Court of Appeals held that:

- Any inverse condemnation claim by landowners was untimely, and
- County held title to an easement along the surface of the property.

County held title to sewer and water mains under landowners' property, and thus held title to an easement along the surface of the property to service, maintain, and repair the utility mains, where county took possession of the lines more than two decades earlier and had continuously used and operated the lines for a public purpose.

PUBLIC UTILITIES - SOUTH DAKOTA

Matter of Ehlebracht

Supreme Court of South Dakota - August 3, 2022 - N.W.2d - 2022 WL 3097464 - 2022 S.D. 46

Intervenors impacted by potential wind energy farm appealed Public Utilities Commission's (PUC) approval of siting permit for wind energy farm.

The Circuit Court affirmed, and intervenors appealed.

The Supreme Court held that:

- PUC correctly applied legal standard requiring an applicant to comply with all applicable laws and rules;
- Application adequately complied with requirement that it include a "forecast" of the impact that the facility would have on solid waste management facilities;
- Adoption of noise levels set forth in amended county ordinance did not pose any danger to the health, safety, or welfare of the inhabitants living near the project;
- Applicant's failure to commission a field study to measure the ambient sound that existed naturally in area of proposed wind energy farm prior to construction did not indicate that applicant failed to meet its burden to show that the facility would not substantially impair the health, safety or welfare of the inhabitants;
- Applicant met its burden to show that the facility would not substantially impair the health, safety or welfare of the inhabitants as it related to the topic of infrasound; and
- Applicant was not required to submit an air quality study.

CHARTER SCHOOLS - TEXAS

KIPP Texas, Inc. v. Doe #1

Court of Appeals of Texas, Houston (1st Dist.) - June 30, 2022 - S.W.3d - 2022 WL 2347906

Parents of students sexually abused by counselor at charter school brought action against school's corporate operator, alleging claims for assault and negligence.

The District Court denied operator's plea to the jurisdiction, which asserted immunity from suit and liability. Operator appealed.

The Court of Appeals held that:

- Operator had governmental immunity from parents' suit;
- Open-courts provision of the State Constitution did not apply to preclude operator's governmental immunity; and
- Uncontroverted affidavit established operator's status as an open-enrollment charter school.

Operator of open-enrollment charter school had governmental immunity from claims for assault and negligence brought by parents of students sexually abused by a counselor employed by operator at school, since a public school district would be immune from such claims.

Open-enrollment charter school had governmental immunity as a matter of common-law interpretation, rather than on the basis of statute, and thus open-courts provision of the State Constitution did not apply to preclude such immunity, so as to confer subject-matter jurisdiction over action against operator of open-enrollment charter school, brought by parents of children sexually abused by counselor, and asserting claims for assault and negligence; although the legislature enacted a statute granting governmental immunity to open-enrollment charter schools, the Supreme Court as a whole did not defer to such enactment in holding that open-enrollment charter schools have immunity.

Uncontroverted affidavit established operator of school as an open-enrollment charter school, as required for school's governmental immunity from suit brought by parents of students sexually abused by school counselor, where parents did not object to the affidavit, did not file any evidence controverting the school's status as an open-enrollment charter school, and sought a declaration that a certain statutory provision applicable only to open-enrollment charter schools violated the open-courts provision of the Texas Constitution, which was tantamount to a judicial admission of the school's status as an open-enrollment charter school.

EMINENT DOMAIN - WASHINNGTON

Maslonka v. Public Utility District No. 1 of Pend Oreille County

Court of Appeals of Washington, Division 3 - August 2, 2022 - P.3d - 2022 WL 3037184

Landowners brought action against county public utility district, an operator of river dam that caused occasional flooding, seeking injunctive relief and asserting claims of inverse condemnation, trespass, nuisance, and negligence arising from flooding of their agricultural property.

Utility district counterclaimed for declaration of prescriptive easement to flood at water levels above those set forth in express easement.

On summary judgment, the Superior Court declared a prescriptive easement in favor of utility district and dismissed landowners' claims. Landowners appealed.

The Court of Appeals held that:

- Continuous and uninterrupted use, as element of prescriptive easement, can be decided on summary judgment;
- As matter of first impression, a party asserting a prescriptive easement must prove each element by clear and convincing evidence;
- Factual issues precluded summary judgment on prescriptive easement claim;
- Factual issue as to applicability of subsequent purchaser rule precluded summary judgment on inverse condemnation claims as to riverfront parcel;
- Trespass and nuisance claims for riverfront parcel were not subsumed by inverse condemnation claims; and
- Utility district did not cause injury to inland agricultural parcel that allegedly flooded due to defect in diking improvements.

Fitch: U.S. State Budgets Brace for Macro Uncertainties Ahead

Fitch Ratings-New York-08 August 2022: State budgets are in a much better position coming into fiscal 2023 and are structured to combat inflationary and macro pressures over the next several months, according to Fitch Ratings in a new report.

All 50 states have enacted budgets as fiscal 2023 gets underway, an improvement from pre-COVID dynamics thanks largely to a second year of surging revenues. “Enacted budgets have effectively moved from restoring cuts taken during the brief but severe downturn to programmatic spending, while also adding to reserves and reducing taxes,” said Senior Director Karen Krop.

Slower economic growth and rising inflation do pose some downside risk. The enacted budgets consider potential economic and geopolitical headwinds. After historically strong US GDP growth of 5.7% in 2021, Fitch expects growth to slow sharply in 2022 to 2.9% and then further to 1.5% in 2023, due to rapidly rising interest rates.

“States are well positioned for slower growth, as a result of generally prudent fiscal choices made over the last two fiscal years,” said Krop. The budgetary safeguards states are enacting include making sizeable deposits to rainy day funds (many of which are now considered fully funded), creating new reserves to address future uncertainty and reducing long-term liabilities.

Strong labor markets, while integral to state revenue strength, also pose a challenge to government and school district in recruiting and retaining employees. In response, states are providing additional funding for school districts and higher education, allotting some of that funding to increase salaries and sweeten compensation packages to retain employees.

“U.S. State Budgets Balanced in 2023” is available at www.fitchratings.com.

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How FY2022 Investment Returns Are Adding to the Pension Obligation Burden for Local Governments.

In FY2022, from July 2021 to June2022, tumultuous financial markets played a key role in many pension funds registering negative investment returns. Since these pension funds invest in a wide array of investment sectors, everything from public and private equity to real estate investments, both domestic and global events adversely impacted these pension fund performances.

These pension fund performances ultimately determine the funding levels of pension obligations for all state and local governments that take part in pension funds for their employees. In addition, when pension funds calculate the pension burden for each participating agency, they use a discount rate to calculate the present value of obligations for a future pension payout. This discount value will typically be adjusted based on the investment performance of the pension fund.

In this article, we will take a closer look at how market investment returns are shaping the future of pension obligations for many local governments in the United States.

Continue reading.

municipalbonds.com

by Jayden Sangha

Aug 10, 2022

Why Municipal Bonds Are Emerging as a Key ESG Investment.

The municipal bonds market is ripe for sustainable investing. These bonds are often tied to ESG projects without a premium price—at least for now.

When investors think about sustainable investing, they often focus on broad themes—such as water scarcity or clean energy—or individual companies that are leaders in environmental, social and governance (ESG) practices.

But those looking to build their ESG portfolios could also tap into municipal bonds. Increasingly issued by state and local governments to fund public projects that can have a positive social or environmental impact—from schools in underserved areas to infrastructure for zero-emission transportation—muni bonds can clearly align with sustainability goals.

What makes them potentially alluring right now? New analysis from Morgan Stanley Research finds that muni bond valuations are still driven largely by the issuer's credit rating, and not according to their ability to address ESG-related risks—a pricing advantage that may soon change.

Continue reading.

Morgan Stanley

Aug 9, 2022

Green Bond Sales Drop to 19-Month Low on Tight Issuance Windows.

- **July is typically a slow month for global green bond sales**
- **BloombergNEF sees issuance slowing under greenwashing scrutiny**

Global sales of green bonds, the largest category of sustainable debt by amount issued, plunged to a 19-month low in July amid a typical summer lull and as opportunistic borrowers preferred traditional bond offerings that are faster to complete.

Sales of green bonds fell to about $24 billion last month from over $45 billion the previous month, data compiled by Bloomberg show. That's the lowest since December 2020, when companies and governments issued about $7.7 billion of green debt.

July, August and December are historically three of the slowest issuance months for green bonds. And while global bond issuance is picking up after a rough first half, borrowers find it harder to accelerate a sustainable transaction when market conditions are favorable because these transactions require more work leading up to the sale, according to top underwriters of the debt.

Continue reading.

Bloomberg Green

By David Caleb Mutua

August 9, 2022

S&P: CDFIs Demonstrate Strengths Post-Pandemic, But Are Equity Increases Only Temporary?

Key Takeaways

- We expect ratings to remain stable or improve over the next two years as rated CDFIs take steps to mitigate risks from inflationary pressure and rising interest rates.
- Some higher equity ratios in 2021 may prove temporary, and thus may not be the sole factors in potential near-term rating actions.
- On lending their recent influx of capital, we expect some CDFIs' equity to decrease relative to assets over time.
- Other credit factors such as asset quality and liquidity are likely to remain strong.

Continue reading.

10 Aug, 2022

The Revival of Supplemental Environmental Projects and How It May Impact Settlement Agreements Moving Forward - Squire Patton Boggs

As the US Department of Justice (DOJ) begins to revive the use of Supplemental Environmental Projects (SEPs), it is likely that they will appear again with increasing frequency in settlement agreements moving forward. DOJ received comments through July 11, 2022 on its interim final rule to revoke the Trump-era regulation that prohibited payments to non-governmental, third-party organizations who are not parties to an enforcement action—the regulation that effectively prohibited SEPs in settlement agreements. This post will provide an overview of SEPs, regulations surrounding SEPs, comments received pertaining to the revival of SEPs, and the likely use of SEPs moving forward.

Continue Reading

By Katherine Wenner on August 4, 2022

Squire Patton Boggs

Four Questions (and Answers) About the Infrastructure Investment and Jobs Act.

The Infrastructure Investment and Jobs Act (IIJA), also known as the bipartisan infrastructure bill, will increase federal spending on infrastructure by about $550 billion over the next decade, nearly all through grants to state and local governments, which own much of the nation's infrastructure. At our annual Municipal Finance Conference in July 2022, four experts addressed several questions about the IIJA: Ryan Berni, senior advisor to Mitch Landrieu, the infrastructure implementation coordinator in the White House; D.J. Gribbin, former special assistant to President Trump for infrastructure; Shoshana Lew, executive director of the Colorado Department of Transportation; and Eden Perry, head of the U.S. Public Finance Operation and S&P Global Ratings.

A video of the panel is posted here. Here are some highlights.

Continue reading.

The Brookings Institution

by Nasiha Salwati and David Wessel

Monday, August 8, 2022

How the American Rescue Plan Is Backstopping the 'Submerged State'

The Prospect interviewed researchers Amanda Kass and Philip Rocco on the American Rescue Plan, an unprecedented fiscal outlay for local governments that remains widely unknown.

In March of last year, the American Rescue Plan put $350 billion toward a fiscal recovery fund for state and local governments. Lately, ARPA only seems to get media attention when the center-left complains that it funded tax cuts or set off inflation. Critics who say it was overkill grumble that it was "fighting the last war"—that ARPA overshot in its attempt to avoid the austerity of the Great Recession.

But ARPA is unrivaled in recent history as a flexible, open-ended public-funding package. A multipurpose fund available to tens of thousands of governments nationwide, ARPA is the largest broad-based aid transfer in 50 years, since the General Revenue Sharing program President Nixon enacted in 1972, which ended in 1986. ARPA is also bigger than its $150 billion predecessor, the CARES Act's Coronavirus Relief Fund, which only went to larger state governments, cities, and counties. That makes it a great trove of information for researchers studying public investment.

Amanda Kass, the associate director of the Government Finance Research Center at the University of Illinois at Chicago, and Philip Rocco, a political scientist at Marquette University, have broken down expenditures by local governments. The Prospect interviewed the researchers about their findings as part of our Twitter Spaces series. The audio is embedded below.

Listen to podcast.

THE AMERICAN PROSPECT

BY PROSPECT STAFF

AUGUST 10, 2022

Farebox Shortfalls Soon to Create 'Sizable' Transit Budget Gaps.

The problem is looming for big city transit agencies in places like New York and San Francisco, with ridership unlikely to recover before federal pandemic aid dries up, Fitch Ratings warns.

Some of the country's busiest transit systems will face big budget pressures in the coming years, because their post-pandemic ridership is not likely to recover before federal stimulus funds run out, a major bond ratings agency warned this week.

Fitch Ratings, one of the three dominant ratings companies, said in a report released Wednesday that transit agencies that relied the most on fare revenues—rather than local sales taxes or other income streams—are "expected to face sizable budget gaps" when the federal aid dries up, Fitch analysts warned.

"Transit agencies and governments have the tools to adjust to volume declines. However, the usual tweaks to spending, service levels and fares will not be enough for the nation's most economically important urban transit agencies, which rely heavily on fares," they wrote in their report.

Continue reading.

Route Fifty

By Daniel C. Vock

AUGUST 11, 2022

Fitch: US Public Transit Faces Multi-Year Recovery

Fitch Ratings-Chicago/New York-10 August 2022: The pandemic was a severe blow to US public transit systems, resulting in durable declines in ridership and pressures on operating budgets, Fitch Ratings says in its report U.S. Public Transit Faces Multi-Year Recovery. Hybrid and remote work fundamentally changed demand, with ridership facing a long recovery to a new normal that will require new sources of revenue or service reductions at the most fare-dependent agencies.

Public transit ridership was trending lower before the precipitous declines of the pandemic. Overall US ridership subsequently plummeted 53% in 2020 and remains around 50% below pre-pandemic levels.

The nation’s largest transit agencies previously were able to employ pricing power based on commuter demand for transportation to urban job centers but commuter volumes are unlikely to return to pre-pandemic levels. Our base case assumes ridership does not fully recover, although some agencies may exceed this expectation. Major fare-dependent agencies estimate ridership will recover to 70%–90% of pre-pandemic levels.

Continue reading.

Fitch: US Public Transit Faces Multi-Year Recovery

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Transit agency financial performance in the pandemic and recovery varies by revenue structure. Transit systems that rely heavily on tax revenue experienced steady revenue growth, even with declines in ridership, primarily reflecting the growth in sales tax revenue and federal aid during the pandemic. Fare-dependent agencies, such as New York's Metropolitan Transportation Authority (MTA) and Bay Area Rapid Transit (BART), lag sales tax-dependent agencies, such as Los Angeles County Metropolitan Transportation Authority (LA Metro).

Extraordinary federal aid as part of federal pandemic relief measures helped compensate for lost fare revenue, particularly at the most fare-dependent agencies. These agencies will face sizeable budget gaps when this aid runs out in the next few years unless they are able to adjust budgets based on new baseline levels of demand and fare revenue.

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The above article originally appeared as a post on the Fitch Wire credit market commentary page. The original article can be accessed at www.fitchratings.com. All opinions expressed are those of Fitch Ratings.

Municipal Bonds And Public Transport (Audio)

Joe Mysak, Editor of the Bloomberg Brief: Municipal Markets, discusses the latest news from the municipal bond market. Hosted by Paul Sweeney and Matt Miller.

Listen to audio.

Bloomberg Markets

Aug 12, 2022

Extreme Weather Is Only Getting Worse. Can Cities Protect Public Transit?

Climate-resilient public transportation is crucial to meeting our climate goals and ensuring mobility for vulnerable communities.

Last September, New York City was so thoroughly inundated by Hurricane Ida that some commuters waded through water up to their waists just to get in and out of the subway station. Across the country, extreme heat battered the West Coast, melting Portland's streetcar power cables. This summer is seeing similar headlines, with heatwaves warping the BART train tracks in San Francisco and sudden rainfall interrupting Northeastern commutes.

These extreme weather events, which are increasing in severity and frequency due to climate change, pose a problem to the millions of Americans who rely on public transit to get to and from work, school, the grocery store, the hospital and social events. According to Maria Sipin, a former Transportation Justice Fellow at the National Association of City Transportation Officials (NACTO), public transit is a "lifeline" for many groups of people that already face disproportionate challenges due to historic discrimination or marginalization — think disabled individuals, low-income communities where private car ownership is rare, and Black and Brown communities that are less likely to have access to a car and more likely to live further from their jobs and rely on public transit for their commutes (thanks in part to the legacy of redlining and ongoing disinvestment in minority neighborhoods). When extreme weather impacts public transit, it has the potential to deepen existing inequalities.

It also threatens the country's ability to meet climate goals: Transportation is responsible for 27% of U.S. carbon pollution, and public transit is a key tool for bringing those emissions down. If train and bus service is disrupted by extreme weather, people may turn to more emissions-intensive ways of getting around, creating a negative feedback loop that fuels the global temperature rise that caused the disruptions in the first place.

Continue reading.

NEXT CITY

WHITNEY BAUCK

AUGUST 12, 2022

TAX - CONNECTICUT

Wind Colebrook South, LLC v. Town of Colebrook

Supreme Court of Connecticut - August 2, 2022 - A.3d - 344 Conn. 150 - 2022 WL 3048353

Taxpayer, which was a limited-liability company (LLC) that owned and operated a wind turbine facility, commenced a municipal property tax appeal after town board of assessment denied taxpayer's appeal of town's classification of the wind turbines and their associated equipment as real property for purposes of taxation.

The Superior Court entered judgment for taxpayer on claim that a late-filing penalty was improper but entered judgment for town in all other respects. Taxpayer appealed.

The Supreme Court held that:

- The turbines were "buildings" under statute on taxation of real property;
- The turbines were "structures" under statute on taxation of real property;
- Statute on equalization of assessments did not preclude classifying commercial wind turbines as real property for property-tax purposes;
- The turbines were not "fixtures" of an electric company pursuant to definition of personal property in statute on filing of declarations for personal property; but
- The equipment associated with the turbines constituted "fixtures" of an electric company pursuant to definition of personal property in statute on filing of declarations for personal property.

Commercial wind turbines used for the generation of electricity were "structures" under statute on taxation of real property and thus were taxable as "real property" rather than "personal property"; turbines were virtually permanent and were suitable for occupancy or storage.

Commercial wind turbines used for the generation of electricity were not "machines" so as to be taxable as "personal property"; even if the turbines had characteristics of machines, they did not constitute "machinery used in mills and factories," which the statute on filing tax declarations for personal property included in its definition of personal property.

Statute on equalization of assessments did not preclude classifying commercial wind turbines as real property for property-tax purposes, despite argument that the only other commercial wind turbine in the state was assessed as personal property; other turbine was in a different municipality, and statute required only that assessors equalize the assessments of property in the town.

Different property-tax classification of hydroelectricity generating turbine did not preclude classifying commercial wind turbines in different municipality as real property for property-tax purposes; unlike the wind turbines, the hydroelectric generating turbine was moveable and removed when not in use.

Commercial wind turbines were not "fixtures" of an electric company pursuant to definition of personal property in statute on filing of declarations for personal property, and thus such an alleged status could not warrant classifying turbines as personal property as opposed to real property; unlike other articles that had been found to be fixtures, the turbines, as constructed, were not once chattels that only became real property through physical annexation to the land.

Equipment associated with commercial wind turbines constituted "fixtures" of an electric company pursuant to definition of personal property in statute on filing of declarations for personal property, and thus equipment was "personal property" for property-tax purposes.

Statute on remedy for wrongful assessment of property was not a basis on which taxpayer, which was a limited-liability company (LLC) that owned and operated a wind turbine facility, could be entitled to relief in property-tax appeal of assessment of wind turbines and association equipment; although the equipment associated with the turbines was improperly was classified as real property, relief was not available under that statute in the absence of evidence of misfeasance or malfeasance.

TAX - COLORADO

Chronos Builders, LLC v. Department of Labor and Employment, Division of Family and Medical Leave Insurance

Supreme Court of Colorado - June 21, 2022 - 512 P.3d 101 - 2022 CO 29

Employer brought action challenging the constitutionality of collection of premiums from employers to fund the Paid Family and Medical Leave Insurance Act.

The District Court dismissed the action. Employer appealed. On parties' joint petition, certiorari review was granted.

The Supreme Court, as matter of apparent first impression, held that premiums collected to fund paid leave under Paid Family and Medical Leave Insurance Act did not amount to "added tax or surcharge" pertaining to income tax law.

Premiums collected from employers and employees to fund paid leave from employment under the Paid Family and Medical Leave Insurance Act did not amount to "added tax or surcharge" pertaining to income tax law that would be prohibited under State Constitution's Taxpayer's Bill of Rights (TABOR); unlike taxes, which were designed to raise revenues to defray general governmental expenses, the premiums were fees used "to defray the cost" of providing paid family and medical leave to employees.

TAX - MISSOURI

Johnson v. Springfield Solar 1, LLC

Supreme Court of Missouri, en banc - August 9, 2022 - S.W.3d - 2022 WL 3219292

County assessor filed petition seeking review of Missouri State Tax Commission's decision that solar energy system was exempt from property taxes as a solar energy system not held for resale, or alternatively, for declaratory judgment that statute exempting solar energy systems not held for resale from property taxes violated constitutional provision limiting tax exemption to specifically-enumerated property.

County was joined as a plaintiff. Taxpayer filed counterclaim seeking declaratory judgment that prior tax assessments were void. The Circuit Court dismissed claim seeking judicial review of Commissioner's decision, and entered declaratory judgment that exemption was constitutional and prior assessments were void. County and county assessor appealed.

The Supreme Court held that legislature did not have authority to enact statute exempting solar energy systems not held for resale from property taxes.

Constitutional provisions granting legislature authority to create subclasses of tangible personal property and fix tax rates for such subclasses did not implicitly permit legislature to enact statute exempting solar energy systems not held for resale from property taxes, since separate constitutional provision limited tax exemptions to specifically-enumerated property and explicitly stated that all non-enumerated exemptions were void, solar energy systems did not fall within any category of enumerated property, and permitting legislature to use its authority to fix tax rates to set 0% tax rate for any type of real or personal property would effectively create backdoor for tax exemptions not enumerated in constitution.

[Jefferies' Pitch on Big Texas Muni Deal: No Gun, Oil Policies That Raise GOP Ire.]

- **Proposal to win $3.4 billion deal touted securitization record**
- **Bank now No. 2 Texas muni underwriter in wake of new GOP laws**

Jefferies Financial Group Inc. may not seem the obvious choice to handle what is poised to be the biggest municipal-bond deal ever in Texas.

It's not one of the largest Wall Street banks, nor is it a top-five player in the nationwide muni market. What's more, the nearly $13 million fee that Jefferies proposed for handling the $3.4 billion offering wasn't even the lowest. Several larger banks, including Morgan Stanley and UBS Group AG, asked for a smaller payment.

But Jefferies' ultimately successful pitch to win the deal — which also touted its deep expertise in complicated bond structures — contained a point that many other large, national banks couldn't put in their proposals: It has never run afoul of new, Republican-backed state laws seeking to punish Wall Street for limiting its work with the fossil fuels and firearms industries.

Continue reading.

Bloomberg Markets

By Amanda Albright and Danielle Moran

August 11, 2022

Fundamentals for Municipal Bonds Remain Healthy.

It's been a six-month slog for municipal bonds as inflation fears have racked one of the bond markets with some of the best investment-grade and yield options. Nonetheless, for investors who are still wary of municipal bonds, there's solace in knowing that fundamentally, munis remain healthy.

"It's hard to believe: Municipal bonds have suffered through one of the worst six-month stretches in their history, yet few marketwide credit concerns are on the horizon," Vanguard noted in its latest fixed income perspective. "State and local tax collections have been strong in correlation with the robust economic growth of 2021. Credit fundamentals are as healthy as they have been in decades."

One of the determinants of how healthy those credit levels stay is how local governments handle their surpluses, according to Vanguard. Those flush with cash will be best suited to handle a recession, should one occur.

"Maintaining that credit profile over the long term will be directly tied to how municipal fiscal surpluses are spent," Vanguard added. "State and local governments that established or bolstered rainy day funds and resisted the temptation to use temporary surpluses to create enduring programs will be best positioned for future downturns."

Continue reading.

ETF TRENDS

by BEN HERNANDEZ

AUGUST 11, 2022

Municipals Shine Amid Seasonal Summer Strength.

Summary

- Municipals posted strong total returns and outperformed comparable U.S. Treasuries in July.
- Light issuance and improved fund flows provided a favorable technical tailwind.
- Supply-and-demand dynamics are expected to remain supportive in August.

Continue reading.

Seeking Alpha

by Peter Hayes

Aug. 09, 2022

The Municipal Bond Opportunity in Three Charts.

Three key trends that signal a positive backdrop for municipal bonds.

Municipal bond market volatility has been high this year. Headwinds, such as rising interest rates, slowing U.S. economic growth, and the uncertainty over the persistence of inflation, weighed on investors' concerns, prompting historically large outflows from municipal bond (muni) funds. But these key trends may suggest a more positive outlook for municipal bonds lies ahead:

1) Resilient municipal bond credit strength and negligible defaults

2) State government issuers in a position of historic fiscal strength

3) Low new issue supply combining with improving demand

Let's examine each of these trends, illustrated by a telling visual.

Continue reading.

Lord Abbett

By Sean Carroll
Product Consultant

Aug 9, 2022

High Yield Bond ETFs Find Favor Once More.

To celebrate the 20th anniversary of the first bond ETFs, investors flocked to the asset class, pouring in $28 billion in July, double the amount that flowed into equity ETFs during a strong month for the U.S. stock market. Demand was widespread, with 46 products gathering at least $100 million last month. While two credit-risk-averse bond ETFs, the iShares U.S. Treasury ETF (GOVT A) and the iShares 20+ Year Treasury Bond ETF (TLT B+), led the charge with a combined $8.5 billion of net inflows, we are particularly pleased to see many high yield ETFs also gain traction.

In mid-July, we highlighted a survey that VettaFi conducted with advisors during a webcast with State Street Global Advisors where high yield credit/senior loans were the bond investment style most appealing to add to client portfolios, ahead of ultra-short bonds, investment-grade credit, long-term Treasuries, and municipal bonds. Both the poll and the article occurred before the Federal Reserve hiked interest rates by 75 basis points in late July and Chair Powell said the U.S. was not in a recession. During July, the yield on the 10-year Treasury note narrowed by 33 basis points to 2.64%, and investors were willing to take on credit risk to receive higher yields. Indeed, six large high yield corporate bond ETFs managing $44 billion pulled in $5.2 billion in July alone.

The iShares iBoxx $ High Yield Corporate Bond ETF (HYG B+) received $1.9 billion of new money in July, shrinking its year-to-date net outflows to $4.6 billion and pushing its asset base back to $15 billion. Demand was also strong for the SPDR Bloomberg High Yield Bond ETF (JNK A-) and the iShares Broad USD High Yield Corporate Bond ETF (USHY A), which gathered $1.7 billion and $1.1 billion, respectively. USHY remained modestly larger than JNK with $8.1 billion in assets ($8.0 billion for JNK). Among the three largest high yield ETFs, USHY has the lowest expense ratio at 0.15%.

Continue reading.

etfdb.com

by Todd Rosenbluth

Aug 08, 2022

After a Quick Run Up, Muni Bond ETFs May Look Pricey.

Municipal bonds have rebounded off their lows, but the munis segment may have bounced back too quickly and could be overpriced relative to Treasuries and other government-related exchange traded funds.

Over the past month, the iShares National Muni Bond ETF (NYSEArca: MUB) rose 1.1% while the iShares 7-10 Year Treasury Bond ETF (IEF) gained 0.1%.

The municipal bond market just marked its best monthly gain in July in over two years, and this segment did not pull back as heavily as U.S. Treasuries after Friday’s unexpectedly strong labor market update, which triggered warnings that the Federal Reserve could have more leeway to enact aggressive interest rate hikes, Bloomberg reports.

Consequently, some market observers have warned that munis are now trading at their costliest level since early 2022 relative to U.S. Treasuries. Yields on 10-year tax-exempt munis were hovering around 2.25%, or 80% of the level on similar-maturity Treasuries, according to Bloomberg data. This ratio, which reflects relative value, is near its lowest since February after the outperformance in munis.

"Municipal valuations are completely unattractive at current levels — the muni market simply went too far, too fast in July and early August," municipal strategists at Barclays Plc led by Mikhail Foux said in a recent research note. "Investors should lighten up going into September, and should look for a better entry point in the fall."

Municipal bonds have increased 2.5% so far in the new quarter, outperforming Treasuries by almost two percentage points.

"People either really love munis or they really hate them, we're coming off a period where they love them and it's harder to get allotments of deals," John Flahive, head of fixed-income investments at BNY Mellon Wealth Management, told Bloomberg.

"The front end of the curve is very rich," Flahive added. "It doesn't make a lot of sense to own at these levels – you should start looking at Treasuries, T-bills with more liquidity."

ETF TRENDS

by MAX CHEN

AUGUST 8, 2022

MSRB Publishes Summary of Responses to its Request for Information on ESG Practices in the Municipal Securities Market.

Washington, DC – The Municipal Securities Rulemaking Board (MSRB) today published a summary of comments received on its request for information (RFI) to solicit public input on environmental, social and governance (ESG) practices in the municipal securities market.

The MSRB issued the RFI in December 2021 to further understanding of how ESG practices are being integrated in the municipal securities market and to engage in information-gathering to fulfill its statutory mandate to protect investors, issuers and the public interest. The summary synthesizes the diversity of viewpoints expressed by the 52 commenters according to three broad themes:

- The evolving nature of ESG practices in the municipal securities market
- Challenges associated with ESG integration in the municipal securities market
- Opportunities to improve market transparency through the MSRB's Electronic Municipal Market Access (EMMA®) website.

"The MSRB acknowledges and appreciates the robust level of stakeholder engagement from across the municipal market," said MSRB CEO Mark Kim. "The 52 commenters provided a broad range of perspectives on ESG that achieved our goal of advancing our own and the broader market's understanding of the current challenges and opportunities presented by two distinct and evolving market trends: disclosure of ESG-related information and the marketing of municipal securities with ESG designations."

The MSRB will continue to monitor and engage with the broader market on understanding emerging ESG practices and their implications for market fairness, efficiency and transparency.

All comment letters are available to read in full on the MSRB's website here.

Date: August 9, 2022

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A Wealthy Suburb's Bid to Secede From Baton Rouge.

Earlier this year, a judge halted the formation of a new city from unincorporated neighborhoods in the southeast corner of Louisiana's East Baton Rouge Parish, ruling that it was "unreasonable." Campaign organizers had argued cityhood would give their residents more control over the spending of their tax dollars. But the judge ruled that the proposed City of St. George — whose residents would have been disproportionately white and wealthy — would take away revenue from the parish and the city of Baton Rouge, forcing them to make serious budget cuts, including to the sheriff's and fire departments.

The case against St. George stands to have implications beyond Louisiana, writes Brentin Mock: Like other municipal breakaway attempts, the campaign aims to transfer revenue from an under-resourced government to communities that are already flush.

Bloomberg CityLab

By Angel Adegbesan

August 10, 2022
